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WITH KEY-NUMBER ANNOTATIONS

VOLUME 204
PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE
CIRCUIT COURTS OF APPEALS, DISTRICT
COURTS, AND COMMERCE COURT
OF THE UNITED STATES

JUNE—JULY, 1913

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JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE DISTRICT COURTS, AND THE COMMERCE COURT

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†

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE DISTRICT COURTS, AND THE COMMERCE COURT

WORDEN et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 11, 1913.)

No. 2,213.

1. PUBLIC LANDS (§ 135*)—PURCHASE FROM UNITED STATES—SALE BY ENTRYMAN.

The Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]) does not forbid an entryman, who in good faith has acquired a holding under such act, to alienate his interest in the lands prior to the issuing of a final certificate; the only transaction denounced by the act being a prior agreement by which the entryman acts for another in the purchase of the land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 351-362; Dec. Dig. § 135.*]

2. PUBLIC LANDS (§ 135*)—ENTRIES—TIMBER AND STONE ACT—PURCHASE FROM ENTRYMAN.

It was not improper for a lumber company located in the vicinity of land subject to entry under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]) to advertise that it wished to buy timber, to loan money to entryman, to purchase incomplete entries made in good faith, and to pay the money required on final proofs, so long as there was no arrangement and understanding between the company and the entryman in the beginning that the company should ultimately acquire the land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 351-362; Dec. Dig. § 135.*]

3. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES—CONSPIRACY—INTENT.

Where, in a prosecution for conspiracy to defraud the United States in the purchase of public lands under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]), the government claimed that the two entries pleaded and the purchase thereof by defendants were part of a broader underlying conspiracy to procure public lands in fraud of the act, and there was testimony substantially tending to sustain that contention, evidence of the making of 27 other entries traced ultimately to defendants or a lumber company operated by them was admissible as bearing on defendants' good faith.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

4. CRIMINAL LAW (§ 417*)—EVIDENCE—DECLARATIONS—HEARSAY.

In a prosecution for conspiracy to defraud the United States out of public lands under the Timber and Stone Act (Act June 3, 1878, c. 151, 20

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Stat. 89 [U. S. Comp. St. 1901, p. 1545]) by means of alleged prior agreements with entrymen to purchase the lands, assertions by the entrymen contained in their final proofs that the purchases were not being made for any other person were admissible on the question of defendants' good faith, notwithstanding the entrymen were not required to make them, and they could not have furnished a basis for a prosecution for perjury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 950-967; Dec. Dig. § 417.*]

5. CRIMINAL LAW (§ 417*)—EVIDENCE—OPINION—HEARSAY.

In a prosecution for conspiracy to defraud the United States out of public land entered under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]), expressions of opinion by entrymen as to the value of the lands they were buying were irrelevant, except so far as defendants could be shown to have been responsible therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 950-967; Dec. Dig. § 417.*]

6. CRIMINAL LAW (§ 422*)—EVIDENCE—CODEFENDANTS—BOOKS OF ACCOUNT.

In a prosecution against two defendants for conspiracy to defraud the United States out of public lands, the books of one of the defendants, showing alleged advances to entrymen of land subsequently conveyed to the defendants or a corporation operated by them, while admissible against the defendant, whose books they were, were not competent evidence against his codefendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. § 422.*]

7. CRIMINAL LAW (§ 434*)—EVIDENCE—BOOKS OF CORPORATION.

While books of a corporation are admissible against it in a criminal proceeding, when the entries are in the nature of admissions without the necessity of strict authentication beyond establishing their identity, and also are competent against the managers of the corporation on proof of their connection and familiarity with the books so as to justify an inference of actual acquaintance with their contents, yet the books of a corporation were inadmissible against its president and superintendent, in a prosecution against them for conspiracy to defraud the United States of land entered under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]), to show advances alleged to have been improperly made to entrymen for land subsequently conveyed to the corporation, in the absence of any proof that defendants had anything to do with the keeping of the books, or had any knowledge of their contents.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1023; Dec. Dig. § 434.*]

In Error to the District Court of the United States for the Western District of Michigan; Arthur C. Denison, Judge.

James H. Worden and Alexander Gustaf Person were convicted of conspiracy to defraud the United States in the purchase of certain public lands, and they bring error. Reversed and new trial ordered.

F. P. Sullivan, of Sault Ste. Marie, Mich., and C. A. Withey, of Reed City, Mich., for plaintiffs in error.

F. C. Wetmore, of Grand Rapids, Mich., for the United States.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

KNAPPEN, Circuit Judge. Plaintiffs in error and one Duell were jointly indicted under section 5440 of the Revised Statutes (U. S.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Comp. St. 1901, p. 3676) on a charge of conspiracy to defraud the United States in the purchase of certain public lands under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]). The gist of the fraud charged in the two counts submitted lay in the procuring of the lands through alleged "dummy" entrymen (one Mrs. Craig and one Alexander) by false and fraudulent representations contained in the respective applications for purchase and in the final proofs, to the effect that the applicant had no agreement or contract with any one whereby the title which he might acquire from the United States should inure, in whole or in part, to the benefit of any one except himself; it being alleged that the purchases were intended for the benefit of plaintiffs in error, said Duell, one Simonds, and the J. H. Worden Lumber & Shingle Company, which we shall hereafter call the Lumber Company.

January 1, 1906 (or 1905), Worden purchased a sawmill plant in Trout Lake township, Chippewa county, Mich., 38 miles from Sault Ste. Marie, the postoffice being called "Dick." He remained owner until some time in August, 1906, when the Lumber Company was incorporated under the laws of Wisconsin. Worden was thereafter president and manager of the company. Person was superintendent for Worden after January 1, 1906, and until the Lumber Company was organized. Thereafter he held the same relation toward the company until December, 1906, or January 1, 1907, when he retired. Duell entered the employ of Worden, or of the Lumber Company, in the summer of 1906, being in the company's employ after its organization. He looked after the office and store and kept the books, and was assistant postmaster. January 1, 1907, on Person's retirement, Duell became superintendent. Simonds was a land looker and timber estimator for Worden up to the Lumber Company's organization, and thereafter acted for that company. Simonds died before the indictment was returned. Upon the trial Duell was acquitted; Worden and Person were convicted. The denial of request to direct verdict for defendants, and the admission of certain evidence complained of, require reference to some features of the testimony.

Mrs. Craig's application was signed July 31, 1906. She executed final proofs October 24th of the same year, and on December 17, 1906, conveyed to the Lumber Company the lands covered by her entry. Alexander's application was dated August 24, 1906, his final proofs were executed November 28th, and on December 9th of the same year he conveyed to the Lumber Company the lands so purchased. Duell was a witness under Mrs. Craig's application, and Simonds was a witness under the application of Alexander. Entries on the books of Worden or of the company, or both, in connection with expert testimony, tended to show the advancement of money to pay the expenses of both applicants and their witnesses to Sault Ste. Marie, when the entries were made, as well as for paying the government fees upon application and the moneys required to be paid on final proofs. The book entries also tended to show that not only the moneys advanced to pay the government for the land, but also (in the case of at least one of the applicants) the moneys advanced

for expenses connected with the making of application were deducted from the amount paid the applicant on conveyance to the Lumber Company. Twenty-seven other entries for purchase under the Timber and Stone Act were made between May 7 and November 15, 1906, principally by employes of the Lumber Company, or their wives or near relatives, including Duell, Person, and Simonds. Duell was a witness under 5 of these applications, Simonds in 18 cases, and Person in 5. Other employes of the Lumber Company acted as witnesses in still others of those applications. In many cases several of the applications were presented at Sault Ste. Marie on the same day. Each of these 29 applications, as well as the final proofs thereunder, contained the applicant's statement negating the existence of any agreement or contract with any person whereby the title to be acquired from the United States should inure to the benefit of any one except the applicant. The books of account referred to tended to show that advances were made to a majority of the 27 other applicants on or about the dates of the signing of their respective applications for purchases from the government, and that payments were made to many of them on or about the date that final proofs were executed. Nearly all of them are affirmatively shown to have conveyed to the Lumber Company the lands so purchased soon after making final proofs. In the case of some at least, the book entries, in connection with the expert testimony, tended to show that the amounts so advanced, both at the dates of signing the applications and at the times when final proofs were executed, were deducted from the purchase price paid by the Lumber Company for the lands. The government produced none of these 29 applicants as witnesses. Two of them (other than Alexander and Mrs. Craig), as witnesses for respondents, testified to the absence of any agreement or understanding with respondents, or either of them, prior to the making of their respective applications. Person testified to his ignorance of anything "crooked" with reference to any of the land purchases in question; that he gave no encouragement to any of the entrymen to take up any of the lands in question; that he made his entry on his own account, and sold it to Worden personally only upon severing his connection with the company. Worden and Duell were not sworn upon the trial, but their affidavit, taken by an examiner of the Government Land Office during the investigation, contained a denial of the advancement of money to any of the claimants, "directly or indirectly, for the purpose of making timber and stone entries of government lands," or to any one for expenses in going to Sault Ste. Marie to make filings or final proofs.

[1] The rule is well settled that the Timber and Stone Act does not forbid an entryman who has in good faith acquired a holding under the act to alienate his interest in the lands prior to the issuing of final certificate. All the act denounces is a prior agreement by which the entryman acts for another in the purchase. *United States v. Budd*, 144 U. S. 154, 163, 12 Sup. Ct. 575, 36 L. Ed. 384; *Williamson v. United States*, 207 U. S. 425, 460, 28 Sup. Ct. 163, 52 L. Ed. 278; *United States v. Biggs*, 211 U. S. 507, 519, 29 Sup. Ct. 181, 53 L. Ed. 305.

[2] This rule was clearly recognized and applied by the trial judge, who properly instructed the jury, among other things, that the Lumber Company had a right to give it out that it wished to buy timber, and that it had the right to loan money to the entryman (so long as there was no arrangement or understanding that the company should ultimately get the land), and had the right to purchase incomplete entries made in good faith, and to pay the money required on the final proofs.

In our opinion the testimony was sufficient to sustain a conviction of both plaintiffs in error, provided the books of account and the record of the 27 other applications for land purchases are to be given the force which the government claims for them. The Budd Case, before cited, is not opposed to this conclusion. That case (which was a suit to cancel a patent) differs from the instant case, in that there was in the Budd Case nothing directly connecting the entryman's vendee with the original entry, or showing that the entryman or his vendee even "knew of the existence of the other until after the entryman had fully paid for the land."

[3] We think it was competent for the government to show the making of the 27 other entries. The defendant's good faith in the Alexander and Craig transactions was the crucial question. It was the government's theory that these two entries and the purchase thereunder were part of a broader underlying conspiracy to procure public lands in fraud of the provisions of the Timber and Stone Act, and we think the testimony substantially tended to sustain that contention. The rule in such cases is that proof of other acts of a similar character at or about the same time, and with like alleged fraudulent purpose, may be shown as bearing upon defendants' good-faith conduct with respect to the particular offense charged, provided the ultimate effect of such evidence as to other transactions is clearly limited to the question of intent or good faith with respect to the particular offense for which the defendants are on trial. *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, 598, 6 Sup. Ct. 877, 29 L. Ed. 997; *Wood v. United States*, 16 Pet. 342, 360, 10 L. Ed. 987; *Olson v. United States* (C. C. A. 8), 133 Fed. 849, 854, 67 C. C. A. 21; *Sapir v. United States* (C. C. A. 2), 174 Fed. 219, 98 C. C. A. 227. The Budd Case does not conflict with this rule or with its application here. What was there said regarding evidence that the purchaser from the entryman in question had made with another entryman, prior to the latter's entry, an agreement to purchase the land so entered, had special reference to the probative force of such fact considered in connection with all the evidence in the case. In the instant case the jury was instructed that these other entries were admitted "only for the light that they may throw upon the question as to whether the Craig and Alexander entries * * * were made in good faith by these people for themselves or were made really for the company." The basic theory upon which the statements made by the 27 other entrymen were admissible is that the defendants induced, and so were responsible for, and were practically themselves the makers of the statements. In this view the alleged falsehoods by

the other entrymen were material, not because they falsified, but so far as their falsehoods can be deemed the falsehoods of defendants. It is perhaps not strictly accurate to say that the statements of the other entrymen bore directly upon the question of the good faith of Alexander and Mrs. Craig. But the distinction is academic. They were pertinent to defendants' good faith, which is the important question.

[4] We therefore think the trial judge rightly held that the assertions contained in the final proofs of the various entrymen, that the purchases were not being made for any other person, might properly be considered upon the broad question of good faith, notwithstanding such assertions were not lawfully required, and could not have furnished basis for prosecution for perjury.

[5] But expressions of opinion by the entrymen, obviously based on hearsay alone, as to the value of the lands they were buying were irrelevant, except so far as defendants may be shown to be responsible for such opinions. It may be that a broader evidential effect was permitted to these statements than we think them entitled to; but, in view of the disposition to be made of the case it is unnecessary to pursue this subject further.

[6] The books of account played an important part on the trial. Worden's books, kept before the company was formed, were, as against him, competent evidence of the making of the alleged advances to entrymen. But the books were not, from the fact alone that they were Worden's, competent evidence against Person. The question of the competency of the company's books affects both plaintiffs in error. The importance of the books, both of Worden and of the company, appears from the facts that (a) they furnished the only evidence there was of actual advances of money to any entryman for preliminary expenses (as distinguished from final payment to the government for the lands), whether for traveling to Sault Ste. Marie, for government fees, or otherwise; and (b), if the evidence afforded by the books were eliminated, the proof, in our opinion, would have been insufficient to support a conviction of plaintiffs in error, having in mind the necessity of unlawful agreement, prior to application for purchase. The books of the company (as distinguished from Worden's) are important, because, while the alleged advances and payments before the company's organization were entered upon books which were then Worden's, yet of the 29 entries in question the last 7 complete (numbering chronologically), as well as all payments to entrymen made subsequent to the filing of application from and including the eighth entry (which is prior to those of Alexander and Mrs. Craig), were made after the corporation was formed, and presumably were entered on books which then belonged to the company. Such payments included alleged advances for preliminary expenses to two entrymen, one of whom was an employé, the other the wife of an employé of the company.

[7] Were the corporation the opposite party here, entries on its books would be competent evidence when in the nature of admissions, and without the necessity of strict authentication beyond establishing the identity of the books. *Foster v. United States* (C. C. A. 6),

178 Fed. 165, 175, 101 C. C. A. 485, 495, and authorities cited. The corporation, however, is not here the opposite party; there was no affirmative proof that the books were correctly kept; and while the rule is well settled that entries in the books of a corporation showing dealings between it and its managers are competent evidence against the latter, even in a criminal prosecution, on proof of such connection and familiarity with the books as to justify an inference of actual acquaintance with their contents, as being admissions or assertions of the facts stated therein (Foster v. United States, supra; People v. Leonard, 106 Cal. 302, 39 Pac. 617; Olney v. Chadsey, 7 R. I. 224; Bacon v. United States, 97 Fed. 35, 40, 38 C. C. A. 37), yet such is, we think, the only theory on which the entries in question can be held competent evidence against the defendants. State v. Ames, 119 Iowa, 680, 684, 94 N. W. 231; Lang v. State, 97 Ala. 41, 46, 12 South. 183; Bartholomew v. Farwell, 41 Conn. 107, 111.

The record, we think, fairly presents the objection that sufficient connection was not shown between defendants and the books of the Lumber Company to make the book entries competent evidence. The learned judge, early in the trial, recognized the necessity of connecting the defendants with knowledge of the books. In overruling a motion to strike out certain testimony of erasures, the court said:

"I should say in that connection, if there is any erasure that it is not proof of anything of itself; it is of no importance unless respondents or some of them are responsible for the erasure."

Did the court hold the book entries competent evidence against plaintiffs in error? In overruling an objection on the ground of incompetency and immateriality and otherwise, the court said of the entries:

"Their exact force, as evidence, will be ruled upon hereafter in the course of the charge to the jury if not before."

Later when it appeared that the Lumber Company's books were not presented by the defendants, their counsel said:

"If they were not produced by these respondents and the books were of some concern, which is not under indictment, then I object to them as incompetent and the erasures—"

The court thereupon ruled:

"The whole question of what these books show against these respondents, if anything, must be finally considered by the jury in connection with the relation of the respondents to the Worden Lumber Company, and if it appears that the respondents acted in the management of the Lumber Company, and that one or more of them acted in the keeping of these books, then the jury may give them such force as the facts justify."

Exception was taken to this ruling. The charge contained no instruction whatever as to the competency or evidential force of the books, except the statement that:

"Such evidence as there has been about erasures on books and records
* * * you may give such force as you think proper in bearing on the general conclusion which you reach."

The court, however, in the course of the charge, used this language:

"Now, assuming that you believe what is shown by the books of the Worden Company, it appears that on or about the day when these two people [Alexander and Mrs. Craig] made their respective entries the Worden Company furnished or provided or loaned the amount of money necessary to pay the expenses of making the entries"

—this remark being followed by reference to the subsequent bookkeeping entries showing the ultimate disposition of the advances to Alexander and Mrs. Craig, according to the court's "inference from the bookkeeping that was done." The fact that no exception was taken to the paragraphs of the charge which we have quoted is not controlling. If there was error in the rulings made on the trial with reference to the competency of the bookkeeping entries, what was said in the charge (in connection with the omission to give further instruction as to the competency of the book entries) emphasized and gave prejudicial effect to those rulings.

While (unless by the above paragraph which we have italicized in full) the court made no express ruling that the proofs were such as to make the book entries competent evidence against the defendants, we are constrained to think that the language referred to (and in view of the fact that defendants were shown to have participated in the management of the company, and that one of them, although not one of the plaintiffs in error, took part in the bookkeeping) may well have been understood by the jury (although perhaps not so intended) as a ruling that the bookkeeping entries would be, in the contingency stated, competent evidence against plaintiffs in error. See *F. C. Austin Mfg. Co. v. Johnson* (C. C. A. 8th Cir.) 89 Fed. 677, 683, 32 C. C. A. 309.

The facts referred to did make the bookkeeping entries competent as against Duell; they were not alone sufficient to make them competent as against plaintiffs in error. The ruling, we think, constituted prejudicial error unless the evidence, taken together, justified a ruling that the bookkeeping entries were competent evidence against plaintiffs in error. This brings us to the question whether the proofs were such as to justify treating the book entries, including not only the original but transfer entries, competent evidence against defendants here complaining on the basis of admissions or assertions by them.

It clearly appears that Person had nothing to do with keeping the books. He was simply superintendent, and there is nothing to indicate that he knew anything about bookkeeping or that he paid any attention to it, or that he directed any of the entries in question. Moreover, he severed his connection with the company as early as January 1, 1907 (if not earlier), and a large number of the bookkeeping entries put in evidence (including those claimed to show that payments, at or before the execution of final proofs, were made to at least five entrymen) are later than that date, although the applications of the entrymen for land purchases were all made before Person retired. The showing was not such as, in our opinion, to justify a

ruling that the bookkeeping entries were competent evidence against him. Person was thus prejudiced even if (as is not quite clear) he failed to save the question of the competency of Worden's books. As to Worden: There is no evidence that he had at any time anything to do with the bookkeeping, or even that he ever looked at the books. The only testimony as to his visits to the plant, including the office where the books were kept, is that he "came to Dick once or twice a month; he would come one day and go the next; he was looking after the Wisconsin Bark & Lumber Company, at Antigo, Wis." The record is consistent with the existence of this situation as to infrequency and briefness of visits until some time after the end of 1906, before which date all alleged payments to Mrs. Craig and Alexander had been made, as well as the great bulk of all the other alleged payments to entrymen. We infer Worden did not live at Dick during any of the time. Person said he was "in the habit of receiving checks from Worden two or three times." Person further says he "cashed these checks and brought the money to the office to be used in our business." The affidavit of Duell and Worden stated that arrangements for conveying the lands to the company were made by Person (except in the case of two purchases, which were made by Worden, presumably), the amount going to each of a large number of claimants being paid by checks signed by Worden, except that in cases where a claimant was indebted "to the company for supplies or money advanced on his wages the amount was deducted from the purchase price of the land." This manifestly could apply only to employes who were paid monthly.

When we consider that the pivotal question of defendants' guilt or innocence was the making of bargains with the entrymen previous to their entries, and that the giving of checks or furnishing of money to pay the Government price of the lands on final proof (which is the first connection Worden personally is shown to have had with the transactions) was not unlawful, it is obvious that the language of the various entries, the bookkeeping treatment of the same by posting and otherwise, the ultimate alleged deduction of the original advances from the amounts paid for the lands, are quite as important as the mere fact of the actual furnishing by the Lumber Company of the money used in making the land entries. It is manifest that Worden would be prejudiced by an improper treatment of the entries on the company's books as competent evidence against him. Unless the mere fact of Worden's presidency and management of the company raised a legal presumption of his acquaintance with the book entries, thus putting upon him, in defense of a charge of crime, the burden of rebutting such legal presumption, we think the books cannot, in the peculiar state of this record, be held as matter of law competent evidence against him. We have found no persuasive decision sustaining such legal presumption (in the absence of statutory requirement of correct bookkeeping) except on proof that the books were kept under the instruction, direction, or supervision of the person against whom the entries are offered, or that such person presumably had examined the books or in some way obtained actual knowledge of the entries.

We think that even as to Worden the instant case is distinguishable from cases like *Bacon v. United States*, where, in a criminal prosecution of the president of a national bank for making false reports of the bank's condition, the bank's books were held competent evidence for the government to show the actual condition of the bank, not only because the defendant was its chief executive officer, and, as such, actually had control and direction of its affairs, but also because the act of Congress enjoined, under severe penalties, that its books should be truthfully kept, so justifying a presumption that they had been so kept; also from *People v. Leonard*, *supra*, where, in a prosecution of a bank officer for embezzlement, it was held (under the peculiar facts of the case showing defendant's relations to the bookkeeping) that entries on the bank's cash book were *prima facie* evidence of the balance of cash on hand; also from *Bird v. Magowan* (N. J. Ch.) 43 Atl. 278, where, in a suit by a receiver of an insolvent corporation against its officers, to recover moneys fraudulently diverted, the account against one of the defendants was, under the proofs, held evidence as an admission. The case differs also from *Foster v. United States*, *supra*. In that case there was no objection to the books on the ground that the entries in question were not properly authenticated. What was there said (178 Fed. 176, 101 C. C. A. 485) as to the relations of the defendants to the books was by way of support to the proposition that the government might have been able, had such objection been made, to supply authenticating proof. The fact that the bookkeeper (Duell) was also indicted did not on mere proof of his handwriting make admissible, as against plaintiffs in error, entries otherwise incompetent.

We therefore think the evidence did not justify a ruling that the entries on the company's books were competent evidence as against Worden. As we construe the record, their competency was not made to depend upon a finding by the jury of his actual acquaintance with the contents of the books, and with the entries involved. Whether the submission of such question of fact would have been justified we need not decide as the evidence on another trial may or may not be the same.

It is suggested in brief of counsel that the indictment was barred because certain of the entries (aside from those of Alexander and Mrs. Craig) antedated the three-year period of limitation; but we see no merit in this suggestion.

The questions raised by the remaining errors assigned seem scarcely likely to arise on another trial, and we therefore refrain from discussing them.

For the errors pointed out, the judgment of the district court must be reversed and a new trial ordered.

DROBNEY v. LUKENS IRON & STEEL CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 129.

1. RELEASE (§ 24*)—MISREPRESENTATION—FRAUD—PROOF AT LAW.

Where plaintiff, an illiterate widow of one of defendant's employes, was induced to execute a receipt for \$1,000 and for \$1, releasing defendant from all liability arising out of the death of her husband, on the misrepresentation that the instrument was a mere receipt for insurance money and that the dollar was a present to her infant child, such misrepresentation was a direct fraud in the execution of the document which could be proven at law.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 41-46; Dec. Dig. § 24.*]

2. RELEASE (§ 13*)—LIABILITY FOR DEATH—MUTUAL BENEFIT SOCIETY—INSURANCE.

Defendant company maintained and operated in connection with its business an employes' mutual benefit society, taking 10 cents a month from the wages of each employe for the benefit of the society, and furnishing the necessary additional funds and clerical force to operate it. The constitution and by-laws provided that the acceptance of benefits for death or permanent disability of an employe, resulting from accident in the company's service, should operate as a full satisfaction of any and all claims against the company on the part of the servant or by all who might legally assert such claim, etc. *Held*, that where the widow of an employe killed in defendant's service received \$1,000 benefit and executed a release to the society, by which, in consideration of that sum and the further sum of \$1 paid by defendant, she released it from all liability on account of the death of her husband, the transaction created a situation which relieved defendant from all liability because of a valuable consideration moving from it to the beneficial association and to its members, in the absence of fraud or mistake, and was a defense to an action for intestate's death.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 21-27, 29; Dec. Dig. § 13.*]

3. RELEASE (§ 24*)—FRAUD—RETURN OF MONEY—TENDER.

Defendant maintained an employes' benefit society, under the constitution and by-laws of which relatives of an employe were entitled to a specific benefit in case of a member's death, the receipt of which should operate to relieve defendant from any liability by reason of such death. After decedent was killed in the course of his employment, his widow was paid \$1,000 by the association and \$1 by defendant. She executed a receipt for the two sums, releasing defendant from all liability by reason of decedent's death. The widow subsequently, claiming that she was induced to sign the release by misrepresentation that it was for insurance money and that the dollar was a present for her child, tendered a return of the insurance money to defendant, and sued for damages. *Held*, that the tender of the insurance money to defendant, instead of to the beneficial association, was not a valid tender, and that her failure to tender the sum to the association was a bar to recovery.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 41-46; Dec. Dig. § 24.*]

Coxe, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of New York; Walter C. Noyes, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Marie Drobney against the Lukens Iron & Steel Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Rufus M. Overlander, of New York City (H. C. Smyth, of New York City, of counsel, and M. F. Tompkins, of New York City, on the brief), for plaintiff in error.

Wingate & Cullen, of New York City (G. W. Wingate, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is an action by the plaintiff as widow of Martin Drobney to recover damages for his death, under the statute of the state of Pennsylvania. He was a member of the Wawasset Beneficial Society composed of defendant's employes. The form of application for membership is as follows:

"To the Wawasset Beneficial Society:

"I residing in the borough township of in county, Penn-
sylvania, aged, at last birthday years and employed by or entering
the employ of the Lukens Iron & Steel Co., as a
admitted as a member of the Wawasset Beneficial Society, hereby consenting
to be bound by the constitution, by-laws and rules of said society, which I
have read or had read to me, and by any amendments thereto which may
hereafter be made by the board of managers of the society and agree that
an admission fee of \$1.00 and dues at the rate of per month in ad-
vance shall be deducted by the pay department of the Lukens Iron & Steel
Co., or its successors, while I am a member of the said society, from the
wages that may be due me from my employment as aforesaid, and paid to
the treasurer, or other proper officer, of the said beneficial society. I also
agree that in consideration of the amount paid or to be paid by the said
company into the treasury of the said beneficial society, namely, ten cents
per month for each beneficial member of the society at work in their em-
ploy and the collection of members' dues and supplying office room and cler-
ical service by the company without cost to the society, and the agreement
and guarantee of the company, as set forth in Art. VII of the constitution,
the payment by the society to me or to my representatives of the benefits
due on account of my permanent disability or death resulting from accident
occurring in the company's service, shall satisfy all claims against the said
company for damages arising from or growing out of said permanent dis-
ability or death unless before payment of such benefits notice is given to the
president of the society of intention to seek indemnity from the company or
to bring suit at law and further, that no part of said benefit for death or
permanent disability shall be due or payable unless and until good and suf-
ficient releases shall be delivered to the president of the said beneficial so-
ciety of all claims against the said society and to an executive officer of the
said company as against said company arising from or growing out of my
death or permanent disablement, said releases having been duly executed
by me or in the event of my death or of my being disqualified by reason of
physical impairment from acting on my own behalf, by all who might legally
assert such claims; and further, if any suit shall be brought against the said
company for damages arising from or growing out of permanent disability or
death occurring to me, the said benefits otherwise payable and all such ob-
ligations of said beneficial society and of said company created by my mem-
bership in the said society shall thereupon be forfeited without any declara-
tion or other act by the said beneficial society or said company. * * *

Article 7, section 1, of the constitution, provides:

"Section 1. The provisions of the society and the schedule of benefits payable are based upon an agreement of the Lukens Iron & Steel Co. to supply office room and clerical service, and collect the members' dues by deduction therefor from wages payable, act as treasurer of the society, also to make a contribution to the treasury of ten cents per month for each beneficial member at work in their employ; also to guarantee the payment of all benefits to the members of the society by advance or loan to the society from time to time of such sum or sums as may be needed, which shall be repaid from surplus income of the society from time to time as it may be able to do, in consideration of which every applicant for membership shall agree that acceptance of benefits for death or permanent disability resulting from accidents in the company's service shall operate as full satisfaction of any and all claims against the company on the part of himself or of any and all who might legally assert such claim on account of such permanent disability or death."

Article 7, section 6(a), of the by-laws, provides:

"Sec. 6(a): In consideration of the agreement and guarantee of the company as set forth in article 7 of the constitution, the acceptance by the member of benefits for permanent disability resulting from accident occurring in their service shall operate as satisfaction of all claims against the company for damages arising from or growing out of such disability unless before payment of any such benefits notice is given to the president of the society of intention to seek indemnity from the company, and, further, in the event of the disability or death of a member resulting from accident occurring in the company's service, no part of the benefits for death or permanent disability shall be due or payable unless and until good and sufficient releases shall be delivered to the president of the society of all claims against the society and to an executive officer of the company as against the company, arising from or growing out of the death or permanent disability of the member, said releases having been duly executed by the member or by all who might legally assert such claims or by those legally competent to release for them, and, further, if any suit shall be brought against the company for damages arising from or growing out of permanent disability or death occurring to a member, or if the member or his legal representative shall elect to sue at law and refuse or fail to execute and deliver the releases as above specified the benefits otherwise payable and all obligations of the society and of the company, created by the membership of such member in the society, shall thereupon be forfeited without any declaration or other act by the society or the company, but the president of the society may, in conjunction with an executive officer of the company, at their discretion, waive such forfeiture upon condition that all pending suits shall first be dismissed and the specified releases executed and delivered."

The plaintiff, an illiterate woman unable to speak English or to read or write, executed the following document:

"Received of Wawasset Beneficial Society the sum of one thousand x/100 dollars in full of all benefits due under certificate of membership No. 742 on account of the accident and death to Mart Drobi No. 1176 and in consideration of said payment and the further sum of one dollar to me in hand paid by the Lukens Iron and Steel Company, I do hereby release the said company of and from all suits, demands and damages for or on account of the accident and death to Mart Drobi No. 1176 as aforesaid.

"Witness my hand and seal this 8th day of April, A. D. 1911.

her
"Mrs. M. X Drobi [L. S.]"
mark

[1] Upon executing the above she received two checks which she deposited in bank and has collected, one for the sum of \$1 and the

other for the sum of \$1,000. The trial judge directed a verdict for the defendant. There was testimony that the plaintiff was told before signing the above that it was merely a receipt for insurance money, and that the \$1 mentioned was a present to the baby. This we think presented a question of fact for the jury who, if they found the allegations to be true, might have treated the document so far as it was a release as never having had any legal existence because of fraudulent representations to the plaintiff as to its purport in this respect. It would not be a case of fraudulent collateral representations by which the plaintiff was induced to sign what she knew to be a release, which could only be corrected in equity, but direct fraud in the execution of the document by making her think that it was not a release, which could be proven at law. *Hartshorn v. Day*, 19 How. 211, 220, 15 L. Ed. 605.

[2] However, this inquiry need not be further prosecuted because we think that, striking out all evidence of a release in the document, it remains a receipt for insurance money, as she was correctly told it was. This payment could have been made and accepted only in accordance with the explicit provisions of the constitution and by-laws of the beneficial association. They made it a full satisfaction of all claims by Martin Drobney or his representatives against the defendant. The plaintiff, though not a member, received the money through her husband's membership. It made no difference whether she could read or not, or whether she knew the conditions upon which the payment was made. The transaction created a situation which relieved the defendant of all liability because of a valuable consideration moving from it to the beneficial association and its members. *Johnson v. Phila. & Reading R. R. Co.*, 163 Pa. 127, 29 Atl. 854; *Ringle v. Penna. R. R.*, 164 Pa. 529, 30 Atl. 492, 44 Am. St. Rep. 628; *Reese v. Penna. R. R. Co.*, 229 Pa. 340, 78 Atl. 851; *Day v. Coast Line*, 179 Fed. 26, 102 C. C. A. 654. Of this right, in the absence of fraud or mutual mistake, no court can deprive the defendant.

[3] If fraud had been proved in inducing the plaintiff to accept the insurance money, she could not maintain this action without returning or offering to return the money to the beneficial association. The case is quite unlike those cited, where a release is signed upon the strength of an untrue statement that the money paid was something different from what the documents called for as, for instance, that it was wages or a gift, instead of a consideration for a release. Under such circumstances there need be no tender. For this reason the plaintiff might not be obliged to return the dollar if she received it upon the representation that it was a present to the baby. In accordance with the advice of her attorney to return the insurance money, the plaintiff drew it out of bank and tendered it to one Jackson, an agent of the defendant. This is denied by Jackson, but, if it were true, the tender would be unavailing because the defendant was under no circumstances entitled to the money, and a tender to it was not a tender to the beneficial association. She was acting under advice at this time, and should have made a proper tender. It would be quite inequitable to permit her to retain the money which the

constitution and by-laws of the beneficial society provided should be forfeited if she brought suit against the defendant, or, if received, should be full satisfaction of all claims and at the same time permit her to maintain this action.

The judgment is affirmed.

COXE, Circuit Judge (dissenting). The plaintiff in error has a cause of action if she has not released the defendant by accepting the insurance money and signing a receipt in full for death claim. If the papers bearing her mark are to be construed literally against her, there is no doubt that she has signed away her entire right to recover for the death of her husband. The plaintiff is an ignorant foreigner, unable to read or write. Her husband was 42 years of age when he was killed and she was left a widow with five children. She does not understand English and had to transact business through an interpreter. The receipt signed by her contained a full release of her claims under the benefit policy for \$1,000, and for this sum and \$1 paid by a separate check, she released all her claims against the defendant for the death of her husband. She insists that she did not intend to sign away her right of action for her husband's death and, finding that she had done so, she endeavored to pay back the money. She was unable to see the president of the defendant, but did in fact make a tender of the total amount paid and interest (\$1007.99) to Mr. Jackson, who was employed by the defendant and who had represented it throughout the transaction. He refused to accept the money. It seems to me that the testimony presented a question of fact which was for the jury to determine. The testimony was not persuasive in favor of the plaintiff's contention, but it cannot be said that there was no evidence to support it. The jury might have found that, being entirely ignorant of our language and not appreciating her rights, she had been induced to sign the paper without knowing the legal aspects of the situation. The jury might have found further that she supposed the \$1000 was as the receipt stated, for "funeral benefits" and that she never intended to release the death claim. That she should have released for \$1 a claim for the death of her husband, who was but 42 years of age seems highly improbable. I do not think it is necessary to establish actual false statements on the part of the defendant. If the plaintiff, through ignorance of her rights and a misunderstanding of the facts, was induced by the defendant or its agents to sign a release which she never intended to sign, she should not be held to its terms. Three days after her husband's death, Jackson, representing the defendant, called at her home and requested her son, she being away at the time, to ask her to come to the office and get her insurance money. On reaching the office, she was asked to sign the two receipts, and did so, believing that they related to the insurance money. She expressly stated that she expected compensation for the death of her husband and was told by Jackson that when the president of the company returned, he would see that she received such compensation. It was, then, clearly a question of fact for the jury to say whether plaintiff's act was voluntary or was induced by the action of the defendant's agent in stating

that the \$1 check was intended as a present to the baby and that the \$1000 was for "funeral benefits"; and also whether it was induced by his failure to explain to her fully the contents of the papers and their true purport and intent. So far as her being able to understand these papers, they might as well have been written in Greek. In a similar case, the Supreme Court approved the following language in the charge:

"When it appears that either party is in a situation as to his health, physical condition, or as to the state of his mind that makes it probable that he acted without deliberation, without an understanding of the act with which he is charged, the instrument itself may be disregarded." *Union Pacific Railway v. Harris*, 158 U. S. 326, 331, 15 Sup. Ct. 843, 845 (39 L. Ed. 1003).

The opinion of the majority of the court expressly recognizes this doctrine, for it says of the testimony as to false representations that "it presented a question of fact for the jury who, if they found the allegations to be true, might have treated the document so far as it was a release as never having had any legal existence because of fraudulent representations to the plaintiff as to its purport in this respect."

But it is said, in substance, that if the portion of the document which releases the defendant from liability be stricken out, it still remains a receipt for the insurance money, which could have been made and accepted only in accordance with the explicit provisions of the constitution and by-laws of the insurance association. In other words, if I understand the proposition, it is that where a party is induced to sign a paper by fraud, it may still be considered a valid document as to that part which he might have signed if the fraud had not been perpetrated. I do not so understand the law. In my judgment, if the plaintiff was induced to sign this paper by stating what was false or suppressing what was true, the entire transaction was absolutely null and void. At least it was a question for the jury to say whether she would have received the insurance money, in any circumstances, after she had discovered that the defendant was endeavoring to secure a release of the claim for her husband's death.

Again, it is said that the plaintiff did not make the proper tender of the money because it was tendered to Jackson and not to an officer of the beneficial association. It is not clear that money, received in such circumstances, must be returned as a prerequisite to commencing the action. In *Mullen v. Old Colony R. R.*, 127 Mass. 86, 34 Am. Rep. 349, the court says:

"The ruling at the trial was that, even if it were true that the plaintiff was induced to sign the paper by the fraud of the defendant's agent as to its contents, he could not maintain his action without first returning the money which he received when the paper was signed. * * * In the case at bar, if the evidence for the plaintiff was true, he signed the paper which purports to show a settlement of his claim, believing it to be a totally different paper from what it in fact was. Signing in that belief, in consequence of the fraudulent representations of the defendant, he is not bound by it, because he never made the agreement which the paper indicates. He is not attempting to avoid a contract which he has made; but is showing that he did not make the contract which he apparently made. If this fact is established, it establishes the further fact that he did not receive the money, which was paid him when the paper was signed, in consideration of the settlement of his claim."

But, assuming that a tender is necessary, it was made when the money was offered to Jackson in the office of the defendant and in the absence of the president. The plaintiff was told by Jackson, "I don't want it, go home." It must be remembered that the beneficial society was confined exclusively to the employes of the defendant, who furnished office room and managed the finances of the society. The only person the plaintiff knew in the transaction was Jackson and at least it was for the jury to say whether under all the circumstances a tender to him was not sufficient. The question is not what this court may think or what the circuit court thought of the testimony, but simply, was there a question which the jury might answer in favor of the plaintiff. I cannot avoid the conclusion that there was such a question. It seems to me that it is a mistake to apply to this case rules which might be applicable if the parties were equally intelligent and able to protect their respective interests. This plaintiff, by reason of her ignorance and utter inability to understand our language, was as helpless in the hands of the defendant and its agents as an infant or an imbecile. In such circumstances it was their duty to tell her the truth, not only, but to be more than ordinarily solicitous that she fully comprehended what she was doing and the true import of the papers signed by her. Let us assume, in order to test the question, that there was a deliberate scheme to trick the plaintiff into releasing her cause of action and to consummate the fraud by preventing her from making a technically perfect tender. The steps taken were, or the jury may find that they were, all a part of the general purpose to defraud. If Jackson did not represent the beneficial society, he surety represented the defendant and, having refused the tender with no word of explanation, he left the plaintiff to infer that it would not be received in any circumstances. It is this deception, by its own agent, of which the defendant seeks to take advantage. If Jackson had not misled the plaintiff she might have found the proper person and tendered the amount to him. The jury may have found that his action constituted a deliberate deception for the express purpose of defeating the plaintiff's claim. The scheme should not succeed simply because it was shrewdly planned. I think the controversy should have been submitted to the jury.

JOHN GUND BREWING CO. v. UNITED STATES (two cases),†

(Circuit Court of Appeals, Eighth Circuit. March 3, 1913.)

Nos. 3,854, 3,855.

1. CRIMINAL LAW (§ 263*)—JURISDICTION OF FEDERAL COURT—ARREST—DIFFERENT DISTRICT.

Rev. St. § 1014 (U. S. Comp. St. 1901, p. 716), providing that for any crime or offense against the United States the offender may be arrested where he may be found, and agreeably to the usual mode of process against offenders in the state where he is found, and may be imprisoned or bailed at the expense of the United States as the case may be for trial before such court of the United States as by law has cognizance

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.
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† Rehearing denied June 30, 1913.

of the offense, applies only to accused persons who may be imprisoned, and cannot apply to a corporation which cannot be arrested or held to bail for its appearance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 610, 611; Dec. Dig. § 263.*]

Jurisdiction of federal courts over corporations. See note to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174.]

2. CRIMINAL LAW (§ 263*)—FEDERAL COURT—PROCESS—STATUTES.

Rev. St. § 716 (U. S. Comp. St. 1901, p. 580), provides that the Supreme Court and the Circuit and District Courts shall have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law. *Held*, that where a corporation domiciled in Wisconsin was charged in indictments returned to the District Court sitting in North Dakota with having engaged in the liquor business in that state without having paid the internal revenue tax and with other correlated offenses committed through agents, such section authorized the court to issue writs conformable to the statutes of North Dakota and direct the service thereof by the marshal of the district of Wisconsin in which the defendant resided, requiring it to answer the indictments in North Dakota.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 610, 611; Dec. Dig. § 263.*]

3. CORPORATIONS (§ 526*)—OFFENSES—PUNISHMENT—PLACE OF TRIAL.

Since the only punishment that can be inflicted on the corporation is a fine, a criminal proceeding against it is in effect an action to recover a penalty subject only to the requirements of the sixth amendment of the Constitution that the trial must be had in the district where the crime was committed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2138, 2139; Dec. Dig. § 526.*]

4. INTERNAL REVENUE (§ 47*)—WHOLESALE LIQUOR DEALER—SPECIAL TAX—INDICTMENT.

Rev. St. § 3242 (U. S. Comp. St. 1901, p. 2094), makes it an offense for a person to engage in the business of a wholesale liquor dealer without having paid the "special tax" required by law. *Held*, that an indictment charging defendant with engaging in the business of a wholesale dealer in malt liquors without having paid the tax was not demurrable because the tax was not referred to as a "special tax" as in the statute.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. § 47.*]

5. INDICTMENT AND INFORMATION (§ 125*)—OBJECTIONS—DUPLICITY.

An indictment charging defendant in a single count with conspiracy to evade the payment of the internal revenue tax required to be paid by the laws of the United States by persons engaged in the liquor business, in violation of Rev. St. § 3242 (U. S. Comp. St. 1901, p. 2094), and also with conspiring to violate Penal Code, § 239 (Act March 4, 1909, c. 321, 35 Stat. 1136 [U. S. Comp. St. Supp. 1911, p. 1662]), prohibiting C. O. D. shipments of liquor and the collection of the purchase price by carriers, was duplicitous as charging in the same count two distinct offenses for which different penalties are provided.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

6. INTERNAL REVENUE (§ 47*)—ENGAGING IN BUSINESS WITHOUT PAYING TAX—ACTS OF AGENT—LIABILITY OF PRINCIPAL—EVIDENCE.

In a prosecution of a nonresident brewing corporation for engaging in business as a wholesale dealer in malt liquors in North Dakota without paying the special internal revenue tax in violation of Rev. St. § 3242

(U. S. Comp. St. 1901, p. 2094), defendant was entitled to show, notwithstanding it was not necessary for the government to establish an unlawful intent on defendant's part, that the acts of its agents in selling liquor in North Dakota were not only without defendant's knowledge and consent, but were in express violation of instructions given them by defendant, and, if the jury found such to be the fact, it constituted a defense.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. § 47.*]

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

The John Gund Brewing Company was indicted for having engaged in the business of a wholesale dealer in malt liquors in Dickinson, Stark county, N. D., without having paid the license imposed by law on such business; with also engaging in the business of a retail dealer in malt liquors without having paid the government license, and with conspiracy to evade the payment of the internal revenue tax required by persons engaged in the sale of malt liquors, and also to violate Penal Code, § 239, making it an offense for any railroad company, express company, or other common carrier or person in connection with the transportation of liquors from one state to another, to collect the purchase price or any part thereof before or after delivery from the consignee or from any other person, or to in any manner act as agent of the buyer or seller of any such liquor for the purpose of buying or selling or completing the sale thereof save only in the actual transportation or delivery of the same. A verdict of guilty was returned on the count charging the engaging in the business of a wholesale dealer without paying the tax, and also on the indictment for conspiracy, and defendant brings error. Reversed on the indictment charging failure to pay the tax as a wholesale dealer, and remanded with instructions to grant a new trial, and reversed and remanded with directions to sustain a demurrer to the indictment charging conspiracy with instructions to dismiss the same.

The grand jury for the district of North Dakota returned two indictments against the plaintiff in error, a corporation existing under the laws of the state of Wisconsin, and having its domicile in that state and no agent in the state of North Dakota. In No. 3,854 the indictment charges the defendant with having engaged in the business of a wholesale dealer in malt liquors at Dickinson, county of Stark, in the state and district of North Dakota, without having paid the tax imposed by law upon such business. There was a second count charging the defendant with a similar offense, except that it was charged with having engaged in the business of a retail dealer in malt liquors; but, as there was a verdict of not guilty on that count, it is unnecessary to consider it further.

In No. 3,855 the indictment charged the defendant and one Hartung in one count with conspiracy to avoid the payment of the internal revenue tax required to be paid by the laws of the United States by persons engaged in the business of dealing in malt liquors, and also to violate the provisions of section 239 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1136 [U. S. Comp. St. Supp. 1911, p. 1662]) of the United States.

The defendant being a nonresident of the district of North Dakota, and having no agent in that district upon whom process could be served, the court below made an order directing the clerk to issue a summons directed to the marshal of the United States for the Western District of Wisconsin,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

where the defendant had its domicile, commanding him to summon the defendant to appear before that court on the 5th day of March next to answer an indictment found against said corporation charging it with violating the statutes set forth in the indictments. This writ conformed to the form prescribed by the statutes of North Dakota for serving process in criminal cases on corporations. These writs were duly served by the marshal for the Western District of Wisconsin upon the chief officer of the corporation. Motions to quash the summons, service thereof, and the return thereon were filed by the defendant, and were by the court overruled and exceptions saved.

Thereupon the defendants filed demurrers to each of the indictments, and, they being overruled, entered pleas of not guilty. By stipulation in writing the parties agreed that the two cases should be consolidated and tried together as if they were different counts in the same indictment. A trial to a jury was had and a verdict of guilty returned on the first count in the indictment in No. 3,854, and a verdict of guilty in the conspiracy indictment.

George A. Bangs, of Grand Forks, N. D. (George R. Robbins, of Grand Forks, N. D., on the brief), for plaintiff in error.

Edward Engerud, U. S. Atty., of Fargo, N. D., and Charles E. Littlefield, Sp. Asst. Atty. Gen. (T. H. McEnroe, Asst. U. S. Atty., of Fargo, N. D., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and W. H. MUNGER and TRIEBER, District Judges.

TRIEBER, District Judge (after stating the facts as above). It is earnestly urged that there was no authority for the process issued in this case directed to the marshal of another district, and that the service and return are unauthorized, and that therefore the court erred in overruling the defendant's motion to quash them.

[1] The only statute of the United States relating to the arrest of a person charged with a criminal offense in a district other than that in which the indictment has been returned is found in section 1014, R. S. (U. S. Comp. St. 1901, p. 716), but that clearly cannot apply to a corporation, for a corporation cannot be arrested, cannot be held to bail for its appearance, and no order for its removal to the other district can be made, as the latter can only be made when the defendant is imprisoned. Unless there is some other law providing for the issuance of some writ which will secure the attendance of such a corporation in the court in which the indictment has been returned, foreign corporations, and for that matter all corporations, would be entirely immune from punishment under the statutes of the United States, for there is no statute of the United States which specifically provides for the kind of process necessary to bring a corporation into court to answer an indictment.

[2] But section 716, R. S. (U. S. Comp. St. 1901, p. 580), grants the courts of the United States power to issue all writs not specifically provided for by the statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law. This statute was no doubt enacted by Congress in order to meet cases of this nature when there is no specific process provided by statute. In *re Chetwood*, 165 U. S. 443, 461, 17 Sup. Ct. 385, 41 L. Ed. 782; *United States v. John Kelso Co.* (D. C.) 86 Fed. 304; *United States v. Standard Oil Co.* (D. C.) 154 Fed. 728; *United*

States v. Virginia-Carolina Chem. Co. (C. C.) 163 Fed. 67; Thompson on Corporations, § 5651.

[3] As the only punishment which can be inflicted upon a corporation is a fine (United States v. Union Supply Co., 215 U. S. 50, 30 Sup. Ct. 15, 54 L. Ed. 87), a criminal proceeding against a corporation is in effect no more than an action for the recovery of a penalty, with this difference, that under the sixth amendment to the Constitution the trial must be had in the district where the crime has been committed. The court committed no error in overruling the motion to quash the process.

[4] The demurrer to the indictment in No. 3,854 charging the defendant with engaging in the business of a wholesale dealer in malt liquors without having paid the tax required by law is based upon the fact that the indictment left out the word "special" before the word "tax," as section 3242, R. S. (U. S. Comp. St. 1901, p. 2094), makes it an offense for a person to engage in that business "without having paid the special tax as required by law." While no doubt it is the better practice in drawing indictments for statutory offenses for the pleader to follow the language of the statute literally or as closely as possible, still, if the omission of a word can in no manner be prejudicial to the defendant by failing to inform him of the crime he is charged with so as to enable him to prepare a proper defense, or prevent him in case of a later indictment for the same offense to plead former jeopardy and in view of the fact that this is the only tax which under the laws of the United States such a dealer is required to pay, the omission is not prejudicial. The strictness with which indictments or informations were at one time construed by the courts, which frequently operated to defeat the ends of justice, no longer prevails, and technical objections not prejudicial are not regarded with as much favor as they were at one time. *Breese v. United States*, 226 U. S. 1, 33 Sup. Ct. 1, 57 L. Ed. —. Act June 1, 1872, c. 255, 17 Stat. 198, digested as section 1025 of the Revised Statutes (U. S. Comp. St. 1901, p. 720), is clearly applicable to a plea of this kind. The demurrer was properly overruled.

[5] The demurrer to the conspiracy indictment, No. 3,855, should have been sustained, as the indictment is bad for duplicity. It charges the defendant in one count with a conspiracy to commit two distinct offenses, one "to evade the payment of the internal revenue tax required to be paid by the laws of the United States by persons engaged in such business," and to violate section 239 of the Penal Code. These are two distinct offenses, with different penalties for violations thereof. This has never been permitted. Without citing the many cases on this subject, the following will be found to throw light on that question: *State v. Huffman*, 136 Mo. 58, 37 S. W. 797; *Wood v. State*, 47 Tex. Cr. R. 543, 84 S. W. 1058; *State v. Dennison*, 60 Neb. 192, 82 N. W. 628; *State v. Ashpole*, 127 Iowa, 680, 104 N. W. 281; *State v. Wester*, 67 Kan. 810, 74 Pac. 239; *State v. Mattison*, 13 N. D. 391, 100 N. W. 1091; *United States v. Smith* (D. C.) 152 Fed. 542, 545.

[6] The government, to sustain its charge in No. 3,854 that the defendant had engaged in the business of a wholesale dealer in malt liquors in the town of Dickinson, Stark county, N. D., introduced evidence tending to show that the defendant had a branch establishment for the sale of malt liquors at Moorhead in the state of Minnesota, which was in charge of a general agent; that it had a large stock of liquors on hand which was constantly replenished to make up the stock according to the sales, which he was authorized to make; that a person by the name of Lally, who resided at Dickinson, N. D., would send orders to the defendant's agent at Moorhead, Minn., for malt liquors with directions to send them with bill of lading to shipper's order with draft for the purchase price attached, which bills of lading were to be turned over upon payment of the draft and thus enable Lally to secure the liquors; that the drafts would be drawn on fictitious persons and would be taken up by Lally, and the bills of lading indorsed in blank would enable Lally or any person to whom he delivered them to obtain the liquors from the carrier. There was evidence tending to show that the agent of the defendant at Moorhead knew that these drafts were drawn on fictitious persons; his dealings being solely with Lally. The defendant introduced in evidence a circular letter which it had sent to all of its agents, including the agent at Moorhead, directing them to place marks on the outside of all packages containing liquors, showing the name of the consignee, the nature of the contents and the quantity contained therein; that shipments could be made subject to either "straight" or "order" bills of lading, but when "straight" bills of lading were issued the agents of the carriers are prohibited from stamping or indorsing waybills to the effect that shipments will be delivered only on surrender of bills of lading. The circular also contained the following instructions:

"We expect you to live up to these instructions strictly. Under no consideration are you to make shipments except on bona fide orders only. The package and shipping receipt or bill of lading covering must also show name of the bona fide consignee. Any one violating any of these instructions will be held accountable."

There was also introduced by the defendant another circular sent to its agents, including the agent at Moorhead, which circular was dated October 21, 1909, inclosing a copy of section 238 of the Penal Code prohibiting C. O. D. shipments, stating that every package must be labeled so as to plainly show the name of the consignee, and, if an agent makes shipments to any fictitious consignee, he will be subject to a fine of \$5,000. It then proceeds:

"Beginning November 1st agents will label all packages showing the nature of the contents and the quantity contained therein, but must look to you to affix the name of the bona fide consignee on every package that is shipped after January 1st. Please familiarize yourself with every requirement under this statute and govern yourself accordingly."

During the trial the defendant offered to prove by its general manager that it had no notice or knowledge of any violation of the instructions contained in those circulars and that it had no knowledge or notice in any way, shape, manner, or form of any sales of beer

at Dickinson, by its Moorhead agent, which was excluded by the court and exceptions saved. The court gave the following instruction to the jury, to which an exception was saved by the defendant:

"The evidence shows that the company had a branch station at Moorhead in the charge of a general agent there for the sale of liquors. It had a large stock of liquors on hand which was constantly replenished to make up the stock according to the sales, and that he was authorized to sell the liquors. Now I charge you that the company is responsible for his acts, within the scope of that agency, and, although it gave directions not to sell in certain ways in violation of the federal C. O. D. law, still, if he did make sales that were in violation of that law, those sales would be within the general scope of his agency, and he would be responsible and the company would be responsible for his acts in that respect. *As to the transaction here involved, I charge you, as a matter of law, that the company is responsible for the acts of its agent at Moorhead in the transactions that are disclosed to you by the evidence here.*"

There is an irreconcilable conflict among the authorities on the question whether a principal can be held liable criminally for the acts of his agent, acting within the scope of his apparent authority, but against the positive instructions of the principal, and of which violation the principal had no knowledge nor consented thereto. A large number of cases on this subject are collected in the notes in the L. R. A. Reports to the following cases: Williams v. Hendricks, 115 Ala. 277, 22 South. 439, 41 L. R. A. 650, 67 Am. St. Rep. 32; State v. Gilmore, 80 Vt. 514, 68 Atl. 658, 16 L. R. A. (N. S.) 786, 13 Ann. Cas. 321; and State v. Nichols, 67 W. Va. 659, 69 S. E. 304, 33 L. R. A. (N. S.) 419, 21 Ann. Cas. 184.

We are of the opinion that while, in the absence of any explanatory evidence on the part of the defendant, the principal will be liable in a case of this nature where it is unnecessary to establish an unlawful intent on the part of the defendant for the acts of his agent within the apparent scope of his authority, the defendant may show that the agent acted not only without his knowledge and consent, either express or implied, but in direct violation of express instructions given to him by the principal. Whether such instructions were given to him by the principal in good faith or whether by reason of the number of such illegal transactions by the agent, or the length of time he continued to disobey them and violate the law the principal must have had knowledge of the agent's unlawful acts and closed his eyes to them, are questions of fact which should be submitted to the jury under proper instructions. Commonwealth v. Hayes, 145 Mass. 289, 14 N. E. 151; Kinnebrew v. State, 80 Ga. 232, 5 S. E. 56; State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688.

The authorities cited by counsel for the government in which corporations have been held liable in civil actions for torts committed by its agents in violation of their instructions, but within the scope of their apparent authority, are inapplicable to criminal proceedings. Nor is New York, etc., R. R. Co. v. United States, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613, in point. That was a proceeding for violation of the Elkins Act (Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847

[U. S. Comp. St. Supp. 1911, p. 1309]], which among other things provides:

"That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons except as such penalties are herein charged."

"In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier * * * shall in every case be also deemed to be the act, omission or failure of such carrier as well as that of the person."

That statute, therefore, in express terms creates the liability of the principal, and to that extent changes the existing rules of law governing such cases. The statute is, in effect, a recognition by Congress that the law is as stated by us in this opinion, and in order to make the penal provisions of the Interstate Commerce Acts effective against the corporation itself enacted this provision.

The court below erred in refusing to admit the evidence offered by the defendant to establish that defense, and also erred in peremptorily instructing the jury as a matter of law that the defendant was responsible for the acts of its agent at Moorhead in the transactions that were disclosed by the evidence.

Let the judgment in No. 3,854 be reversed and the case remanded to the court below, with directions to grant a new trial. Let the judgment in No. 3,855 be reversed, with directions to the court below to sustain the demurrer, discharge the defendant, and dismiss the case.

MECHANICS'-AMERICAN NAT. BANK v. COLEMAN.

(Circuit Court of Appeals, Eighth Circuit. February 10, 1913.)

No. 3,814.

1. COURTS (§ 372*)—FEDERAL COURTS—DECISIONS OF STATE COURT—RULES OF DECISION.

The effect of a provision for attorney's fees in a note is a matter of general or commercial law, with reference to which the federal courts are not bound by state decisions, but are entitled to form an independent judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977-979; Dec. Dig. § 372.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Nat. Bank v. City of Memphis*, 49 C. C. A. 468; *Converse v. Stewart*, 118 C. C. A. 215.]

2. COURTS (§ 372*)—FEDERAL COURTS—RULES OF DECISION—STATUTES.

Judiciary Act Sept. 24, 1789, c. 20, § 34, 1 Stat. 92 (U. S. Comp. St. 1901, p. 581), declaring that the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

States in cases where they apply, is limited to state laws strictly local in character, and does not extend to contracts or other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977-979; Dec. Dig. § 372.*]

3. BILLS AND NOTES (§ 110*)—CONSTRUCTION—PROVISION FOR ATTORNEY'S FEES—EFFECT.

A provision in a note that, if it is not paid when due and is placed in the hands of an attorney for collection, the maker will pay the holder 10 per cent. additional on the principal and interest due as an attorney's fee, is in the nature of a penalty and will not be enforced except to provide indemnity to the holder.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 221; Dec. Dig. § 110.*]

4. BILLS AND NOTES (§ 534*)—ATTORNEY'S FEES—VALUE OF SERVICES—EVIDENCE.

In general, no allowance will be made for attorney's fees in an action on a note, pursuant to a provision for such fees in the note, in the absence of evidence as to the value of the attorney's services.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.*]

5. BILLS AND NOTES (§ 126*)—ATTORNEY'S FEES—NEGOTIABLE INSTRUMENTS LAW—EFFECT—"SUM CERTAIN."

Under the Missouri Negotiable Instrument Law (Laws 1905, p. 244) § 2, subsec. 5, providing that the sum payable on a note is a sum certain within the meaning of the act, though it is to be paid with costs of collection or an attorney's fee in case payment shall not be made at maturity, does not render a provision in a note executed in Missouri, providing for 10 per cent. attorney's fees, conclusive either as to the right of the holder to recover such fees or the amount to be allowed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 272, 273; Dec. Dig. § 126.*]

6. BILLS AND NOTES (§ 126*)—ATTORNEY'S FEES—SERVICES OF ATTORNEY—"PLACED WITH ATTORNEY FOR COLLECTION."

Where a bank, on discovering that it had discounted certain forged notes for a bankrupt, immediately took steps to ascertain the bankrupt's financial condition, agreeing to keep the business running until the report of the experts could be received, and then delivered the notes, which provided for 10 per cent. attorney's fees if placed in the hands of an attorney for collection, to the bank's attorney, the president of the bank testifying that the attorney was employed to keep the bank straight on the felonious part of handling forged notes and getting the money for them and that he was to collect the notes whenever it was necessary, but there was no intention that suit should be brought thereon, and no suit was actually brought prior to bankruptcy proceedings against the maker the notes were not "placed in the hands of an attorney for collection" within such clause, and the bank was therefore not entitled to the allowance of any sum for attorney's fees against the bankrupt's estate.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 272, 273; Dec. Dig. § 126.*]

7. BANKRUPTCY (§ 482*)—CLAIMS—SERVICES OF ATTORNEY FOR CLAIMANT.

There is no authority for allowance in bankruptcy proceedings of compensation from the estate for services of an attorney employed by a secured or nonsecured creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Claim of the Mechanics'-American National Bank against Frank B. Coleman, trustee in bankruptcy of the Embree-McLean Carriage Company. A referee's order overruling a motion to reduce the claim by the amount of certain attorney's fees, claimed pursuant to a provision in the notes on which the claim was based, having been disapproved and reversed, the bank appeals. Affirmed.

Walter H. Saunders, of St. Louis, Mo., for appellant.

George M. Block, of St. Louis, Mo. (F. H. Sullivan, of St. Louis, Mo., on the brief), for appellee.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. The appellant is a national banking corporation of St. Louis, Mo. The appellee is the trustee in bankruptcy of the Embree-McLean Carriage Company, a corporation, formerly doing business in the same city. About May 1st, 1910, the president of the appellant bank learned that the Carriage Company had negotiated with said bank forged notes to the extent of about \$20,000. Immediately thereafter a meeting of the directors of the Carriage Company was held, at which the president of the bank was present, and at this meeting it was determined to elect an employé of the bank secretary of the Carriage Company, and place him in charge of its affairs. It was at first suggested that a receiver be appointed for the Carriage Company, but to this the president of the bank objected, until an expert accountant should make an examination of the financial condition of the company, agreeing that the bank would discount the bills receivable of the company sufficiently to carry the concern until its true condition could be determined by such examination. Inasmuch as the bank was the largest creditor of the Carriage Company, holding its obligations in an amount exceeding \$70,000, this suggestion of its president was adopted. The expert accountants were employed and made their report July 10, 1910. This report showed so conclusively that the Carriage Company was insolvent that, by common consent of all interested, a petition in bankruptcy was filed against it on the 15th day of July, 1910, and thereafter, on August 2, 1910, said company was adjudicated a bankrupt. Shortly thereafter, the bank filed its claim against the Carriage Company which, in a net amount of \$24,950.36, was duly allowed. Included in this claim were 13 notes aggregating approximately \$21,596. Each of said notes was secured by pledged collateral, and contained the following clause:

"In case said above note is not paid when due and payable and the same is placed in the hands of an attorney for collection we agree to pay to the holder thereof 10 per cent. additional on the principal and interest due thereon as an attorney's fee."

At the time the bank filed its original claim, to which reference has been made, no mention was made of this clause, nor was any allowance asked thereunder.

August 2, 1911, on the last day of the year following the adjudication, the appellant filed what it called a supplemental proof of claim made up of various items aggregating \$9,303.52; one of which, for \$2,159.60, was based upon the clauses allowing 10 per cent. for attorney's fees. This additional claim was allowed by the referee; thereafter, the trustee filed his motion to reduce this supplemental claim of \$9,303.52 by the amount asked for attorney's fees, as aforesaid, or at any rate that such fees be fixed at a reasonable amount for services actually rendered, if any. At the hearing of this motion before the referee it was shown that, at the time it was decided that an expert accountant should examine the affairs of the Carriage Company, the president of the bank assured the officers of that company that, if the course suggested by him was adopted, the business would go on until an examination could be made, and that there should be no change in the situation until the result of that investigation could be known. Mr. Hill, the bank's president, testified, however, that some time in May, 1910, and therefore during the period of investigation referred to, he placed these notes in the hands of Mr. Saunders, the bank's attorney. He told Saunders that he had learned that \$20,000 of forged or fictitious paper of the Carriage Company had been discounted at the bank; that he wanted Saunders to take these notes and collect them whenever it was necessary, and to "keep him (Hill) straight on the felonious part of handling forged notes and getting the money for them." He testified further that Saunders took the notes to his office, and returned them to the bank in a few days. They were made payable, on demand, at the appellant bank; and to satisfy this provision Saunders made formal demand for payment upon Hill, the president of the bank. No demand, however, was made upon the Carriage Company, nor was this action communicated to that company, nor any one in charge of its affairs. No suit was brought or contemplated. Mr. Hill testified that he gave no directions to Saunders; that he knew that if suit were to be brought on the notes at any time prior to the report of the expert accountants it would precipitate proceedings in bankruptcy; that he knew the company had no money with which to meet its obligations to the bank, but that all its receipts were being deposited in the bank; that he did not want suit to be brought, because he did not desire proceedings in bankruptcy to be instituted. However, when the report of the experts came in it was immediately resolved to appeal to the bankruptcy court. Consequently no action upon the notes themselves was either taken or contemplated by the bank's attorney, other than to make the formal demand to which reference has been made. Meantime, the bank did proceed, in the usual course, to collect the collateral held as security, and Saunders, as attorney for the bank, was consulted, and advised the bank as to its rights and its attitude toward this collateral. He did not, however, have charge of the collateral, which remained with the bank, and was handled by its officers and employes in the usual manner. Respecting the services of Saunders, President Hill testified as follows:

"Q. What did Saunders do in relation to the collection of these notes between the time that you say you gave them to him in May and the time you got the Price, Waterhouse report? A. I don't know what he did except he did a great deal of work and made us do a great deal of work.

"Q. In relation to this? A. I said that.

"Q. What were you called upon to do during that time? A. Give collateral, due dates, and everything that was bad and anything that we thought good.

"Q. You mean simply looking up the collateral? A. Yes, sir.

"Q. Well, I am talking about the principal notes with reference to the Embree-McLean Carriage Company; what, if any, steps did he take against the Embree-McLean Carriage Company, do you know? A. I really don't know.

"Q. Did he take any steps, do you know? A. He made demand on us for the payment of them.

"Q. You were not an officer in the Embree-McLean Carriage Company? A. No, sir; but these notes were payable at our bank."

Mr. Hill stated frankly that he had no agreement with Saunders as to what fee the latter should receive for any services rendered the bank in connection with these notes; that all he expected to pay was a reasonable compensation for services actually performed.

Appellant, in the hearing before the referee, stood upon the clause in the note, providing a collection fee of 10 per cent., as conclusive, and offered no testimony as to the value of the services rendered. This was the view adopted by the referee, by whom the motion of the trustee to reduce the supplemental claim of the bank was overruled. The order of the referee overruling this motion was taken to the District Court for review, where the same was disapproved and reversed, and the position of the trustee sustained. From this order the bank brings its appeal to this court.

[1] The position of counsel for appellant is that a clause in a note stipulating for an attorney's fee, provided the note is placed in the hands of an attorney for collection, is valid, enforceable, and conclusive as to amount; that such is the law of the state of Missouri, in which this contract was made, and therefore binding upon this court. The proposition, as stated, cannot be accepted in its entirety. The question here presented is one which falls within the domain of general or commercial law. It involves simply the construction and effect of recitals in negotiable instruments, and no question of right under the Constitution and statutes of a state. In such matters the decisions of the state court are not controlling in the federal tribunals.

"It is not only the privilege, but the duty, of the federal courts, imposed upon them by the Constitution and statutes of the United States, to consider for themselves, and to form their independent opinions and decisions upon, questions of commercial or general law presented in cases in which they have jurisdiction, and it is a duty which they cannot justly renounce or disregard." *Independent School Dist. v. Rew*, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364.

[2] The doctrine thus announced by this court finds abundant confirmation in the decisions of the Supreme Court of the United States. The thirty-fourth section of the Judiciary Act of 1789, declaring that the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply, is limited in its application to state laws strictly local. It

does not extend to contracts or other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles, and doctrines of commercial jurisprudence. In such cases it is the right and duty of the national courts to exercise their own judgment. *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.

In *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 443, 9 Sup. Ct. 469, 472 (32 L. Ed. 788), the Supreme Court, speaking through Mr. Justice Gray, said:

"But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the state, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state."

It is, of course, true, as stated in *Burgess v. Seligman*, *supra*, that:

"Even in such cases, for the sake of harmony and to avoid confusion, the courts of the United States will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt."

[3] The general law and the weight of authority in the majority of states, whether based upon express provision of statute, or otherwise, are against the allowance of such attorney's fees under a provision of this character, except for indemnity and in the nature of a penalty as distinguished from liquidated damages. In *United Shoe Machinery Co. v. Abbott*, 158 Fed. 762, 86 C. C. A. 118, this court stated the principle in the following language:

"Legal interest is the measure of damages for the failure to pay debts when they are due, and hence a contract to pay an amount in excess of such interest on account of a default in the payment of money when it is due is an agreement for a penalty which the courts will not enforce."

[4] It is quite generally held that when no testimony is offered as to the value of services attorney's commissions should be disallowed. In *re Torchia* (D. C. Pa.) 185 Fed. 576-583.

In *Chestertown Bank of Maryland v. Walker*, 163 Fed. 511-513, 90 C. C. A. 140, the Court of Appeals for the Fourth Circuit held that a contract in a note to pay a collection fee if the note is not paid at maturity is valid to the extent of a reasonable fee actually expended or contracted to be paid, but no further; observing that in no state where usury laws are in effect are such contracts permitted to be enforced if the charges are either unreasonable or may be made a subterfuge for usurious exactions.

In *Re Fabacher* (D. C. La.) 193 Fed. 556-558, a 10 per cent. stipulation was held to justify only a reasonable fee. The court said:

"This does not mean he must necessarily recover the amount stipulated by the act of mortgage, as this provision relates solely to his remedy. The lender is usually apt to stipulate for as high a rate of attorney's fees as he possibly can in order to fully protect himself, while the borrower will no doubt agree to almost any amount of fee, having no idea at the time that he

will ever be called upon to pay it. When bankruptcy intervenes, however, the rights of general creditors must be considered, and the bankruptcy court should deal with the question so that equity be done to all parties."

In *Merchants' Bank v. Thomas*, 121 Fed. 306-312, 57 C. C. A. 374, the Court of Appeals for the Fifth Circuit held that a stipulation for 10 per cent. was reasonable, where not obviously excessive, but that such an amount was not conclusive, and that the creditor is not permitted to profit thereby; the theory being that the creditor has become indebted to an attorney and the purpose of the stipulation is to indemnify him against such expense. To the same effect are *In re Gebhard* (D. C. Pa.) 140 Fed. 571; *McCabe v. Patton et al.* (C. C. A. Third Circuit) 174 Fed. 217, 98 C. C. A. 225.

In Missouri the courts have uniformly recognized the validity of such stipulations for attorney's fees; but prior to 1905 it was held that the notes were thereby rendered nonnegotiable for uncertainty as to amount. *Creasy v. Gray*, 88 Mo. App. 454; *Bank v. Jacobs*, 73 Mo. 35; *McCoy v. Green*, 83 Mo. 626; *Bank v. Gay*, 63 Mo. 33, 21 Am. Rep. 430; *Clark v. Barnes*, 58 Mo. App. 667; *Bank v. Marlow*, 71 Mo. 618; *Bank v. Gay*, 71 Mo. 627.

[5] In that year the Negotiable Instrument Law was passed, which contained the following provision:

"The sum payable is a sum certain within the meaning of this chapter, although it is to be paid * * * (5) with costs of collection, or an attorney's fee in case payment shall not be made at maturity." Laws 1905; p. 244, § 2.

This removed the former disability, and since that time notes containing such clauses are held to be negotiable.

It is urged by counsel for appellant that this act is a statutory recognition, not only of the validity of such provisions for an attorney's fee, but also of the conclusiveness of the amount named therein. Without conceding that this court is bound by any local construction of purely commercial contracts, we are of opinion that neither this statute, nor the decisions of the appellate courts of Missouri, bear the construction placed upon them by counsel.

Prior to the passage of this act it was lawful to contract for the payment of an attorney's fee as an incident to the collection of a note not paid at maturity. Such a contract, however, was held to destroy the negotiability of the paper. The act of 1905 restored the element of negotiability, but added nothing to the validity of the provision that had always existed. The element of certainty thus introduced is arbitrary, not actual. To illustrate: A provision for the payment of "a reasonable attorney's fee," without fixing the amount by percentage, or otherwise, would be uncertain in fact, but would not destroy the negotiability of the note under the terms of this statute. So, also, costs of collection, other than attorney's fees, are never definitely known. It is evident therefore that the effect of such clauses has not been changed by any express provision of law.

Turning to the decided cases, we do not find the Missouri courts in conflict with the general trend of decision elsewhere. In *North Atchi-*

son Bank v. Gay et al., 114 Mo. 203, 21 S. W. 479, the contract provided that:

"If it should be collected by an attorney, or by process of law, an attorney's fee of 10 per cent. should be added."

In that very case an attorney was collecting by process of law. The note itself was for \$2,500, which would make the collection fee \$250. The court, in effect, held that this was not unreasonable under the circumstances, and was sufficiently supported by the provision in the instrument. The exception arose upon instructions to the jury; and the contention here urged does not appear to have been sharply defined nor considered by the court.

In Bank v. Martin, 129 Mo. App. 484, 107 S. W. 1108, the language was:

"If this note is not paid at maturity, the undersigned agree to pay reasonable expenses of collection, including attorney's fees."

The court held that this had reference to expenses incurred by the plaintiff in collecting the note; that it was "in the contemplation of the parties that if the note was not paid at maturity, and plaintiff should be put to the expense of compelling its collection by the assistance of an attorney, then such expense, if reasonable, should become a part of the debt." The Supreme Court of Missouri has repeatedly announced that it inclines toward a construction in favor of a penalty as against liquidated damages, at least where there is doubt and where the actual damage can be assessed by known rules or with reasonable certainty. The test is whether the amount ostensibly awarded, in the contract for the breach complained of, is or is not reasonably appropriate and just. *May v. Crawford*, 142 Mo. 390, 44 S. W. 260; *Thompson v. St. Charles County*, 227 Mo. 220-238, 126 S. W. 1044.

No other Missouri cases bearing upon this disputed point have been found, or called to our attention. In discharge of the duty imposed upon us to consider for ourselves and form our independent opinions upon questions of commercial and general law presented for our decision, we are constrained to hold that this provision in the notes in suit calls for the payment only of a reasonable attorney's fee, for services actually rendered in conformity with its terms; that such is the decided weight of authority; and that neither the statute law of Missouri, nor the decisions of its courts of last resort, are in conflict therewith.

[6] It remains to consider only whether the attorney for the bank rendered any services within the intendment of the clause providing for attorney's fees. We do not think so. The language, "placed in the hands of an attorney for collection," means something more substantial than the purely formal acts disclosed by this record. At the time these notes are said to have been given to Saunders no suit was contemplated, nor was this or any other form of collection proceeding desired. The bank had obligated itself, morally at least, to take no steps which would change the situation until the expert accountants should make their report. There was no appreciable transfer of possession of the notes from the bank to its attorney. Neither the collat-

eral nor its collection was intrusted to him, but the latter proceeded through the regular bank officials—aided, no doubt, by the advice and counsel of the bank's attorney. It is probable that—as Mr. Hill testified—Saunders was employed more particularly to keep the bank “straight on the felonious part of handling forged notes and getting the money for them.” He was to collect these notes “whenever it was necessary”; but that necessity had not arisen, so far as legal proceedings were concerned, and did not arise until after bankruptcy had intervened. It is true that Mr. Saunders represented the bank before the referee in resisting a motion of the trustee to expunge the bank's claim; but this action was incidental to the proceedings in bankruptcy, and cannot support a claim for attorney's fees under this provision in the notes.

[7] There is no authority to allow compensation from the estate for services of any attorney employed by a secured or nonsecured creditor in bankruptcy proceedings. Loveland on Bankruptcy, vol. 1, p. 254, par. 109; *In re Hersey* (D. C.) 171 Fed. 1004-1008. Neither the bank nor its attorney apparently conceived that such a demand was justified when the claim was originally filed, although it existed then, if at all, as fully as at any later period. Its tardy assertion, practically a year after the adjudication, stamps it as an afterthought.

Since it appears that these notes were not placed in the hands of an attorney for collection within the meaning of the language relied upon, and that no evidence was adduced as to the reasonable value of services rendered, if any, the motion of the trustee to reduce the allowance theretofore improvidently made was properly sustained.

The order and decree of the district court should therefore be affirmed.

RIFF et al. v. LUMBER UNDERWRITERS.

(Circuit Court of Appeals, Sixth Circuit. April 11, 1913.)

No. 2,232.

1. REMOVAL OF CAUSES (§ 119*)—CIRCUIT COURT OF APPEALS—DETERMINATION OF JURISDICTION.

Where a removed cause is taken to the Circuit Court of Appeals by writ of error, it is the court's duty on its own motion to determine whether the record exhibits a removable cause, regardless of whether any objection was taken to the jurisdiction of the federal court, either in the trial court or on appeal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 252; Dec. Dig. § 119.*]

2. REMOVAL OF CAUSES (§ 111*)—FEDERAL JURISDICTION—DIVERSITY OF CITIZENSHIP—RECORD.

Where a cause is removed for diversity of citizenship, the record must affirmatively show jurisdiction, and the facts necessary to show diversity of citizenship not be left to argument or inference.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 237, 239; Dec. Dig. § 111.*]

3. REMOVAL OF CAUSES (§ 86*)—RECORD—DIVERSITY OF CITIZENSHIP—PLEADING.

In an action against a Lloyds association, mere assertion in a petition to remove that defendant is a resident and citizen of New York and a nonresident of Tennessee, where the suit has been brought, is not necessarily more than a mere conclusion of the pleader, and alone is not sufficiently definite to show diversity of citizenship, relied on as a ground for removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

4. COURTS (§ 322*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP—PLEADING—ASSOCIATIONS—"CITIZEN."

In an action against a Lloyds association, an allegation that defendant is an "association" is not alone sufficient to show citizenship, since an association, which is not a corporation, is not a "citizen," within the statutes regulating jurisdiction of the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876-881, 887; Dec. Dig. § 322.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1164-1174; vol. 8, pp. 7602, 7603.

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.]

5. REMOVAL OF CAUSES (§ 118*)—DIVERSITY OF CITIZENSHIP—RECORD—AMENDMENT.

Where the record in a state court of a removed cause against a Lloyds association was deficient, in that it failed to show the legal status of the defendant, but nevertheless contained allegations in the language of the statute of the existence of the elements entitling defendant to a removal, it was not so fatally lacking in jurisdictional allegations as to preclude amendment in the federal court by way of correct and definite showing of the actual status and citizenship of the defendant association and its members.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 250; Dec. Dig. § 118.*]

6. INSURANCE (§ 317*)—FIRE POLICY—"CONTINUOUS CLEAR SPACE."

A provision in a fire policy, covering lumber in piles, requiring a "continuous clear space" of 100 feet between the property insured and any woodworking or manufacturing establishments, was breached by the maintenance of an oilhouse, barn, and an elevated driveway in the 100-foot space between the lumber insured and plaintiff's mill.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 748; Dec. Dig. § 317.*]

7. INSURANCE (§ 664*)—EVIDENCE—CONDITIONS—CLEAR SPACE—WAIVER.

Where defendant's inspector made measurements and observations of plaintiffs' sawmill yard prior to the issuance of the policy sued on, and ascertained the then existing conditions, and defendant association (through its "home office" or general managing officers) had the report of the inspector, showing the existence of a barn, oilhouse, and elevated lumber platform within the 100-foot space required by the policy to be kept clear between the piles of lumber insured and plaintiffs' sawmill, proof that with such knowledge (and with reason to believe that the continued existence of such structures in their then location during the life of the successor policy was contemplated) defendant issued the policy and retained the premium would be competent to raise an estoppel against de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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fendant's right to insist on a breach of the clear space provision as a defense to an action on the policy, notwithstanding the provision in the policy that no agent or representative of the underwriters should have power to waive any provision or condition in the policy, except such as by its terms might be the subject of agreement, indorsed thereon or attached thereto, and as to such provisions they could not be waived, unless in writing indorsed on or attached to the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1687, 1688, 1699; Dec. Dig. § 664.*]

8. INSURANCE (§ 664*)—EVIDENCE—CONDITIONS—CLEAR SPACE—WAIVER.

Evidence of an alleged waiver of a clear space provision in a fire policy by defendant's local agent was inadmissible, in the absence of an offer to show ratification of the agent's act by the company; the same not having been in writing and attached to the policy as required by its terms.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1687, 1688, 1699; Dec. Dig. § 664.*]

In Error to the Circuit Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by O. C. Rife and another against the Lumber Underwriters. Judgment for defendant, and plaintiffs bring error. Reversed.

C. L. Marsilliot and Caruthers Ewing, both of Memphis, Tenn., for plaintiffs in error.

Trezevant, Bartels & Trezevant, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiffs in error sued upon two policies of insurance issued by defendant in error, for the recovery of fire loss upon a stock of lumber and other property in plaintiffs' mill-yard. Plaintiffs submitted to nonsuit as to one policy. As to the other, verdict was directed for defendant.

[1] 1. The suit was begun in a state court of Tennessee. It was removed to the federal court for alleged diversity of citizenship of the parties. No motion to remand was made. On the hearing here, the question whether the suit was lawfully removed was raised by a member of this court. That it is the duty of this court to determine whether the record exhibits a case properly removable, regardless of whether any objection was taken to the jurisdiction of the federal court, either in the court below or on appeal, is established by a long line of decisions, among which are *Great Southern, etc., Hotel Co. v. Jones*, 177 U. S. 449, 453, 20 Sup. Ct. 690, 44 L. Ed. 842; *Fred Macey Co. v. Macey* (C. C. A. 6th Cir.) 135 Fed. 725, 726, 68 C. C. A. 363; *Chicago, etc., Ry. Co. v. Willard*, 220 U. S. 413, 419, 31 Sup. Ct. 460, 55 L. Ed. 521. The question of jurisdiction arises in this way:

In the title to the bill of complaint the defendant was described as "an insurance corporation or association doing business in Tennessee."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The petition for removal asserted that the defendant then, and at the time suit was begun, was a resident and citizen of the state and city of New York, and a nonresident of the state of Tennessee, and that the plaintiffs were residents and citizens of Tennessee and Mississippi, respectively. Service of subpoena had been made upon an agent representing the defendant in Tennessee. After the removal, defendant appeared specially, denying the authority of the alleged agent to accept or acknowledge such service, and challenging the jurisdiction of the court over its person; alleging that defendant was not a corporation or a joint-stock company, but a voluntary association composed of 15 individuals named, each of whom (correcting what is conceded to be an error in the printed record as to the stated residence of one member) was alleged to be a citizen and resident of a specified state other than Tennessee, and (according to the undisputed statement in brief of defendant's counsel) was, in effect, alleged to be a citizen of a state other than Mississippi. Alias summons was served upon the commissioner of insurance, as provided by the Tennessee statutes, under which (Shannon's Code, § 3298) associations formed, as is defendant, upon the plan of "Lloyds," are authorized to transact in that state insurance other than life upon the same terms and conditions as required of "insurance companies of the United States or one of the United States"; the defendant association having duly authorized the commissioner to acknowledge service of all legal process. Supplemental process also issued against the attorney in fact of the association. The plea to the merits alleged that the association was not a "legal entity," and was neither a corporation nor a joint-stock company.

[2-4] It is well settled that the record must affirmatively show jurisdiction to make the removal, and that the facts necessary to show diversity of citizenship may not be left to argument or inference. *Laden v. Meck* (C. C. A. 6th Cir.) 130 Fed. 877, 65 C. C. A. 361; *Thomas v. Board of Trustees*, 195 U. S. 207, 210, 25 Sup. Ct. 24, 49 L. Ed. 160. Diversity of citizenship does not appear with sufficient definiteness of detail upon the record in the state court. The bill of complaint does not unequivocally allege that defendant was a foreign corporation, or even a corporation; nor does the petition to remove allege the defendant to be a corporation, much less that it is organized under the laws of a state other than Tennessee or Mississippi. The mere assertion that it is a "resident and citizen of the state of New York * * * and a nonresident of the state of Tennessee" is not necessarily more than a mere conclusion of the pleader, and standing by itself is not sufficiently definite. *Lafayette Ins. Co. v. French*, 18 How. 405, 15 L. Ed. 451; *Great Southern, etc., Hotel Co. v. Jones*, supra, 177 U. S. 454, 20 Sup. Ct. 690, 44 L. Ed. 842; *Fred Macey Co. v. Macey*, supra, 135 Fed. 725, 68 C. C. A. 363. And an allegation that defendant is an "association" is not alone sufficient to show citizenship; for an association which is not a corporation is not a citizen within the meaning of the statutes regulating jurisdiction. *Chapman v. Barney*, 129 U. S. 677, 682, 9 Sup. Ct. 426, 32 L. Ed. 800; *Gt. Southern, etc., Hotel Co. v. Jones*, supra, 177 U. S. 449, 456, 457,

20 Sup. Ct. 690, 44 L. Ed. 842; *Thomas v. Board of Trustees*, supra, 195 U. S. 216, 25 Sup. Ct. 24, 49 L. Ed. 160; *Fred Macey Co. v. Macey*, supra, 135 Fed. 726, 727, 68 C. C. A. 363.

[5] The petition for removal, in addition to what has already been stated, contained an assertion of the requisite jurisdictional amount in dispute, and an allegation that "the controversy in said suit is between citizens of different states." The record in the state court as to diversity of citizenship thus showed in general terms: (a) The existence of a controversy between citizens of different states; (b) defendant's residence in and citizenship of New York; and specifically (c) plaintiffs' residence in and citizenship of Tennessee and Mississippi, respectively. It is true the petition misstated defendant's citizenship and residence, but such misstatement, not being challenged, did not affect the jurisdiction to remove. While, therefore, the record in the state court was deficient, in that it failed to show the legal status of the defendant (whether a corporation or an association), it contained assertions in the language of the statute of the existence of the elements entitling defendant to a removal. We therefore think the record in the state court was not so fatally lacking in showing a jurisdiction to remove as to preclude amendment in the federal court, by way of correct and definite showing of the actual status and citizenship of the defendant association and the members composing it.

We think this conclusion sustained by the decision in *Kinney v. Columbia Savings & Loan Ass'n*, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, which materially relaxed the strictness formerly applied to the question of jurisdictional showing in removal proceedings. It is true that in the *Kinney Case* the application in the federal court, to amend the petition for removal, was made before any proceeding on the merits; but we are unable to see that that feature is important where, as here, the record in the federal court, before any proceeding had therein on the merits, showed (as asserted) diversity of citizenship and thus actual jurisdiction to remove. We think the case distinguishable from *Thomas v. Board of Trustees*, supra, and *Fred Macey Co. v. Macey*, supra, in that the court could see, as matter of law, from the face of the record, that the board of trustees (in the *Thomas Case*) and the partnership association (in the *Macey Case*) were not and could not be citizens within the meaning of the statutes relating to removal, while in this case defendant might be an "association," and yet be a corporation. We see no merit in the suggestion that the individual members of the defendant association have not asked removal. If the association could be sued as such, we think it could lawfully take the necessary steps in its defense, including removal.

[6] 2. The policy contained a warranty by the assured that "a continuous clear space of 100 feet shall at all times be maintained between the property hereby insured and any woodworking or manufacturing establishment." The undisputed proofs show that at the time of the fire the distance between the mill and the lumber yards was more than 100 feet, and that in one direction there was a continuous clear space of more than 100 feet between the mill and the lumber. In other directions, however, and thus between the mill and certain of the lum-

ber piles, there intervened an oilhouse, a barn, and an elevated driveway. The existence of these three structures was clearly a violation of the "continuous clear space" provision. They naturally increased the risk, and the effect of this violation is not taken away by the fact that the fire was actually communicated from the mill to lumber piles more than 100 feet therefrom, without the agency of these intervening structures. It was because of the violation of the clear space provision that verdict was directed for defendant. In the absence of evidence of waiver, this direction was correct.

[7] Plaintiffs contended that defendant had waived this clear space provision, and in proof of their contention offered to show, in substance, that shortly before the issuance of the present policy, and while its predecessor policy was in force, defendant's inspector made measurements and observations of the millyard, and ascertained the then existing conditions, that the company had the report of the inspector showing the conditions, and that the conditions so shown were substantially and practically the same as at the time of the fire, and that no objection was made by the company on account of the existence of the conditions referred to. The argument in substance is that, by accepting the premium and issuing the policy, the company is estopped to declare the policy void by reason of a condition which it knew existed when the policy issued, and which it had reason to believe was expected to continue during the policy period.

We think the offer broad enough to embrace proof that the "home office" or the general managing officers of the company (as distinguished from a mere agent) actually received the inspector's report. Plaintiffs offered to show "that the insurance association itself received the report of this inspector." The policy contains the express provision that:

"No agent or other representative of the underwriters shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon or attached hereto, and as to such provisions and conditions no agent, or representative, shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The alleged waiver is not written upon or attached to the policy, and defendant invokes the above provision as absolutely precluding the assertion of the alleged waiver. In *Assurance Co. v. Building Ass'n*, 183 U. S. 308, at page 361, 22 Sup. Ct. 133, at page 153 (46 L. Ed. 213), an exhaustive examination and discussion is had of the authorities relating to waiver of conditions in insurance policies, and to the prohibition against altering or contradicting unambiguous written contracts by parol evidence. That case involved a provision as to waiver in the identical language found in the policy before us. Justice Shiras, in the enumeration of the principles sustained by the authorities, included the propositions:

"That insurance companies may waive forfeiture caused by nonobservance of such conditions; that where waiver is relied on, the plaintiff must show

that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

That the defendant here might effectually waive the "clear space" provision in question is established by *Assurance Co. v. Building Association*. The objection that the policy makes the waiver ineffective, unless written upon or attached to the policy, is disposed of by the decision of this court in *Ætna Life Ins. Co. v. Frierson*, 114 Fed. 56, 51 C. C. A. 424, where it was held in an opinion by Judge (now Mr. Justice) Lurton that such provision may be itself waived as well as any other, and that the question in every such case is whether the waiver has been made by the corporation or by one authorized to act for it in the matter. Forfeitures are not favored, and any course of action on the part of an insurer which leads the insured necessarily to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon forfeiture, although it might be claimed under the express letter of the contract. This principle has been applied in the following cases, among others: *Insurance Co. v. Wolff*, 95 U. S. 326, 330, 24 L. Ed. 387; *Insurance Co. v. Eggleston*, 96 U. S. 572, 577, 24 L. Ed. 841; *Queen Ins. Co. v. Union Bank & Trust Co.* (C. C. A. 6th Cir.) 111 Fed. 697, 49 C. C. A. 555; *Etna Life Ins. Co. v. Frierson*, supra, 114 Fed. 63, 51 C. C. A. 424; *Supreme Lodge v. Wellenvoss* (C. C. A. 6th Cir.) 119 Fed. 671, 675, 56 C. C. A. 287.

We do not think that defendant's knowledge, at the time the policy issued, that lumber was piled within 100 feet of the mill, would necessarily estop defendant from urging such breach of the "clear space" warranty as avoiding the policy. *Shingle Co. v. Insurance Co.*, 91 Mich. 441, 51 N. W. 1111. The specific location of lumber piles is or may be more or less temporary in nature, and, as affecting such structures, a warranty might well be considered promissory in nature. On the other hand, the barn, the oilhouse and the lumber platform were more or less permanent in nature; and if defendant, with knowledge of their existence and with reason to believe that their continued existence in their then location with respect to the mill and lumber piles was contemplated, elected to receive the premium and issue the policy, it would, we think, be estopped from asserting the continued existence of those structures as a breach of the "clear space" warranty. Whether defendant had such knowledge and reasonable expectation would be a question of fact for the jury; and so of the question whether the knowledge of the location of the structures named, obtained by defendant during the existence of its predecessor policy, could reasonably be presumed to be, or should have been, present in its mind at the time the policy in suit was issued.

We pass by without decision the question whether the alleged waiver was asserted in the declaration, as well as the question whether such assertion was necessary; for we find nothing in the declaration in-

consistent with the claim of such waiver in case plaintiffs' contention there stated, that a "clear space" of 100 feet actually existed, should not be sustained, and the objection to the offered testimony did not clearly raise a question of pleading, and thus of the necessity of, or right to, amendment. Plaintiff should be allowed before another trial to make any proper amendment in this regard.

[8] 3. Upon the authority of *Assurance Co. v. Building Association*, we think the court rightly rejected the offer to show that defendant's local agent waived the "clear space" provision of the policy. Such alleged waiver was not written upon or attached to the policy, and there was no offer to show a ratification of his act by the company itself, unless and except as involved in the company's own alleged waiver already discussed. The case is not, we think, affected by the provision of the Tennessee statutes (chapter 441, Acts of 1907):

"That every policy of insurance issued to and for the benefit of any citizen or resident" of the state "shall be held as made in this state and construed solely according to the laws of this state."

This statute undoubtedly has the effect of making the policy a Tennessee contract, and requiring its validity and interpretation to be determined by the law of that state. *Russell v. Grigsby* (C. C. A. 6th Cir.) 168 Fed. 577, 94 C. C. A. 61. No law of Tennessee requiring a construction of the waiver provision differently than we have construed it has been called to our attention. Such is not the effect of decisions that a policy provision that no agent has authority to waive any condition, and that no waiver could be recognized, unless in writing, may itself be waived.

For the error pointed out, the judgment of the Circuit Court is reversed and a new trial ordered. The defendant may apply to the District Court for an amendment of its removal proceedings to conform to the facts. Failing such prompt application, the case should be remanded to the state court.

AMERICAN SHIPBUILDING CO. v. LORENSKI.

SAME v. LEWANDOWSKI.

(Circuit Court of Appeals, Sixth Circuit. April 11, 1913.)

Nos. 2,299, 2,300.

1. MASTER AND SERVANT (§ 116*)—INJURIES TO SERVANT—DEFECTIVE SCAFFOLD—MASTER'S LIABILITY.

Plaintiffs, who were employed in defendant's shipyard, were injured by the fall of a wooden structure constructed on one side of a dry dock to afford means of working on the side of a ship in course of construction, and to support a track for the use of a traveling crane. The structure was 42 feet high and extended 650 feet in length, and was composed of transverse frames or bents placed 10 feet apart, constructed of heavy

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

materials. The substructure was regarded by defendant as distinct from the line of stringers on top of the whole structure, being constructed under orders of defendant's superintendent, who was cognizant of the nature and purposes thereof and also the mode in which the work was usually conducted and the special conditions surrounding the construction of the one in question. *Held*, that the structure was not a mere temporary affair constructed by defendant's carpenters and laborers working together, and that defendant did not perform its whole duty by furnishing sufficient material of proper character.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 207; Dec. Dig. § 116.*]

2. MASTER AND SERVANT § 265*)—INJURIES TO SERVANT—FALL OF SCAFFOLD—*RES IPSA LOQUITUR*.

The fall of a staging or scaffolding without any apparent cause may be regarded as *prima facie* evidence of negligence on the part of the person who provided it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

Application of doctrine of *res ipsa loquitur* in action for injuries to servant, see note to *Carnegie Steel Co. v. Byers*, 82 C. C. A. 121.]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio; Wm. L. Day, Judge.

Actions by Lawrence Lorenski and by Frank Lewandowski against the American Shipbuilding Company. Judgment for plaintiff in each case, and defendant brings error. Affirmed.

These two cases were heard together both below and here, and will be disposed of in this opinion. Damages for personal injuries were sought and recovered in each case upon pleadings substantially alike and upon the same evidence, except as to description and extent of the injuries sustained. No evidence was offered by the company. At the close of plaintiffs' evidence a motion for a directed verdict was overruled, judgments were entered on the verdicts, and the cases are pending here on error.

The plaintiff in error, hereinafter called company, is a New Jersey corporation, and owns and operates a shipyard in the city of Lorain, Ohio. The defendants in error, hereinafter called plaintiffs, were in the company's employ as laborers in the shipyard, and received their injuries February 10, 1909. The plaintiffs were injured by the falling of a wooden structure upon which they were at the time working. This structure was designed for two purposes in shipbuilding. One purpose was to afford means for working on the side of a ship while in course of construction, and the other was to support a track on which one end of a traveling crane used in such construction could be operated. The structure was placed on the north side of a dry dock, and was intended to correspond in purposes with those of an iron structure then maintained on the opposite side; and thus the means for ship construction and of operating the crane were to be alike on each side of the dry dock.

The structure was about 42 feet in height, extending in an east and west direction 650 feet. It comprised 65 transverse frames, or bents, placed 10 feet apart. These bents were each composed of substantial uprights resting on sunken blocks of wood, and the uprights were held in place by strong cross bracings and also by an additional brace for each bent, called a "stay last" (consisting of timbers 2x6 inches and 16 feet long, which were spliced into lengths of 28 feet): one end of each being bolted to and near the top of the upright next to the dry dock, and the other end to a strong oak stake

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

driven into the ground, except that some of the ground ends were spiked to keel blocks. The work of placing these bents in upright positions was begun at the east end of the structure, where it was securely fastened to an iron structure there permanently maintained. At this point a steam crane was placed for hoisting materials to the top of the structure and also for dragging, by means of a cable suitably adjusted and operated, some of the heavy materials so hoisted along the top of the structure to the places where needed. Among the materials so hoisted were planks, which were placed across the bents to accommodate men working on top of the structure. Among the heavier materials so hoisted were timbers 12x12 inches and 30 feet long. It is not entirely clear whether these timbers, called "stringers," were dragged to points near their respective positions by cable, or were carried there by men. Witnesses differ in their testimony on this subject. The stringers were placed, as far as that feature of the work had progressed, across the bents and immediately over the uprights next to the dry dock; and it was part of the design to place and maintain thereon iron rails, on which one end of the crane was to be operated as stated. The plan of fastening and holding these stringers in place was to bolt iron plates, 24 inches in length, on the face of each of the inner uprights and across the stringers, except at the ends where the plates were to extend lengthwise of each of the two adjoining stringers and also to the supporting upright. Simultaneously with the placing of the stringers in position, beginning at the east end, the work of replacing every third stay last with a heavier brace was begun, as also the attaching of the iron plates. These substituted braces were of pine, 6x6 inches, each fastened to every inner third upright (substantially as the stay last was held), and at the other end by an iron device connected with a substantial foundation.

Enough has been stated to describe the twofold character of this structure and the purpose for which each portion was designed and was to be used. The removal and erection of similar wooden structures are repeated every time the hull of a boat is finished and launched. Indeed, a boat was launched in the earlier part of the very day on which this structure was begun. At the time of the accident the work of laying the stringers had progressed about one-half the length of the staging, and, although the work of attaching the plates for holding the stringers in place was being carried on, the evidence does not clearly show how far it had progressed; but the work of substituting the heavier braces at the points and in the manner stated was then about 150 feet short of the point to which the stringers had been placed in position.

That portion of the wooden structure along which the heavier braces had not been placed fell. The plaintiffs, who were then on the loose planks lying on top of the bents and engaged in putting stringers in place, were thrown into the bottom of the dry dock, a distance of some 75 feet. The rest of the necessary facts appear in the opinion.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for plaintiff in error.

Skiles, Green & Skiles, of Shelby, Ohio, and R. B. & A. G. Newcomb, of Cleveland, Ohio, for defendants in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above).
[1] The contention of the company is that the court erred in overruling the motion to direct a verdict and in its charge to the jury. Both of these features of error are based on the claim that if any negligence intervened it was the negligence of one or more of plaintiffs' fellow servants and not of the company. The theory is that the structure was simply temporary staging to be used in the building of

a steamboat, and was constructed by carpenters and laborers working together and under the direction, respectively, of a foreman for each class; that the materials supplied were sufficient, both in kind and quantity; and that the staging was constantly changing, and was incomplete when it fell. It is true that in a comparative sense the structure was intended to be temporary. It was to be removed when the boat was finished; but this is not determinative of the case. It fails to give effect to the nature and purposes of the structure. While it was composed almost entirely of wood, yet it was designed for the upper portion of one side of a dry dock; and the part below the stringers was so planned as to accommodate men working on the outside of the hull of a boat, and to support and carry a structure for the operation of a crane to distribute materials along the boat. It was intended, during the time required to construct the hull of a boat, to accomplish the same ends as those of the permanent iron structure then maintained on the opposite side of the dry dock. Plainly, then, it had to be very substantial in all its parts. Again, counsel take no account of the fact, and it is a fact, that plaintiffs had nothing to do with the selection of the materials for, or the design or construction of, the substructure; that is, the bents and their supports. The plaintiffs began and conducted their work under orders after the substructure had been erected and the stay laths put in place. Their work consisted of putting planks across the top of the bents for use as a floor and in placing the stringers on top of the bents in the line of the inner uprights described in the statement.

Do the facts, then, present a case simply for the application of the fellow-servant doctrine, or do they present the question whether the master owed the plaintiffs a duty touching the safety of the substructure respecting the placing of stringers upon it and putting them into position? There is a class of cases which hold that when an employer furnishes proper materials for scaffolding and staging, and the workmen themselves construct it as part of the work they undertake to perform and in accordance with their own judgment, the employer is not liable for injuries sustained by one or more of their own number while subsequently using the structure and in consequence of negligence in its construction. The reason is that such structures do not require greater knowledge or the exercise of more skill than is usually possessed by the ordinary laborer or mechanic. *Noble v. C. Crane & Co.*, 169 Fed. 55, 94 C. C. A. 423 (C. C. A. 6th Cir.); *Chambers v. American Tin Plate Co.*, 129 Fed. 561, 562, 64 C. C. A. 129 (C. C. A. 6th Cir.); *Armour v. Hahn*, 111 U. S. 313, 318, 4 Sup. Ct. 433, 28 L. Ed. 440; *Kerr-Murray Mfg. Co. v. Hess*, 98 Fed. 56, 59, 38 C. C. A. 647 (C. C. A. 8th Cir.). However, as the present Mr. Justice Lurton said in *Chambers v. American Tin Plate Company*, *supra*, after stating the rule of the class of cases before alluded to (129 Fed. 562, 64 C. C. A. 130):

"But the rule is quite otherwise if the employer himself undertake to furnish such scaffolding for the men who are to work thereon. In such case the duty is one of those positive duties of the master toward the servant which cannot be discharged by the substitution of a competent agent. The

act or service to be done is that of furnishing a reasonably safe place or appliance, and negligence in the doing of such a service is the negligence of the master, without regard to the rank of different employes." *F. C. Austin Mfg. Co. v. Johnson*, 89 Fed. 681, 682, 32 C. C. A. 309 (C. C. A. 8th Cir.); *National Refining Co. v. Willis*, 143 Fed. 107, 109, 74 C. C. A. 301 (C. C. A. 6th Cir.).

It is true that the stagings involved in those cases were complete in the sense that they were in use as means for constructing something else, but we think they furnish sufficient analogy for the application of their principles to the present case. On the motion to direct, the plaintiffs were entitled to have taken in their behalf the most favorable view of the evidence. *Erie R. Co. v. Rooney*, 186 Fed. 16, 19, 108 C. C. A. 118 (C. C. A. 6th Cir.); *Mitchell v. Toledo, St. L. & W. R. Co.*, 197 Fed. 528, 533, 117 C. C. A. 24 (C. C. A. 6th Cir.); *Hales v. Michigan Cent. R. Co.*, 200 Fed. 533, 537 (C. C. A. 6th Cir.). Under this rule we cannot ignore the apparent fact that, at least for purposes of its construction, the substructure in dispute was regarded by the company as a structure distinct from the line of stringers, not to speak of the iron rails, designed to be placed upon it and as sufficient to carry their weight and withstand the effect of moving them along the structure and the work of placing them in position. Besides, the difference between the ultimate uses intended to be made of the portion below the stringers and the stringers themselves, as well as the mode of construction adopted (pointed out in the statement), justly require these two parts to be separately considered. There is no sound distinction, then, between a case involving, as this one does, a substructure and another structure to be superimposed upon it, and cases (before cited) relating to false work of a bridge and the bridge to be built upon it, or staging for an iron tank designed to sustain the material for and the work of placing the roof upon it, and the like. It is true, as we have said in the statement, that the work of placing heavier braces at every third bent and of attaching iron plates to the bents and stringers was commenced at the east end of the substructure simultaneously with the placing of the stringers on top of the bents. It is also true that plaintiffs and their associates made faster progress than did the men who were engaged in so putting up the heavier braces and attaching the iron plates; but the evidence does not show that this was out of the course ordinarily pursued in carrying on these different classes of work. Nor does it appear that either such heavier braces or iron plates were regarded as necessary to sustain the substructure while the stringers were being put in place, although it is reasonably to be inferred that they were necessary to sustain the operation of the crane. In short, it is fairly to be deduced from the evidence that the course pursued here in doing the work was in accord with that usually followed, except in some respects which are not helpful to the company.

The evidence tends to show that the ground was so frozen as to prevent driving to their usual depth the stakes which held the ground ends of the stay lasts; that many of the stakes were pulled out of their places by the fall of the structure. Also that in the construction in question the stringers were, for the first time in doing this

class of work, dragged along the top of the staging by steam power cables from the east end of the structure to the points at which they were to be placed, and that this caused the structure to fall. It appears, both by the pleadings and evidence, that a very high wind was blowing during the day of the accident.

[2] The evidence further tends to show, not only that the foremen in charge of the carpenters and laborers directed the work to be prosecuted in the manner and under the conditions pointed out, but also that the superintendent in charge of the shipyard was there and observing the work upon the structure in dispute on the day of the accident. There was a general superintendent of the company, but he was not at this shipyard on that day. He seems to have been at another shipyard of the company at Cleveland. The company was a New Jersey corporation, and, so far as the record discloses, the superintendent present was its principal and controlling representative at the shipyard in question on the day plaintiffs were injured. Apart from the special conditions attending the work on that day, it is clear that the company was cognizant of the nature and purposes of the structure, and also of the mode in which the work was usually conducted on such structures as this; and knowledge of the special conditions mentioned was plainly imputable to the company through the presence and control of its superintendent. *Leonard Martin Const. Co. v. Highbarger*, 175 Fed. 340, 343, 99 C. C. A. 128 (C. C. A. 6th Cir.). Neither of the plaintiffs had reached the age of legal majority at the time of their injuries; nor had they any knowledge of the capacity of the structure or experience in the work they were doing. If the structure on which they were working was unsafe, it was not because of anything they had done or omitted to do; indeed, contributory negligence is not claimed. It cannot be rightfully said that the company did not provide the staging upon which the stringers were being placed; it presumably designed the structure; it supplied the materials and furnished the men to construct it. It was said in *Chambers v. American Tin Plate Company*, *supra*, 129 Fed. 561, 64 C. C. A. 129:

"The falling of a staging or scaffold without any apparent cause may well be regarded as *prima facie* evidence of negligence on the part of the person who had provided it."

If all the inferences reasonably to be drawn from the evidence are added to this, the conclusion is inevitable that the duty of the master was both involved and violated. *Texas & Pacific Ry. v. Howell*, 224 U. S. 577, 582, 32 Sup. Ct. 601, 56 L. Ed. 892; *James Griffith & Sons Co. v. Brooks*, 197 Fed. at pages 726 to 729, 117 C. C. A. 117 (C. C. A. 6th Cir.). It is not important whether some of the fellow servants of plaintiffs were negligent or not; such concurring negligence would not excuse the master. *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 257, 29 Sup. Ct. 619, 53 L. Ed. 984; *Bryson v. Gallo*, 180 Fed. 70, 76, 103 C. C. A. 424 (C. C. A. 6th Cir.).

It follows that the motion to direct a verdict for the company was rightly denied. The errors assigned respecting the charge of the court for the most part concerned the submission to the jury of the

question whether the "scaffolding or staging" furnished to the plaintiffs was "a completed instrumentality for the sole purpose of placing heavy track timbers on top of the scaffold." Enough has been said on this subject to require these assignments to be overruled. The only other assignment that need be noticed relates to the company's duty of inspection. We are not satisfied that there was error in this portion of the charge (*Petroleum Iron Works Co. v. Boyle*, 179 Fed. 433, 437, 102 C. C. A. 579 [C. C. A. 6th Cir.]; *James Griffith & Sons Co. v. Brooks*, *supra*, 197 Fed. at pages 729, 730, 117 C. C. A. 117), but it was not in any event prejudicial error, and we do not pass upon it.

The judgment below in each case is affirmed, with costs.

UNION PAC. R. CO. v. FULLER.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1913.)

No. 3,873.

1. MASTER AND SERVANT (§ 285*)—DEATH OF SERVANT—RAILROAD BRAKEMAN—PROXIMATE CAUSE.

In an action for death of a railroad brakeman by being crushed between the deadwood of a car and the buffer beam of another one as he was coupling the air hose, whether the engineer's negligence in having the air lever either in full release or in running position, instead of in lap, was the proximate cause of the injury, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. § 285.*]

2. MASTER AND SERVANT (§ 216*)—DEATH OF SERVANT—RAILROAD OPERATION—ASSUMED RISK.

Decedent, a brakeman on an interstate train, after certain cars had been coupled to other cars on which the air brakes were set, went between the cars to couple the air hose, and, not knowing that the train was on a downgrade, opened the angle cock on the cars nearest the engine, and then reached across the buffer or deadwood to open the angle cock on the front end of the rear cars, and as he did this the brakes were suddenly released, due to the fact that the engineer negligently had the air lever in an improper position, and the rear cars moved down on and crushed him. *Held*, that the risk of injury as the result of such negligence was not one of the risks of decedent's employment that he assumed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567-573; Dec. Dig. § 216.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

In Error to the District Court of the United States for the District of Nebraska; Page Morris, Judge.

Action by Emma M. Fuller, administratrix of the estate of John C. Fuller, deceased, against the Union Pacific Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This action was instituted by the administratrix of the estate of John C. Fuller, deceased, to recover damages under the national Employer's Liability Act on account of the death of said decedent, alleged to have been caused by the negligence of the defendant. The decedent was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the employ of the defendant as a brakeman at the time of the alleged accident, and the negligent act of the defendant charged in the complaint is:

"That on or about the 17th day of October, 1908, there were standing upon one of the tracks of the defendant company in the city of Omaha 20 loaded freight cars upon which the brakes were set; that while said cars were thus standing, the defendant caused said locomotive engine to back a train of 3 cars against said standing cars for the purpose of coupling the said train to said standing cars, and did thereby effect automatically a coupling of said train to said standing cars; that immediately after effecting said coupling the said John C. Fuller, in the discharge of his duty as a brakeman in the employ of the said defendant railroad company, and while employed by the defendant in interstate commerce, reached across the drawbars of the connecting cars of said train and said standing cars and through which said coupling had been effected, for the purpose of coupling the air brake tubes between said cars; that in doing this his body came between the drawheads or deadwoods of said cars, and that while in said position, in the performance of said duty, and without any carelessness or negligence upon his part, the said defendant negligently and carelessly, and without proper regard for the safety of the said John C. Fuller, caused said locomotive engine to back said train against said standing cars, and so manipulated said locomotive and so set and used the engineer's brake valve thereon as to cause and permit said last-mentioned cars to move and thereby crush the said John C. Fuller between said deadwoods or drawheads of said cars, and thereby caused his instant death."

The answer denied that defendant was guilty of negligence, and charged that the decedent was guilty of negligence, which was the proximate, direct, and contributing cause thereof, and that the injury was not due in any manner to any negligence or failure of duty on the part of the defendant. It also pleads assumption of risk. There was a trial to a jury, and a verdict for the plaintiff.

John A. Sheean, of Omaha, Neb. (Edson Rich, of Omaha, Neb., on the brief), for plaintiff in error.

Constantine J. Smyth, of Omaha, Neb. (Edward P. Smith and W. A. Schall, both of Omaha, Neb., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and W. H. MUNGER and TRIEBER, District Judges.

TRIEBER, District Judge (after stating the facts as above). While there were a number of exceptions taken by the defendant during the trial, the only errors relied upon, as stated in the brief of the counsel for plaintiff in error, are that:

"(1) The verdict is contrary to law; (2) the verdict is not sustained by the evidence; and (3) the court below erred in overruling the motion, made by the defendant at the close of the whole case, to direct the jury to return its verdict in favor of the defendant and against the plaintiff."

These exceptions necessitate a review of the evidence for the purpose of determining whether there was any substantial evidence to warrant the submission of the case to the jury. There is substantial evidence to establish the following facts:

The decedent was in the employ of the defendant as a brakeman on a freight train. The train, upon which he was the head brakeman at the time of the injury, had come into the yards at Omaha, Neb., from Grand Island, with 35 or 36 cars, 13 of which were to be

set out in Omaha, and others taken to Council Bluffs, Iowa. The train came to a stop on Union Pacific track No. 4, which was supposed to be level, but by placing an engineer's instrument on the ground at that point it was discovered that there was a grade of about 11 feet to the mile at the point where the accident occurred; but there is no evidence that the decedent knew this. The train was stopped for the purpose of cutting out the 13 cars for Omaha and others for places other than Council Bluffs. The 20 rear cars in the train, and the second, third, and fourth cars back from the engine, were to be taken to Council Bluffs. The second, third, and fourth cars were to be placed on the track upon which the 20 had been left standing. The one next to the engine was detached from the other 3, switched to another track, and the engine came back and coupled onto the 3 cars. The angle cock on the air hose on the ends of the 20 cars was closed, so that the brakes were set on those 20 cars. When the engine came back to the 3 cars, they were pushed up against the string of 20 cars in the usual way, but with sufficient force to enable them to connect automatically. The decedent was standing on the side of the track where the 3 cars were coupled onto the 20 cars, and gave the proper signals to the engineer to move the 3 cars back for the purpose of connecting them with the 20 cars and then to stop.

After the 3 cars had been backed and automatically coupled with the 20, and all of them were at a perfect stop, one Schoberg, a fellow brakeman with Fuller on that train, went in between the tender of the engine and coupled the air hose between the tender and the first car, turned the angle cocks, and as he did so heard the air going through the hose. The decedent went between the third and the 20 cars to couple the air hose and release the brakes. After coupling the air hose, he opened the angle cock on the rear end of the last car attached to the engine, and then reached across the buffer or deadwood to open the angle cock on the front end of the 20 cars. As he turned the angle cock, the air from the air tube of these cars passed into the tube of the 20 cars, releasing the brakes on them, which, owing, in part probably, to the decline of the grade at that place, caused these cars to move forward, and, being between the buffers of the two cars, he was crushed and injured so seriously that he died within 45 minutes therefrom. The car on which he last turned the angle cock was a Union Pacific car, and the last of the three cars was a foreign car belonging to another road. This latter car had a buffer beam. The space between the deadwood on the one car and the buffer beam on the other, when they were close together, was approximately 6 inches; when apart, about 16 inches. The decedent was rather stockily built, weighed about 180 pounds, so that after he went in between the deadwood and buffer beam there would need only to be a movement of the cars of a few inches to crush him. After Schoberg had coupled the hose up between the engine and car next to it, he stepped out, and, not seeing Fuller, hollowed to him. Not getting any response, he walked up to the car where Fuller had gone in, and found him crushed between the deadwood and buffer beam.

There was substantial evidence to establish the fact that the air is regulated by a lever on the locomotive; that if the lever is in lap then the air would not be released, while, on the other hand, if it is in a

running position, the brakes will release gradually, while if in full release the brakes would be released at once. There is no dispute but that the air lever was either in running position or in full release. Some of the witnesses on the part of the plaintiff testified that the air rushed through with such force that it must have been in full release, while there is some evidence on the part of the defendant that it was only in running position. There was also substantial evidence to show that it is customary, and the safe and proper method, to have the air valve in lap position when a brakeman goes between the cars for the purpose of coupling the air hose, and that the short distance necessary to move the cars is accomplished with the brakes on. The defendant introduced in evidence instructions issued by the Westinghouse Air Brake Company, which direct:

"Testing Brakes and Signals.—When coupling the hose be sure to have 70 pounds train pipe pressure on the engine, the handle on the engineer's valve in running position, and the pump throttle well open. When notified by the car inspector or trainmen make test as follows"

—and then proceeds to explain how the test should be made. But the witness, who on cross-examination testified to this rule, when asked on re-examination in relation to whether that rule had reference to a situation where the brakes were already set upon the cars to which coupling was to be made, testified:

"No; I do not think it does. I think it has reference to coupling onto cars where there is no air in them at all."

[1] Counsel for the defendant admit that the cause was submitted to the jury under proper instructions and make no complaint on that score; but it is now claimed that the negligence of the locomotive engineer was not the proximate cause of the injury, that the decedent negligently opened the angle cock on the last of the 3 cars attached to the engine before he opened the angle cock on the standing cars, that if he had reversed the order he could not have been injured, that by his act the brakes on the standing cars were released while he was reaching over between the buffer and the beam to open the angle cock on the rear cars, while if he had opened them in the reverse order he could not have been in a position to be injured, and that for this reason it was the negligent act of the decedent that was the proximate cause of the injury.

It is true that if the negligence of the engineer was not the proximate cause of the injury, but that a new force or power intervened between the negligent act and the injury sufficient in itself to stand as the cause of the injury, the negligent act must be considered as too remote to justify a recovery. On the other hand, it is equally well settled that the proximate cause of an injury is not necessarily the act or omission nearest in time and place. *Union Pacific Ry. Co. v. Callaghan*, 56 Fed. 988, 993, 6 C. C. A. 205, 210; *City of Winona v. Botzet*, 169 Fed. 321, 328, 94 C. C. A. 563, 570, 23 L. R. A. (N. S.) 204. In the last-cited case the plaintiff had been injured by the running away of a team of horses he was driving, caused by the negligent blowing of a steam whistle by the employes of the city. He held onto his horses and guided them past two teams in front of him, when the

tugs on his harnesses unhooked, the end of the tongue slipped out of the yoke, dropped, and broke. The horses, running on, dragged the end of the broken tongue against the guard rail of a bridge, throwing the occupants of the wagon over the railing on the ice of the river 40 feet below, and injuring them. Judge Sanborn, who delivered the opinion of this court, in answer to the contention that the unhooking of the tugs and the breaking of the pole were the proximate cause of the accident, and the blowing of the whistle only the remote cause, said:

"The proximate cause of an injury is the primary moving cause without which it would not have been inflicted, but which, in the natural and probable sequence of events, and without the intervention of any new or independent cause, produces the injury. The intervening cause that will insulate the original wrongful act or omission from the injury and relieve of liability for it must be an independent, intervening cause, which interrupts the natural sequence of events, prevents the ordinary and probable result of the original act or omission, and produces a different result which could not have been reasonably anticipated. * * * The blast of this whistle was the primary moving cause, without which the accident would not have happened. It was the cause which set in motion all the other events; the cause which set the horses into a dead run, made them uncontrollable, brought about the unhooking of the tugs, the breaking of the pole, the crash of the wagon against the railing, and the throwing of its occupants to the ground below. All these intermediate acts were dependent, not independent, causes. They were mere links in the chain of causation between the blowing of the whistle and the injuries and death it produced, and were themselves caused by the blast of the whistle."

In *Shugart v. Atlantic, etc., Ry. Co.*, 133 Fed. 505, 510, 66 C. C. A. 379, 384, Judge (now Mr. Justice) Lurton, delivering the opinion of the court, said:

"That cause is proximate without which the accident would not have happened, but which in the probable sequence of events, and without the interposition of a new and efficient cause wholly sufficient in itself, produces the wrong complained of."

Applying these rules, it was for the jury to determine, under proper instructions from the court, what was the proximate cause of the accident in this case. *Choctaw, etc., Ry. Co. v. Holloway*, 191 U. S. 334, 339, 24 Sup. Ct. 102, 48 L. Ed. 207.

In *Milwaukee, etc., R. R. Co. v. Kellogg*, 94 U. S. 469, 474, 24 L. Ed. 256, it was held:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place."

This rule was recognized by this court in *Travelers' Ins. Co. v. Melick*, 65 Fed. 178, 180, 12 C. C. A. 544, 27 L. R. A. 629; *St. Louis, Iron Mountain & Southern Ry. Co. v. Needham*, 69 Fed. 823, 825, 16 C. C. A. 457, 459; *Missouri, etc., Ry. Co. v. Byrne*, 100 Fed. 359, 363, 40 C. C. A. 402, 406.

The decedent had a right to rely upon the fact that the air lever would be in lap when the connection was made as that was the usual and customary method followed by engineers. He did not know that the track was not entirely level, and that there was sufficient decline in the grade there to cause the cars to move. Had the air lever been in lap, it would have been immaterial whether he opened the angle cock of the standing cars first, or even that there was that slight decline in the grade.

[2] There is nothing in the evidence which would warrant a finding that this was one of the risks assumed by the decedent under his employment. Whether he was guilty of contributory negligence is immaterial, as that would not relieve the defendant of all liability under the national Employer's Liability Act. The only effect it would have had would be to reduce the damages, and there is no complaint on the part of the defendant that the jury, in assessing the damages, failed to take that fact into consideration.

There was no error in submitting the case to the jury, there was substantial evidence to warrant the verdict, and the judgment is affirmed.

TWEEDIE TRADING CO. v. PARLIN & ORENDORFF CO.

(Circuit Court of Appeals, Seventh Circuit. January 8, 1913.)

No. 1,883.

CONTRACTS (§ 10*)—VALIDITY—WANT OF MUTUALITY.

A contract of affreightment, requiring defendant to furnish for shipment from 150 to 200 car loads of farm implements within the ensuing year and plaintiff to transport the same in its vessels from New York to certain South American ports at rates of freight specified therein, which provides that the "bulk" of the shipments shall be subject to plaintiff's call during a specified three months of the year, terminating 10 days before its expiration, is unilateral and not enforceable as an executory contract against defendant for want of mutuality, since it leaves defendant without the right to require the carriage of any definite quantity at any time during the year, unless within the last 10 days.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

Mutuality in contract, see note to American Cotton Oil Co. v. Kirk, 15 C. C. A. 543.*]

Appeal from the District Court of the United States for the Northern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

Suit in admiralty by the Tweedie Trading Company against the Parlin & Orendorff Company. Decree for respondent, and libelant appeals. Affirmed.

The appellant, Tweedie Trading Company, filed their libel in personam against the appellee, Parlin & Orendorff Company, to recover damages for breach of an alleged contract of affreightment, and this appeal is from a decree dismissing the libel on final hearing of the issues.

The written instrument in suit is dated New York, February 6, 1906, partly typewritten and partly printed, on a printed form used by the appellant for affreightment proposals, and reads:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The Tweedie LINE OF STEAMERS



Trading Company's
TO SOUTH AMERICA.

BRAZILIAN PORTS.

RIVER PLATE PORTS

—COLON—

ALSO WEST INDIES AND MEXICAN PORTS.

Freight Contractors for all parts of the World.

Messrs. Parlin & Orendorff, Canton, Ill.

DEAR SIRS:—

We confirm contract for freight room, for cargo as stated below, for shipment on the Steamer or by a steamer or steamers to be named later, shipment in whole or part cargo, via port or ports in or out of customary and/or geographical order at Steamers option.

*Bulk shipments at The Tweedie Trading Co.'s call for November
December 1906 and January 1907.*

Cargo as follows:

Barrels of	at	per Bbl.	
Brs. of Rosin	at	per 250 lbs. intaken weight.	
Superficial feet	at	per 1000 Super. ft. intaken measurement.	
Cases Kerosene	at	per case (not to exceed two cubic feet of measurement.)	
Cases	at	per case.	
Cubic feet of	at	per cubic foot or	per 100 lbs. Steamers option.
Cubic feet of	at	per cubic foot or	per 100 lbs. Steamers option.
Tons of	at	per ton of 2,000 lbs.	
Tons of	at	per ton of 2,240 lbs.	

150 to 200 cars Agricultural implements (each car containing about 2,000 cu. ft. of cargo, and cargo weighing about 30,000 lbs. per car) for shipment from New York to Buenos Aires and Rosario; rate on Buenos Aires shipment 11 cents per cu. ft. steamer's option 23 cents per 100 lbs. and Rosario cargo 14 cents cu. ft. steamer's option 28 cents per 100 lbs.

It is especially understood and agreed that all shipments are made subject to the terms and conditions of THE TWEEDIE TRADING CO. form of shipping receipt and Bill of Lading, and the conditions contained therein are made a part of this Contract. All lighterage at risk and expense of the cargo. FREIGHT TO BE PREPAID on the signing of Bills of Lading, at NEW YORK and earned steamer and/or goods lost or not lost at any stage of the transit.

THE TWEEDIE TRADING COMPANY engages to declare a Steamer or Steamers on this contract later. The understanding is, that said Steamer or Steamers in order to be a good delivery on this contract, must be in a position when declared, barring accidents, and unforeseen detention, to reach loading port within the dates provided under this contract. The Tweedie Trading Company has the privilege of ordering the Steamer to proceed to loading port, via port or ports in or out of customary and/or geographical order. If before shipment of cargo, the steamer designated to carry it is lost, the Tweedie Trading Company shall not be liable to carry the goods pursuant to this contract. The Tweedie Trading Co. however reserves the right within ten days after the known loss of the declared steamer, to substitute another steamer in place thereof. Lay days, if required by shippers, **not** to count before *Feb. 10th, 1906*.

Shippers option of cancelling, if Steamer not ready to receive cargo, by 6 P. M. on *Feb. 10th, 1907*. The Tweedie Trading Company has the option of designating loading and/or discharging berths. If The Tweedie Trading Company does not avail itself of this option, the consignor and/or consignee to supply berths immediately upon the readiness of steamer to load and/or discharge.

We accept and confirm the contract.

By authority from Messrs. Parlin & Orendorff.
(Sgd.) International Freight Bureau
New York By E. J. Focke.

SIGNED IN DUPLICATE, AN ORIGINAL
BEING HELD BY BOTH PARTIES.

NOTICE.—THE COMPANY ASSUMES NO RESPONSIBILITY FOR ANY REFUSALS GIVEN THAT ARE NOT ISSUED ON THIS REFUSAL FORM AND THAT ARE NOT SIGNED BY ONE OF THE COMPANY'S OFFICERS.

NEW YORK, *Feb. 6th, 1906.*

[illegible]

Yours very truly,

(Sgd.) The Tweedie Trading Co.,
By M. Stanley Tweedie,
President.

Frederick A. Brown, of Chicago, Ill., and Sherwin A. Hill, of Detroit, Mich. (Charles B. Warren, Wm. B. Cady, Sanford W. Ladd, and Jos. G. Hamblen, Jr., all of Detroit, Mich., and Ralph James M. Bullowa, of New York City, of counsel), for appellant.

Charles E. Kremer, of Chicago, Ill. (Frank T. Miller and John M. Elliott, both of Peoria, Ill., of counsel), for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The appellant-libelant is a New York corporation, operating lines of steamers, with several steamers plying between New York and the South American ports of Buenos Ayres and Rosario, and filed its libel in personam for recovery against the appellee, an Illinois corporation and manufacturer of agricultural implements, for nonperformance of an alleged executory contract of affreightment. The agreement in suit purports to be made in New York, on February 6, 1906, between the appellant, as carrier, and the appellee, as shipper, with "International Freight Bureau" purporting to be the representative of the appellee in its execution. It is in the form of a letter written by the appellant, on one of its printed forms, applicable only in part to the matters involved, addressed to the appellee, with an acceptance underwritten by the above-mentioned "Bureau," which was a shipping agency maintained in New York by the "National Association of Manufacturers," of which the appellee was a member. Its terms resulted from negotiations for rates on shipments contemplated by the appellee of agricultural implements for South American trade, to aggregate 150 to 200 car loads, and its provisions involved in the controversy read as follows:

"We confirm contract for freight room for cargo as stated below" on "steamers to be named later, shipment in whole or part cargo, via port or ports in or out of customary and/or geographical order at steamer's option, bulk shipments at the Tweedie Trading Co.'s call for November, December 1906 and January, 1907, 150 to 200 cars Agricultural implements (each car containing about 2,000 cu. ft. of cargo, and cargo weighing about 30,000 lbs. per car) for shipment from New York to Buenos Ayres and Rosario," at rates named.

"The Tweedie Trading Company engages to declare a Steamer or Steamers on this contract later. The understanding is, that said Steamer or Steamers in order to be a good delivery on this contract, must be in a position when declared, barring accidents, and unforeseen detention, to reach loading port within the dates provided under this contract. The Tweedie Trading Company has the privilege of ordering the Steamer to proceed to loading port, via port or ports in or out of customary and/or geographical order. If before shipment of cargo, the steamer designated to carry it is lost, the Tweedie Trading Company shall not be liable to carry the goods pursuant to this contract. The Tweedie Trading Co. however reserves the right within ten days after the known loss of the declared steamer, to substitute another steamer in place thereof. Lay days, if required by shippers, not to count before Feb. 10th, 1906.

"Shippers option of cancelling, if Steamer not ready to receive cargo, by 6 p. m. on Feb. 10th, 1907. The Tweedie Trading Company has the option of designating loading or discharging berths. If the Tweedie Trading Company does not avail itself of this option, the consignor and/or consignee to supply berths immediately upon the readiness of steamer to load and/or discharge."

After the making of the contract, the appellee forwarded two consignments: One small lot early in May, for which the appellant had no steamer in readiness and agreed with the "Bureau" agency upon its shipment through another line; and the other, two car loads on May 15th, which the appellant forwarded in purported compliance with the contract. No other consignments were sent or tendered to the appellant, and in October the appellee notified the appellant, in effect, repudiating any obligation to make shipments and declining to forward goods under the alleged contract; nor was any steamer "declared" or tendered by the appellant, to receive shipments under the contract, prior to the above-mentioned notification.

The libel therefore predicates recovery for the alleged breach on the contentions that this contract was either authorized or ratified by the appellee and became operative as a mutual executory obligation for shipment of the entire amount of goods therein mentioned. Defenses are set up, in substance: (1) That the agreement was neither authorized nor ratified by the appellee; (2) that it is invalid because the appellant secretly promised the representative of the appellee in its procurement a commission of $2\frac{1}{2}$ per cent. on all shipments made thereunder; and (3) that it is without force for want of mutuality. On final hearing of the issues the trial court dismissed the libel—no specification of the ground thereof appearing of record—and it is obvious that any one of these defenses, if well supported, must defeat recovery and uphold the decree.

We believe the first-mentioned defense to be untenable, as authorization of the agreement appears under the undisputed facts. The second defense raises an issue not free from difficulty in its solution under the evidence, were decision thereof needful. Promise of the commission to be paid the New York agency, unknown to the appellee, is established of even date with the making of the contract in suit; but evidence is introduced on behalf of the appellant of a well-recognized general custom in New York for "shipping brokers" to be paid such commission by the shipping line with which a contract is made through the broker. Whether this evidence is applicable to the instant agency and transaction, and whether the contract in suit may be avoided because of such arrangement, are questions not requiring answer, under the interpretation which must be placed, as we believe, upon the terms of the shipping contract.

The agreement was unmistakably made upon an understanding between the parties that the appellee was to furnish, for shipment during the ensuing year, the aggregate amount of goods mentioned, and its obligation to forward the goods accordingly may rightly be implied from its acceptance thereof, although not expressed in terms, provided the appellant's promises therein are commensurate with such purpose. Without clear undertaking, however, on the part of the appellant for shipment of the goods when so furnished, no consideration exists for any agreement (express or implied) for future deliveries on the part of the shipper. The test, therefore, of enforceability of the contract, must rest on the terms of obligation assumed by the appellant in framing the instrument. Although the typewritten portions are stated with abbreviations and crudeness, we are impressed with no doubt as to

their meaning except for the uncertainty introduced by the above-mentioned provision in reference to the "bulk" of the shipments to be made in November, December and January. That the terms "bulk shipments," as thus used refer, to a large portion or "bulk" of the aggregate shipments contemplated for carriage during the contract-year, is undoubted. If it was intended by this provision to leave no substantial share of the entire amount within the right of the shipper (appellee) to exact shipments thereof whenever goods were forwarded during the other months of the year, the agreement was plainly unilateral and void for want of mutuality. It would thus place performance of the essence of the executory affreightment contract "at the Tweedie Trading Co.'s call," entirely subject to its option.

On behalf of the appellants it is contended that the purpose and meaning of this provision was "to exact tenders of cargo" to the extent of such "bulk" only, to be carried during the three months referred to, and that it was open to the appellee to have the shipments forwarded during the other months of the year free from such provision. The interpretation thus sought, however, is without force, as we believe, to render the contract enforceable against the appellee for refusal to make shipments thereunder.

Laying aside the above-mentioned objection, for want of obligation to accept and forward substantially all consignments embraced in the contract, and assuming the foregoing contention to be tenable, the amount or amounts of goods thus left open for shipment during other months of the year were uncertain, with no standard or means provided to make certain any portion not subject alone to the appellant's call or option. It goes without saying that the quantity embraced in the term "bulk" is not ascertainable with sufficient certainty to be set apart in advance, for reservation to comply with "calls" for shipment thereof during the three months period. The indefiniteness and uncertainty so created leaves no enforceable obligation in favor of the appellee for the assumed residue of shipments intended for other months. In other words, no definable rights were conferred to require "freight room" to be furnished between February 10th and November 1st, when the appellant's option became operative, and the few days remaining after such option expired were plainly insufficient to be of substantial benefit for completion of shipments not called for under the option.

Under either view of the contract, therefore, its provisions are unilateral and cannot be enforced for unexecuted portions thereof. See *Oakland Motor Car Co. v. Indiana Automobile Co.*, 201 Fed. 499, decided by this court at the present term; *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520; *American Cotton Oil Co. v. Kirk*, 68 Fed. 791, 15 C. C. A. 540.

We are of opinion, accordingly, that the libel was rightly dismissed, and the decree of the District Court is affirmed.

WOOD et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 13, 1913.)

No. 1,129.

1. INDICTMENT AND INFORMATION (§ 91*)—SUFFICIENCY—FELONIES—NECESSITY OF CHARGING FELONIOUS INTENT.

Where a crime is made a felony by statute, it is not necessary to charge in the indictment that it was feloniously committed, unless the statute itself makes a felonious intent an element of the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 261-265; Dec. Dig. § 91.*]

2. INTERNAL REVENUE (§ 47*)—PROSECUTION FOR VIOLATION OF STATUTE—INDICTMENT.

In an indictment against a distiller for making false entries in a book required to be kept by him as such distiller by Rev. St. § 3303 (U. S. Comp. St. 1901, p. 2155), it is not necessary to allege that the book was one prescribed by the Commissioner of Internal Revenue, nor to set forth the exact entries alleged to be false, in the absence of a motion for a bill of particulars.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. § 47.*]

3. CRIMINAL LAW (§ 43*)—PROSECUTION FOR VIOLATION OF INTERNAL REVENUE LAW—EFFECT OF PRIOR FORFEITURE OF PROPERTY.

That a distillery owned by a corporation has been forfeited in a proceeding by the United States for a violation of the internal revenue laws is not a bar to the prosecution of a stockholder personally for the same violation, although he is the sole stockholder; nor would it be a bar if the property was in his own name.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 49; Dec. Dig. § 43.*]

4. CRIMINAL LAW (§ 622*)—TRIAL—SEVERANCE.

The granting of a severance in a criminal prosecution of two or more defendants rests in the sound discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380-1383, 1385, 1386, 1388-1390; Dec. Dig. § 622.*]

5. INTERNAL REVENUE (§ 47*)—DISTILLERY—PROSECUTION FOR VIOLATION OF LAW—EVIDENCE.

An indictment for unlawfully carrying on the business of distillers with intent to defraud the United States, or having a still under their superintendence, is supported by proof that the distillery was owned by a corporation of which defendants were the officers and managers.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. § 47.*]

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Criminal prosecution by the United States against Clarence B. Wood, John M. Rhea, and Luther W. Williams. From a judgment of conviction, defendants bring error. Affirmed.

George A. Hanson and L. O. Wendenburg, both of Richmond, Va. (Oswald L. Cole, of West Point, Va., on the brief), for plaintiffs in error.

Robert H. Talley, Asst. U. S. Atty., of Richmond, Va.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. The plaintiffs in error were the defendants below. They will be referred to as such. An indictment of 16 counts was returned against them and others. They demurred to each count. The demurrer was overruled. They here say that it should have been sustained. As they were convicted on the first and sixteenth counts only, it is unnecessary to consider the sufficiency of any of the others.

The first charged that on certain named dates at a specified locality in the district, they unlawfully did engage in and carry on the business of distillers with intent to defraud the United States of the tax on a part of the spirits distilled by them. The sixteenth alleged that they on certain named dates at a specified place were persons who made and distilled spirits and had a particular described still under their superintendence, and—

"unlawfully and with intent to defraud the United States did make certain false entries in the book required to be kept by them as such distillers under the provisions of section 3303 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2155), to wit, form 13—that is to say, did make entries of the quantity of grain and other material used for the production of spirits, and the number of gallons of spirits distilled, greatly below the true and exact quantity of grain and other materials so used and the number of gallons of spirits so distilled."

[1] The offense charged in each of these counts may be punished by imprisonment for more than a year. Defendants argue that it is therefore made a felony by section 335 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [U. S. Comp. St. Supp. 1911, p. 1687]). Neither count alleges that what is therein charged was feloniously done. The omission is said to be fatal to the validity of the counts.

The government asserts that the above provision of the Penal Code has no application to breaches of the internal revenue laws. We do not find it necessary here to decide whether it has or has not. More than 60 years ago, in *United States v. Staats*, 8 How. 41, 12 L. Ed. 979, it was ruled that where a crime is made a felony by statute, it is not necessary to charge that it was feloniously committed, unless the statute itself makes a felonious intent an element of the offense.

[2] Defendants say the sixteenth count was bad, because it did not set forth the exact entries alleged to be false, nor give a description of such entries sufficient to bar future prosecutions for the same offense, nor did it allege that the book in which the entries were made was one prescribed by the Commissioner of Internal Revenue.

We are of opinion that the description of the entries was sufficient, in the absence of any request by the defendants for a bill of particulars, and that the statement that the book in which the entries were made was a book required to be kept by them as such distillers under the provisions of section 3303 Revised Statutes of the United States, to wit, form 13, was all that was necessary to show that it was a book which such section required to be kept and the making of false entries in which with intent to defraud or conceal is by section 3305 (U. S. Comp. St. 1901, p. 2156) made an offense.

The demurrers to these counts of the indictment were rightly overruled.

[3] Wood, one of the defendants, filed a special plea in his own behalf. By it he alleged that while the distillery in connection with which the frauds charged against him were said to have been committed stood in the name of the Broad Rock Distilling Company, Incorporated, he was the president, the sole owner, and the sole stockholder of such company, and therefore sole owner of such distillery, and that upon a libel of information against such distillery, filed by the government and charging the same offenses as those alleged in the indictment, the distillery had been forfeited to the government. The United States demurred to this plea. The demurrer was sustained.

There was no error in so doing. The plea was bad, and that for two reasons. If a man for his own convenience chooses to conduct any business through a corporation, he is estopped to say that he and the corporation are one person, and not two. He may not obtain for himself the limitation of liability and the other advantages which flow from the conduct of the business by the corporation, and then when it suits him say that there is no difference between him and the corporation. For the purposes of this case it is immaterial whether Wood owned one share of the corporate stock or all of it. If the forfeiture of the corporate property was a punishment of the stockholder whose interest in the property was thereby taken from him, the holder of one share was punished as well as the holder of all, although the extent of the punishment might differ. Stockholders, innocent or guilty of any personal participation or knowledge of the crime, suffer alike from the forfeiture of the corporate property. It certainly cannot be contended that innocent or guilty they are equally immune from other punishment.

There are many statutes which impose criminal penalties upon both corporate and individual offenders—as, for example, a railroad company which gives a rebate and the officer or agent who actually and knowingly conducts the transaction are made equally guilty. According to the contention of the defendant Wood, an officer or agent of a railroad corporation which had paid a fine for allowing a rebate could not be punished for so doing, if he happened to be a stockholder in the corporation, but could be if he were not.

Secondly, even if Wood had been the owner in his own name of the distillery property, its forfeiture in a civil proceeding in consequence of its having been used by him to defraud the government would have been no bar to his prosecution for the personal crime committed by him. *Origet v. United States*, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743.

[4] The court refused a severance, asked for by the defendants. They assign error therein. Whether a severance shall or shall not be granted is a matter lying in the sound discretion of the trial court. *United States v. Ball*, 163 U. S. 672, 16 Sup. Ct. 1192, 41 L. Ed. 300. In this case there was no abuse of such discretion.

There are a number of assignments of error based upon the admis-

sion or rejection of testimony. We have considered each of them. We do not find merit in any of them.

[5] The defendants say that the jury should have been instructed to acquit them, because there was no evidence that they carried on the business of distillers, as charged in the first count, nor that they were persons who had a still under their superintendence, as charged in the sixteenth. Wood was the president of the company which owned and operated the distillery. Williams was the man who actually did the distilling. Rhea was the man to whom the whisky which had not paid the tax was delivered and by whom it was sold. A corporation can only act through human agencies. If the persons who actually direct and commit the frauds upon the government are not distillers or persons having superintendence of a still, as charged in the counts of the indictment under consideration, no one can ever be in those cases in which the distillery belongs to and is operated by a corporation. Speaking with precise technical accuracy, it may be said that what happened was that the corporation committed these offenses and that the defendants and each of them knowingly, willfully, and actively aided, abetted, and procured their commission. There is abundant evidence in the record from which the jury might find that that was precisely what these defendants did. If so, by the express language of section 332 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [U. S. Comp. St. Supp. p. 1686]) they became principal offenders and were properly indictable and punishable as such.

Defendants also assign error to the action of the court in giving and refusing to give instructions to the jury. We do not perceive that any prejudicial error was made. As usual in such cases, particular instructions are criticised because they do not themselves contain all the applicable law of the case, and complaint is made that the court did not give some possibly correct instruction in the very language in which defendants asked for it. In our opinion, the instructions which were given as a whole accurately and fully stated the law of the case and substantially embodied everything for which defendants had rightfully asked. Nor were any of the instructions so worded as to make it at all likely that the jury could have been in any wise misled by them.

It follows that the judgment below must be affirmed.

Affirmed.

AMERICAN TOBACCO CO. et al. v. PEOPLE'S TOBACCO CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1913.)

No. 2,372.

LIMITATION OF ACTIONS (§ 100*)—DISCOVERY OF CONSPIRACY—ANTI-TRUST ACT—VIOLATION.

Where plaintiff sued defendants for conspiracy, consisting of an alleged unlawful agreement to injure plaintiff in its business, in violation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), the period of limitation did not begin to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

run until plaintiff discovered the existence of the conspiracy and its cause of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by the People's Tobacco Company, Limited, against the American Tobacco Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Junius Parker, of New York City, and George Denegre, Joseph Paxton Blair, and W. S. Parkerson, all of New Orleans, La., for plaintiffs in error.

Edwin T. Merrick and Ralph J. Schwarz, both of New Orleans, La., for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. This is a suit by the People's Tobacco Company, Limited, against the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company, which was brought under the act of Congress of July 2, 1890, known as the "Sherman Anti-Trust Act" (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). The suit was for damages alleged to have been sustained by the plaintiff below, the defendant in error here, by reason of an unlawful agreement on the part of the defendant companies and Augustus Craft, who, it is also alleged, conspired to injure the People's Tobacco Company in its business. There was a verdict and judgment for the plaintiff.

It is unnecessary to go into the character of the action or the questions involved on the merits of the case to any great extent, because the recovery in the District Court as to the liability and the amount is not questioned here. The judgment, which recites the amount of the verdict, and is for three times the amount of the same and for counsel fees, is as follows:

"Considering the verdict of the jury rendered in this cause on March 30, 1912, wherein the jury found in favor of the plaintiff and against the defendants, in solido, in the sum of \$8,728.06, and considering the law in such cases made and provided (Act of Congress approved July 2, 1890), it is ordered, adjudged, and decreed that the plaintiff, the People's Tobacco Company, do have and recover of and from the defendants, the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company, Limited, in solido, the sum of \$26,184.18, being three times the amount of the said verdict rendered on March 30, 1912, by the jury herein, together with interest thereon at the rate of 5 per cent. per annum from the date of this judgment. It is further ordered, adjudged, and decreed, in accordance with the act of Congress as aforesaid, that the plaintiff, the People's Tobacco Company, do have and recover of and from the defendants, the American Tobacco Company, Augustus Craft and the Craft Tobacco Company, Limited, in solido, the sum of \$5,000 as reasonable attorney's fees herein allowed by the court to plaintiff in this cause. It is further ordered, adjudged, and decreed that said defendants be condemned to pay all the costs of this suit."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The only question made on this writ of error is whether the suit was brought in time, the defendants pleading the prescription of one year under the law of Louisiana, and it is conceded that that is the prescribed time for such actions in Louisiana.

The original petition which commenced this proceeding was filed January 30, 1908, and it is claimed that the first knowledge the plaintiff had of the fact that the American Tobacco Company was interested with Augustus Craft and the Craft Tobacco Company in the business which resulted in the injury to the plaintiff was in December, 1907. It is claimed by the plaintiff that the time when it became aware of the fact that the American Tobacco Company had combined with Augustus Craft and the Craft Tobacco Company to injure it in its business is the period from which the prescription began to run. The contention here, on the part of the People's Tobacco Company, as we understand it, is that the combination and conspiracy between the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company was concealed by the latter companies, or, at least, that their business operations and their methods were of such character that they concealed themselves, and that such concealment would prevent the running of the statute.

The question of prescription here was made in several ways by the defendants in the court below, by their requests to charge, which were refused by the court. They are properly certified, making the question here clearly and specifically as to whether prescription began to run before the fact of the concerted action on the part of the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company was discovered by or became known to the People's Tobacco Company. The charge of the court on this question of prescription was as follows:

"When you have gotten that far, if you first decide the case on the question of conspiracy, approached the question of damages, and have determined that the petitioner is entitled to damages, then there is another question of fact for you to determine, and that relates to the defense of prescription. It is the law of Louisiana that acts, such as these, are prescribed in one year after they occur. But it is also the law that this prescription is suspended, has not effect or operation, during such period as the party injured does not know that he has been injured and is unable to bring a suit. That means, gentlemen, that it begins to run from the moment or the day that the petitioner knows that he has suffered an actionable injury. That does not mean that it would begin to run if he merely knew his profits were falling off, or he knew they were falling off from the competition of the Craft Tobacco Company; but it would begin to run if he knew that the falling off or damage was caused by the competition to effect and in pursuance of an illegal combination in restraint of trade. In other words, from the moment he knew he could bring an action against somebody to recover his damages, although he might not have known who the person was, or he might not have known how he was going to prove his action, prescription would run, and after the lapse of one year his right of action would be barred. Therefore it is a question of fact for you to determine, in connection with this case, whether or not the plaintiff knew, or ought to have known, more than a year before this petition was filed, that he had suffered an actionable injury. The petition was filed on the 30th day of January, 1908, the citation was served the same day on all the defendants, and the allegation in the petition is that he did not know of this combination or its operation against him until the 10th of December, 1907, which, of course, is within one year.

So, if you find the allegation in his petition is correct, and is not offset by the evidence, or not disproved by the evidence, you will pay no further attention to the question of prescription."

Taking this charge as a whole, we think it fairly presents the question of prescription in this case. The particular language which we think renders the charge sound, if it is otherwise subject to criticism, is this:

"Therefore it is a question of fact for you to determine, in connection with this case, whether or not the plaintiff knew, or ought to have known, more than one year before this petition was filed, that he had suffered an actionable injury."

The court then proceeds to state that the petition was filed in January, 1908, and that the plaintiff alleges he did not know of the combination and its operation against him until December, 1907, clearly indicating, and saying to the jury, and so they must have understood, that if the plaintiff knew, or could have known, more than a year before the filing of its petition, of this unlawful combination against it, the plea of prescription would be good. The view of the court, as indicated by the charge, was that prescription did not begin to run until the People's Tobacco Company knew, or ought to have known, of the agreement or arrangement called "a combination or conspiracy" on the part of the other tobacco companies against it. While it might have known that its profits were falling off, and that the competition of the Craft Tobacco Company was causing this, this could not give it a cause of action under the provisions of the Sherman Law, and until it discovered that it had a right of action prescription would not commence to run. We think this states substantially the law of the case, and is the correct view of the question of prescription.

Much of the argument here has been directed to the question as to whether the maxim "*contra non valentem agere non currit prescriptio*" is now a part of the jurisprudence of the state of Louisiana. The decisions of the Supreme Court of Louisiana are conflicting, and there might well be doubt, under those decisions alone, as to what is the correct view of this. In *Levy v. Stewart*, 11 Wall. 244, 20 L. Ed. 86, however, which was a case from Louisiana, reference is made in the opinion by Mr. Justice Clifford to the law of Louisiana on this subject, and especially to the maxim "*contra non valentem*," etc., as follows:

"Recent decisions of the Supreme Court of the state are referred to by the defendant, in which it is denied that any exception whatever is allowed in any case, in the law of prescription, as to bills and notes. None of those decisions are founded upon any express enactment, and the reasons assigned for the conclusion are not satisfactory. They admit that the maxim '*contra non valentem agere non currit prescriptio*' is a maxim of universal justice, but deny that it applies to causes of action founded upon bills and notes, chiefly because 'they are prescriptible against minors and interdicted persons as well as others,' which the Chief Justice of the court, in the case first cited, held to be an unsatisfactory reason for the conclusion, and in that view the court here entirely concurs."

This would seem to indicate that the Supreme Court of the United States recognizes the correctness of those decisions of the Supreme Court of Louisiana which consider this maxim still a part of the jurisprudence of that state.

In *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636, in the opinion by Mr. Justice Miller, this is said:

"In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or effort on the part of the party committing the fraud to conceal it from the knowledge of the other party."

Afterward in the opinion the following is added:

"But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded on a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds—to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side."

This case of *Bailey v. Glover* has since been frequently recognized in decisions by the Supreme Court and other United States courts. In *Traer v. Clews*, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. Ed. 467, the court, in discussing the question involved here as to the suspension of the statute of limitations, where the facts on which the case was based had been concealed, said (115 U. S. 538, 6 Sup. Ct. 159, 29 L. Ed. 467):

"The case of *Bailey v. Glover* has never been overruled, doubted, or modified by this court."

Many other authorities to the same effect might be cited, but the foregoing are considered sufficient to establish the principle which must control here.

It is stated in this case, however, that the question of fraud or concealment of facts upon which the case is founded was not made in the District Court, or presented to the jury by the court. We do not think this material here. The fact of a combination and conspiracy between the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company had already been established in this case, and also the amount which the plaintiff was entitled to recover, embracing three-fold damages and attorney's fees. The judge, in his charge, fixed the time when prescription should commence to run as the date of the discovery of the fact of the concerted action by the two defendant companies and Craft. It must be borne in mind that the course of the wrongful conduct, injurious to the plaintiff, was all this time concealed from the plaintiff, and this conduct and this concealment must nec-

essarily be considered as a fraud on the plaintiff. The court, in its charge, evidently assumed that, if the jury had found that the plaintiff was not entitled to damages, it would be unnecessary for it to consider the question of prescription at all. Indeed, such is indicated in the charge itself. But if it found damages for the plaintiff, making the consideration of the question of prescription necessary, then they would have already found such conduct on the part of the defendants as would amount to a fraud on the plaintiff, and all it was then necessary for it to consider was when the plaintiff first ascertained the facts which formed the basis for the charge of fraud.

It is said, however, that the only purpose for concealing the connection between the American Tobacco Company and Augustus Craft and the Craft Tobacco Company was that the American Tobacco Company was on the "unfair list" of organized labor, and that if its connection with the Craft Tobacco Company became known it would bring about a boycott by union labor of the Craft Tobacco Company. The fact of the concealment of the combination between the American and the Craft Tobacco Companies and Craft is none the less a concealment, as we see it, so far as the suspension of the running of the statute against the People's Tobacco Company is concerned. It is the lack of knowledge of the facts which would give it a cause of action, and its inability for that reason to bring suit, that tolls the statute.

It must be borne in mind all the time that the questions of combination and conspiracy between the two defendant companies and Craft to injure the plaintiff's business, and of the plaintiff's damages and the amount it is entitled to recover of defendants, have been settled in this case; also that it has been adjudged that there was a combination against the People's Tobacco Company, of which it did not know until within the prescriptive period. Why should not the prescriptive period in this case commence at the time the combination against the plaintiff was discovered? The Sherman Act gives the right to an action for conspiracy to injure the business of the plaintiff, such as was alleged, and such as we must consider to have been established in this case. No action could be brought by the plaintiff until he had knowledge of the facts which gave him a cause of action. We think the court below was right in holding as it did on this question.

This being the only question for consideration here, for the reasons given, the judgment must be affirmed.

In re A. O. BROWN & CO.

Appeal of HOCHSTADTER.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 185.

BANKRUPTCY (§ 409*)—DISCHARGE—OBJECTIONS—BOOKS OF ACCOUNT.

Where bankrupts, who were stockbrokers, kept certain individual accounts of customers in their general ledger by number, but kept other records from which the accounts might be readily identified, and it also

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

appeared that a numbered account covered speculative transactions of the firm and was readily identified, the bankrupts had not failed to keep books of accounts or records from which their condition might be ascertained with intent to conceal their financial condition and could not therefore be lawfully deprived of a discharge on that ground.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752-757; Dec. Dig. § 409.*]

Appeal from the District Court of the United States for the Southern District of New York; Julius M. Mayer, Judge.

In the matter of the bankruptcy proceeding of A. O. Brown & Co. From an order overruling specifications of objection of Leonard A. Hochstadter to bankrupt's discharge, he appeals. Bankrupt's application granted so far as Albert O. Brown and Lewis G. Young, individually, were concerned, and objector appeals. Affirmed.

See, also, 193 Fed. 24, 113 C. C. A. 348; 193 Fed. 30, 113 C. C. A. 354.

Kendall & Herzog, of New York City (D. W. Kahn and Irving L. Ernst, both of New York City, of counsel), for appellant.

R. P. Levis, of New York City, for appellee.

Dix W. Noel, of New York City, for A. O. Brown.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The sole ground of objection was under subdivision 2 of section 14b (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]); it being alleged that the bankrupts applying for discharge, "with intent to conceal (bankrupts') financial condition, * * * failed to keep books of accounts or records from which such condition might be ascertained."

The bankrupts were a firm of stockbrokers. Their books of accounts were kept by a thoroughly competent bookkeeper with assistants, and so far as appears the various entries which represent the transactions occurring in the conduct of the business of the firm were correctly recorded in such books. What is mainly complained of is that such books did not in all cases contain the names of the bankrupts' customers. Customers' accounts with a firm are usually kept in ledgers, each customer having a folio allotted to him, and such accounts are usually headed each with the name of the customer. In the stock business where customers buy and sell stocks through brokers, it is not unusual, when a customer so wishes, to arrange the entitling of his account, so that the numerous clerks to whom the general ledgers are accessible may not learn the names of the individuals who are operating through the broker in some particular stocks. This is usually done by heading the ledger account with a number instead of a name. Thus the account of William Smith may appear in the ledger as "Account No. 53," and the account of George Jones as "Account of No. 127." The accounts of very many of the customers of A. O. Brown & Co. were thus kept in their general ledgers. It may be questioned whether this method of keeping these accounts does operate to conceal the financial condition of the firm. When the books are examined at any time it will appear from them how much is due

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from the firm to customers and how much is due from customers to the firm. Striking a balance between these two sums will disclose, so far as dealings with customers are concerned, whether the firm is on the whole a creditor or a debtor, and it would seem to do this whether the customers are described by name or number. But passing this, it appears from the testimony that, whenever at a customer's request these bankrupts kept his account under a number, they took from him a power of attorney or a letter of instructions which identified the signer as the individual whose accounts were kept under such number. Of course, these documents were not left lying open in the office for the clerks to overhaul and read; that would have defeated the object sought to be obtained by keeping numbered accounts. But they were kept safely so that the brokers might have them in the event of future controversy with some customers. They were kept among the other records of the firm and when bankruptcy came were turned over with all the books and records of the firm to the receiver or trustee. It is manifest that with these documents and the general ledgers before him any intelligent bookkeeper could ascertain whose transactions it was that the entries in a numbered account referred to. The language of the statute relied on and above quoted is suggestive. It does not speak of a failure to keep *books* of account, but of a failure to keep books of account *or records* from which their financial condition might be ascertained. Inasmuch as we have here records which establish the identity of all the numbered customers' accounts there is no force in the objection that such accounts were headed in the books with a number only, "with intent to conceal bankrupts' financial condition."

There is another numbered account of a different character. It is known as "Account No. 2" and records various speculative purchases and sales of stock by the four members of the firm. Of such an account it cannot be said, as it might be of a customer's account, that the financial condition of the firm could be ascertained whether it was headed with number or name. If a customer's account showed a debit balance, it would indicate an asset of the brokers, viz., the amount due from the customer. But if a firm account showed a debit balance, it would be a liability of the firm. Therefore there would be a concealment of financial condition unless a competent person examining the books and records would ascertain that "Account No. 2" recorded the transactions of the members of the firm.

The appellees contend with much force that the character of "Account No. 2," viz., that it was a firm account, would be manifest upon inspection. It was not kept in the general ledger, but in a private ledger which was kept locked, i. e., the covers of the book were locked and the confidential bookkeeper kept the key. The other accounts which were kept in this ledger were the capital accounts of the several partners, the expense account, profit and loss account, and commission account. Account No. 2 itself indicated that the money which, by way of margin, opened it was transferred from the cash loan account. From time to time each of the four partners drew out of this account No. 2, and the amount he so drew out was credited to his personal capital account. The confidential bookkeeper who kept it, assumed from the nature of the entries that it was a firm account. He sup-

posed the firm was "bucketing," buying and selling against its own customers; but, whether it was or not, he had no doubt that this No. 2 was a firm account, and says that other of the clerks who had access to it so spoke of it. Even the accountant called by the appellant, whose testimony is not especially persuasive—even the District Judge had difficulty in getting positive answers out of him—admitted finally that the account was evidently not that of an outsider, although he says that *he* could not tell whether it covered transactions of the firm or of an individual member. Why he could not determine this, when it appeared that all four members drew from it, he did not make clear. We think the character of the account was such that the heading it with a number only did not conceal its identity.

It further appeared that by their articles of copartnership the members of the firm agreed that none of them would speculate, except upon written agreement of all. At the time this account was opened they made such a written agreement, profit or loss to be divided equally between them, and in such agreement directed the account of such transactions should be opened on the books "to be known as account No. 2." This agreement remained among the records of the firm and passed with all the books and records to the trustee. From this record and the books, the identity of this account could be ascertained.

There are some other accounts referred to which we need not discuss at length. One was opened in the name of George Considine. This was done by direction of Buchanan, the member of the firm who attended to the office; A. O. Brown and Young being the floor members of the firm on the Stock Exchange. Buchanan expected after making a few operations on this account that it would be so attractive that he could persuade Considine to assume it. This Considine would not do; whereupon Buchanan had it transferred to Mary A. Teddes, his stepmother, and continued to operate under it. We do not think it necessary to add anything to what was said by the special master and the District Judge in reference to these accounts and a few others specified by appellant. They refused a discharge to Buchanan and granted one to A. O. Brown and Young. In these conclusions we concur.

The order is affirmed.

THE PRUDENCE. THE NORFOLK. THE N. Y., P. & N. R. R. BARGE
NO. 14.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1913.)

No. 1,130.

1. COLLISION (§ 95*)—FAULT—ANCHORING TOW IN CHANNEL AT NIGHT.

A tug which stopped her tow of four barges in Elizabeth river on a dark and stormy night and proceeded to anchor the same, so that under the circumstances of wind and weather they in effect occupied the entire channel, *held* in fault for a collision between one of them and an incoming tow. The injured barge also *held* in fault for failing to put out her anchor lights.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. ADMIRALTY (§ 70*)—COLLISION (§ 121*)—SUIT FOR DAMAGES—PROOF AND VARIANCE.

In admiralty there are no technical rules of variance or departure, and in a collision case the court, having the entire matter before it, is bound to decree in accordance with the facts established, although the result may be a recovery on grounds different from those alleged or proved by libelant, but which were alleged and proved by another party.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 544-556; Dec. Dig. § 70; * Collision, Cent. Dig. § 256; Dec. Dig. § 121.*]

Appeal and Cross-Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Suit in admiralty by John Andrews, master of the barge Ella A. Dempsey, against the steam tug Prudence, Charles Gring, claimant, the steam tug Norfolk, and N. Y., P. & N. R. R. Barge No. 14. Decree against the Prudence for half damages, and libelant and claimant both appeal. Affirmed.

For opinion below, see 197 Fed. 479.

John W. Oast, Jr., of Norfolk, Va., for the Ella A. Dempsey.

Edward R. Baird, Jr., of Norfolk, Va., for the Prudence.

Floyd Hughes, of Norfolk, Va. (Hughes & Vandeventer and Thomas H. Willcox, all of Norfolk, Va., on the brief), for the Norfolk and the N. Y., P. & N. R. R. Barge No. 14.

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. [1] The barge Dempsey was injured by a collision with the N. Y., P. & N. R. R. barge No. 14, then in tow of the steam tug Norfolk. The master of the barge thereupon libeled the Norfolk, barge 14 and the steam tug Prudence, which had undertaken to tow the Dempsey from Baltimore to Norfolk. The court below held that the collision was in part due to the fault of the Dempsey. The record amply justifies such conclusion. It further decreed that the Prudence was also to blame, and she was required, in consequence, to make good to the Dempsey one-half the loss suffered by the latter. The Prudence was held liable because she had cut loose her tow and directed the barges of which it was composed to anchor under such circumstances as to cause them, in the then condition of wind and weather, to occupy in effect the entire channel. While the learned advocate for the Prudence does not ask us to review the conclusions of the judge below on any controverted questions of fact, he says that there is no evidence that what the Prudence did, whether it was a fault or not, in any wise contributed to the collision. In this view we cannot concur. This opinion might well end here, had not the Prudence raised an important question of pleading and practice.

[2] In its libel the Dempsey said that the Prudence and its tow just before the collision had been moving up the eastern or port side of the channel. In its answer the Prudence admitted the truth of such allegation. Barge 14 and the Norfolk, on the other hand, in their

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

answers charged that the Prudence and her tow were on the western side of the channel. The court found that the accident happened, except in so far as the Dempsey's fault contributed to it, because the Prudence stopped her tow to shorten hawser on the western side of the channel on a dark and stormy night, when the wind was blowing strongly from the northwest. The Dempsey was the rearmost barge. It was light. It showed a large freeboard to the wind. Naturally and almost inevitably it drifted across the channel, so as to endanger other craft. The Prudence now contends that one vessel cannot be held liable to another because the court believes a state of facts to have existed which is not alleged or proved by either of such vessels, nor when the court rejects as impossible what is said and shown by the vessel to which a recovery is awarded.

The Prudence is required to pay half the Dempsey's loss because, and only because, the Prudence, when she told her tow to shorten hawser, was on the west side of the channel. The Dempsey in her libel had charged that both she and the Prudence were on the east side. Had the Dempsey and the Prudence been the sole parties to the litigation, the former would not ordinarily have been allowed, against the objection of the latter, to offer evidence that both vessels had been where it said neither of them were. Whether the Dempsey would then have been permitted to amend its libel, so as to bring its allegations into harmony with its proofs, would have been in the discretion of the court. Doubtless before such amendment would have been allowed the libelant would have been required satisfactorily to explain why it had not accurately stated in its libel the facts as it afterwards understood them to be.

The rules of pleading in admiralty do not require all the technical precision and accuracy which is necessary in the practice of the courts of common law. They do demand that the cause of action shall be plainly and explicitly set forth in clear and intelligible language, so that the adverse party may understand what is the precise charge which he is required to answer, and make up an issue directly upon that charge. A party cannot regularly prove that which is not properly alleged. In this case the Dempsey did not offer evidence to contradict the allegation of its libel. The witnesses examined on its behalf believed both it and the Prudence to have been on the east side of the channel.

Even where there are only two parties to a collision controversy, there is no rigid rule that a libelant, alleging one fault on the part of a defendant vessel, cannot recover on proof of a different fault. In *The Cambridge*, 4 Fed. Cas. 1118, the libel alleged only that the defendant's steamer ported when she should have starboarded. The evidence for the steamer proved that she was running at too great a speed in a fog and had no lookout forward. Judge Lowell held that the libelant could rely on these faults as well as on those alleged in the libel. He said:

"In our courts the question is treated as a matter of evidence rather than of pleading. If surprise is shown, there may be reason for excluding the testimony, or for giving time to meet it. If the witnesses of one side vary

the case from that which his pleadings set up, it may be reason for disbelieving them. But it is the practice of our courts of admiralty rather to extract the truth and found a decree upon it, whenever, by amendment or otherwise, justice can be fully done to both parties, than to follow any very strict rules of variance."

Justice Curtis in *The Clement*, 5 Fed. Cas. 1015, said:

"In all collision cases the court will look at the allegations of both the parties of all matters of fact, upon which fault or its absence depends; they will consider which of those allegations is proved, not allowing either party to contradict by proof what he has alleged; and, having thus extracted the real case from the whole record, will pronounce for the one party or the other as that case requires."

In the case at bar there are four parties to the controversy and not two. Such a contest differs in kind, as well as in degree, from that in which there are but two antagonists. The rules which govern it must differ accordingly, whether it be waged in a court of admiralty or on the pages of Captain Marryatt. The question whether the *Prudence* and the *Dempsey* were on the west or on the east side of the channel was raised by the pleadings of the *Norfolk* and *Barge 14*. To this, among other issues, all parties directed their testimony. The rule which forbids a litigant to prove something which he has not charged is largely intended to prevent a surprise to his adversary. The *Steamer Syracuse*, 12 Wall. 167, 20 L. Ed. 382.

In this case there was no surprise and no possibility of it. Apparently every one who could throw any light upon the collision or its causes testified. In the admiralty there are no technical rules of variance or departure. The court below, having the whole matter before it, was bound to decree in accordance with the facts established. *Dupont v. Vance*, 19 How. 172, 15 L. Ed. 584; *The Quickstep*, 9 Wall. 670, 19 L. Ed. 767.

Affirmed.

NOBLE et al. v. GUSTAFSON.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1913.)

No. 2,170.

MINES AND MINERALS (§ 112*)—CONSTRUCTION AND DEVELOPMENT—LIENS—STATUTES.

Civ. Code Alaska, § 262 (1 Fed. Stat. Ann. p. 282), giving a lien to persons performing labor on the construction, development, alteration or repair of any building, flume, mine, tunnel, aqueduct, or other structure, limits the lien to work done in the development or improvement of a mine; and hence did not confer a lien for sluicing up the dump for extracting gold therefrom, which was the ordinary work of a miner in the operation of a placer claim, having no relation to the development or improvement of the mine.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 233-235; Dec. Dig. § 112.*]

Appeal from the District Court of the United States for the Fourth Division of the District of Alaska; Peter D. Overfield, Judge.

Suit by Algot Gustafson against Jesse Noble and others. Decree for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

complainant, and defendants appeal. Reversed and remanded, with directions.

F. J. Kierce and Walter Christie, both of San Francisco, Cal., and John L. McGinn and Arthur Frame, both of Fairbanks, Alaska, for appellants.

T. C. West, F. De Journal, and Joseph T. Curley, all of San Francisco, Cal., and Guy B. Erwin, of Fairbanks, Alaska, for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This is a suit to foreclose several mechanics' liens claimed by appellee and others upon a certain mine and premises known as "Creek Placer Mining Claim No. 2 above Discovery on Wolf Creek, a Tributary of Cleary Creek," in Fairbanks recording district, Alaska. In each count of the complaint it is alleged that said work and labor performed upon the said mine and premises was performed in running tunnels, opening cross-cuts, drifting out, excavating, and hoisting gold-bearing gravel, building flumes and ditches, and timbering shafts upon said mine and premises, for the development and improvement thereof; and the claims of lien, taking one as an example, are "for work and labor done and performed * * * upon said property, as miner and laborer in digging tunnel, running cross-cuts, drifting out, excavating and hoisting gold-bearing gravels, building flumes and ditches, and timbering shafts in the improvement, opening up, development and working of same." The various statements of claim show that the claimants commenced the performance of the work on the 29th day of April or 1st or 16th of May, 1911, and continued up to the 26th of May or the 1st to the 4th of June. Wright's claim is an exception to this, as his runs from April 1st to June 9, 1911; he giving credit for \$150 paid. The complaint avers, taking the Gustafson claim as an example, that between the 1st day of May, 1911, and the 1st day of June, 1911, Gustafson performed 29½ days' work and labor upon that certain mine, etc., and, further, that he commenced to perform work and labor upon said mine and premises on the 1st day of May, 1911, and ceased to work and labor thereupon on the 1st day of June, 1911.

The testimony shows that generally the work and labor done and performed by claimants, except as to one or two who were employed as cooks, was in sluicing up the dump for extracting the gold therefrom. Some of these men worked ranging from four to six or seven days in repairing a ditch used in connection with the sluicing operations. Thus Peterson worked four days in making such repairs, Anderson five or six days, and Strass seven days. The witnesses were not sure as to the time. The dump came in part from a shaft and tunnels which were sunk and drifted in March, the work continuing up to April, 1911, possibly beyond, but not later than the latter part of April, and in part from other excavations and tunneling carried on in the winter; the larger part coming from the latter source. Now, it is urged that the work done and performed was not the kind or character of work and labor for which the claimants were entitled to claim liens upon the mine and premises under the statute.

The statute gives a lien to laborers and other persons performing labor upon the construction, development, alteration, or repair of any building, flume, mine, tunnel, aqueduct, or other structure. Section 262, Civil Code of Alaska. See 1 Fed. Stats. Annotated, p. 282. This statute has been construed by this court, and limits the lien of the miner to work done in the development or improvement of a mine. *Pioneer Mining Co. v. Delamotte*, 185 Fed. 752, 108 C. C. A. 90. And it was further held that it does not include the ordinary work of a miner in the operation of a placer claim, having no relation to the development or improvement of the mine. That the work shown to have been performed by claimants does not bring them within the purposes of the act is clearly apparent. The dump consists of the pay dirt extracted from the mine. It is thrown out from the shafts and tunnels as the excavations are carried on, and lies where thrown until the season is opportune for sluicing it up. This is done by the use of running water for washing out and separating the gold from the earth and gravel as the dump is thawed out. Such work is simply a mining process for extracting the gold from the mass, and is nothing more nor less than a mining operation, or a working of the mine, as distinguished from development operations, or work with a view to exploration or development. True, as indicated in the above case, sluicing and extracting of the gold may, in a conceivable case, be incidental to a development of the mine, but it is not shown to be such here. Indeed, the contrary appears, as the earth removed through the process of sinking the shaft and tunneling was all in the dump for a time at least prior to the time when the sluicing began, and we are to infer that it was only awaiting the process of separation. In other words, the mining work, namely, the sinking of the shafts, the running of the tunnels and the development work in general had ceased, and the work of extracting the gold by the sluicing method was not a work incidental to the development of the mine or the alteration or repair of any building, flume, or tunnel in connection therewith. The removal of the dump served no purpose whatever in developing or improving the mine, and, except for the washing out and extraction of the gold, it probably would never have been further disturbed.

While mechanic's lien statutes are to be liberally construed, so that their purpose may not be frustrated, and with a view to effecting substantial justice, yet, unless the labor performed for which the lien is claimed is such as comes within the contemplation of the statute, there can be no valid lien. The allegations of the complaint and the statements of lien show sufficient to bring the liens in question within the act, but the proofs wholly fail to support either, except as it pertains to a small amount of work done by some of the claimants upon the ditch or flume in the way of repairs. And as to this, the labor which is subject to lien is so commingled with that which is not that it cannot be satisfactorily segregated. The liens themselves are therefore void.

Such being our conclusion, the decree of the District Court must be reversed, and the cause will be remanded, with directions to dismiss the complaint. The appellants are entitled to their costs in both courts.

LEVISON v. HAMILTON.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 154.

JUDGMENT (§ 822*)—FOREIGN JUDGMENT—CONCLUSIVENESS—STOCKHOLDERS—DOUBLE LIABILITY.

Certain stock in a Minnesota corporation was issued to defendant in his own name, without qualification, as collateral security for a debt which the corporation owed to defendant's firm, on the understanding that the certificate should be surrendered and canceled on payment of the debt. Defendant remained a stockholder on the corporation's books from April 23, 1902, until August 18, 1904, when the corporation became insolvent and proceedings were instituted in Minnesota to wind up its affairs. The Minnesota court, on notice to defendant and to all other nonresident stockholders in the dissolution proceedings, entered judgment by default against defendant, imposing an assessment of 100 per cent. on each share of the stock. *Held*, that when defendant became a stockholder he submitted himself to the Minnesota law, and the Minnesota court having jurisdiction to determine the question that defendant was a stockholder and subject to assessment, defendant was bound thereby, and could not contest that question in a subsequent action in New York to recover the assessment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488-1490, 1496-1500; Dec. Dig. § 822.*]

In Error to the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

Action by Charles Hamilton, as receiver of Evans-Johnson-Sloane Company, against Benno Levison, Jr., to recover an assessment levied by the district court of Ramsey county, Minn., on defendant as a stockholder in the Evans-Johnson-Sloane Company. Defendant was found by such court to be the owner of 30 shares, which were assessed \$100 each. From a judgment in favor of plaintiff for \$4,119.11 (198 Fed. 444), defendant brings error. Affirmed.

Charles H. Fuller, of New York City (Wm. J. Wallace and L. W. Severy, both of New York City, of counsel), for plaintiff in error.

James E. Trask and E. H. Morphy, both of St. Paul, Minn., and John J. Clark, of New York City, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The complaint alleges that the Evans-Johnson-Sloane Company was organized under the law of Minnesota and is and was a citizen and resident of that state; that the defendant subscribed for the stock of said corporation and ever since the 23d of April, 1902, has been the owner and holder of 30 shares of said stock which stood in his name on the books of the corporation from the date aforesaid until August 18, 1904, when the defendant executed the assignment indorsed on the certificate and surrendered it to the corporation. The plaintiff contends that the attempted surrender of the stock was without consideration, ultra vires, fraudulent, null and void and that during the period when the stock stood in the defend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant's name, absolutely and without qualification, a large amount of the admitted indebtedness accrued. The answer denies that the defendant ever subscribed for any part of the stock of the said corporation or ever became a stockholder therein, except that the corporation issued 30 shares to him as collateral security for a debt of over \$3,000 which the corporation had assumed and owed to the defendant's firm, it being understood that the certificate should be surrendered and canceled upon the payment of the debt.

The defendant alleges further that his firm brought suit upon the note, which suit the corporation settled by paying the note and costs, and thereupon, pursuant to the agreement, the defendant delivered up and returned the certificate to the corporation's attorney May 27, 1904. The action was tried before the court and jury, but at the close of the testimony both sides, conceding that there was no controversy on the facts, moved for the direction of a verdict. The plaintiff insisted that the testimony shows the defendant to have been a past stockholder, and also that it sustains the plaintiff's contention that the surrender by defendant of the stock was pursuant to a void secret agreement, the purpose of which was to invalidate the defendant's subscription. There can be no doubt that a certificate was issued to the defendant, in his own name, without qualification, and remained on the books of the corporation from April 23, 1902, until August 18, 1904. It is also proved that defendant's name so appeared upon the list of stockholders attached to the petition for assessment filed in the Minnesota court. On September 4, 1906, the court entered an order assessing 100 on each share of capital stock owned by the stockholders, the defendant being among them. During the time that the defendant held the stock in his own name a large amount of indebtedness arose which was allowed by the court. We think there can be no doubt, at least during this period of two years and four months, that the defendant was a stockholder of the corporation.

The Minnesota courts had jurisdiction to wind up insolvent corporations created by the laws of that state in the manner provided by those laws. This the court did, giving notice to nonresident stockholders. The defendant did not appear in the winding up proceedings, where most of the defenses he now urges could have been properly heard and decided. Judgment was taken against him by default. We think the law is well settled that when the defendant became a stockholder in the Minnesota corporation, he submitted himself to the Minnesota law, as interpreted by the courts of that state, and is bound by their decree holding him liable.

In the case of *Spargo v. Converse*, 191 Fed. 823, 112 C. C. A. 337, this court had before it the Minnesota statute and held that an assessment made under it was valid against the estate of a stockholder, although made after her death, notice being addressed to her and not to her executor. The defendant knew, or should have known, that his name appeared upon the corporation books as stockholder. He knew that persons dealing with the corporation who had a right to examine the corporation books might be influenced in giving credit to the

corporation by seeing his name among its stockholders. He could have sold his stock or transferred it at any time during the two years and more that it stood in his name upon the books. We think it is too late now to avoid responsibility for his acts. The authorities sustaining these views are sufficiently cited in the opinion of the District Court and need not be restated.

The judgment is affirmed with costs.

GRISCOM-SPENCER CO. v. BERNIER.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 180.

1. MASTER AND SERVANT (§ 43*)—CONTRACT OF EMPLOYMENT—BREACH—ACTION—QUESTION FOR JURY.

Where defendant's manager and treasurer contracted to employ plaintiff, and to deliver to him certain corporate stock as part consideration for his services, and in an action for breach of the contract it appeared that the value of the stock was less than par, whether defendant's manager and treasurer acted for defendant or individually in making such contract of employment, and the value of the stock, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 57, 58; Dec. Dig. § 43.*]

2. MASTER AND SERVANT (§ 40*)—CONTRACT OF EMPLOYMENT—BREACH—EVIDENCE.

Correspondence between plaintiff and the manager and treasurer of defendant, pursuant to which plaintiff claimed he was employed to serve defendant, and for breach of which contract he sued, was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 47-49; Dec. Dig. § 40.*]

3. CORPORATIONS (§ 521*)—ACTS OF OFFICERS—AUTHORITY—CONTRACT OF EMPLOYMENT.

Where defendant's manager and treasurer employed plaintiff to work for defendant, but there was evidence from which it appeared that in doing so he did not act in his official capacity, an instruction reviewing such evidence, and charging that, unless the jury found that such treasurer, in making the agreement, was acting for defendant, it was not liable, was proper.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2094-2098; Dec. Dig. § 521.*]

In Error to the District Court of the United States for the Southern District of New York; Walter C. Noyes, Judge.

Action by Louis L. Bernier against the Griscom-Spencer Company. Judgment for plaintiff for \$2,738.40, and defendant brings error. Affirmed.

Burlingham, Montgomery & Beecher, of New York City (Norman B. Beecher and Ray Rood Allen, both of New York City, of counsel), for plaintiff in error.

Dennis F. O'Brien and M. L. Malevinsky, both of New York City, for defendant in error.

Before LACOMBE and COXE, Circuit Judges, and HAZEL, District Judge.

COXE, Circuit Judge. This action was brought to recover upon a contract of employment by which, the plaintiff alleges, the defendant agreed to pay him \$100 a week and \$20,000 worth of stock of the James Reilly Repair & Supply Company (the predecessor of the defendant), which stock was to be assigned to him at the rate of \$3,000 per year, the contract to remain in force until the entire \$20,000 worth of stock had been acquired by the plaintiff. He asserts that he performed the contract in good faith until June 15, 1907, when he was wrongfully discharged by the defendant, who refused to transfer to him any part of the \$20,000 worth of stock and he demands judgment for \$3,000 worth of stock for each of the three years he was in the defendant's employ.

[1, 2] The trial court submitted to the jury the single question of plaintiff's right to recover for the third year ending June 15, 1907, deciding all the other questions in favor of the defendant. This certainly was as favorable a ruling on the law of the case as the defendant could desire. It limited the recovery, in any event, to \$3,000 and as the jury found the value of the stock to be less than par, their verdict was for \$2,700. The questions relating to the value of the stock and the actual intention of the parties were all for the jury and were fairly presented to them by the trial judge. The letters between the plaintiff and Bowman were properly received in evidence as the contract alleged in the complaint depended upon the construction given to this correspondence.

[3] The question whether Bowman was acting in his individual capacity or as agent of the company was properly left to the jury as it could not be determined as matter of law. The court charged on this subject as follows:

"The first thing you will take up, in considering the case, is the question as to whether this letter was written by Mr. Bowman in his official capacity, or whether it was written by him individually and personally, and if you find that it was written by him in his official capacity you will then come to the question as to whether, if it was so written, it was binding upon the company. It would be observed that the letter is signed by Mr. Bowman without his official title and is written on the official letter head of, apparently, the first Reilly corporation, which did not have the word 'The' in its name. Now, it is apparent from this letter, that some one was promising stock to the plaintiff and the first question to consider is who made the promise? The corporation, through Mr. Bowman, its manager and treasurer, or Bowman individually? Unless you find that Bowman, in making the agreement, was acting for the corporation, your verdict must be for the defendant."

We think this states the question as fairly for the defendant as the facts justified. There was sufficient testimony to warrant the jury in finding that, as to the third year of the plaintiff's employment, there was an agreement between him and the defendant that he should remain in the company's employ on the terms stated in the letter of April 18, 1906. See, as bearing upon the questions involved, our decisions in *Crichfield v. Julia*, 147 Fed. 65, 77 C. C. A. 297, and *Westinghouse v. Carlton* (C. C. A.) 202 Fed. 129, decided January 13, 1913.

The judgment is affirmed with costs.

STORRIE v. CITY OF PENSACOLA.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1913.)

No. 2,460.

CONTRACTS (§ 277*)—CONSTRUCTION—COMMENCEMENT OF WORK—NOTICE.

Where a contract provided that plaintiff should have a certain number of days to complete work, and should begin the same on receipt of notice from the engineer in charge, which notice was sent him from Philadelphia on September 4, 1906, but was not received until September 14th, the time began to run only from the date the notice was received.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1217-1232; Dec. Dig. § 277.*]

In Error to the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

Action by Robert G. Storrie against the City of Pensacola. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

Gregory L. Smith and Harry T. Smith, both of Mobile, Ala., and E. C. Maxwell, of Pensacola, Fla., for plaintiff in error.

John B. Jones, W. A. Blount, A. C. Blount, Jr., and F. B. Carter, all of Pensacola, Fla., for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. This was a suit in the Circuit Court (now the District Court) of the United States, by Robert C. Storrie against the city of Pensacola, to recover certain amounts alleged to be due him for work done as contractor in building or putting in a certain sewerage or drainage system in the city of Pensacola. The amount originally agreed to be paid Storrie for this work was \$309,640, and he was given 350 days for the completion of the work, exclusive of Sundays and legal holidays. It was provided in the contract that, should the amount of work be diminished, the time specified for completing the whole work should be diminished by the number of days represented by the relation which the cost of the work deducted bore to the cost of the whole work. The contract also provided for \$25 liquidated damages for each day occupied in completing the contract over and above the time allowed by the contract. It was subsequently agreed that the total cost of the work, the plans having been modified accordingly, should be \$217,000. This reduced the number of days in which Storrie was to do the work to 247. The completion of the contract was delayed very much, so that it occupied 831 days, according to the engineer in charge. The city was holding up, at the time the contract was completed, \$14,875. Storrie failed to recover, there being a verdict and judgment against him.

We do not find any ground for interfering with the judgment, except as to one matter, and that is as to the number of days that Storrie

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was charged with for delaying the work. The provision in the contract was that Storrie should begin the work on receipt of notice from the engineer in charge. Notice was sent him to this effect from Philadelphia on September 4, 1906; but it was shown that the letter, by some delay in the mails, did not reach him until September 14th. The engineer's estimate and calculation fixed the time for him to commence the work as September 4th, thereby charging him with 10 days more than was right under the facts. There was also a failure to deduct the legal holidays under the laws of Florida to the number of 14 days. In addition to this the engineer, by a mistake in his calculation, which he conceded himself on the trial of the case, only allowed the plaintiff in error 236 days in which to complete the work, when, as stated above, he was entitled to 247 days. Storrie was, therefore, clearly entitled to recover against the city the amount which was thus improperly withheld; that is, for 35 days at \$25 per day, making a total of \$875. For this he was entitled to a verdict and judgment.

The judgment is reversed and the case remanded to the District Court, with instructions, as appellee may elect, to enter a judgment for the plaintiff for the sum of \$875 with legal interest thereon from May 21, 1909, and costs, or award a trial de novo.

THE CHARLES B. SANDFORD.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 123.

TOWAGE (§ 11*)—LIABILITY FOR LOSS OF TOW—TUG OF INSUFFICIENT POWER.

A tug, which undertook to tow nine barges in Long Island Sound, which she had not sufficient power to safely handle in such bad weather as might reasonably be anticipated, *held* liable for the loss of part of her tow in a storm, which was not of an unusual or extraordinary character.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

Appeal from the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

Petition in admiralty by John Scully, owner of the steam tug Charles B. Sandford, for limitation of liability. From a decree holding the tug solely in fault for the loss of part of her tow, petitioner appeals. Affirmed.

De Lagnel Berier, of New York City, for appellant.

Wilcox & Green, of New York City (Herbert Green, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. We concur with Judge Hand in the finding that the storm was not of an unusual or extraordinary character. One might expect to encounter such a storm in that part of Long Island Sound at any time. We also concur in his conclusion that the Sandford

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was not of sufficient power to undertake to haul such a tow as this through the Sound with the chance of meeting such a storm. The event shows this quite clearly.

It is contended on appeal that her lack of power was not the cause of the catastrophe, because before it happened her own power was supplemented by the much great power of the Hokendauqua. This presents a question of fact: Whether the Hokendauqua made fast to the Sandford before or after the towing hawser of the barges parted. There is a sharp conflict of testimony on this point; some of those on the tow say she made fast before. On the other hand, the petition of the owner of the Sandford avers that it was subsequently, while she was proceeding to New Haven, with what was left of her tow, intending after getting those in a place of safety to return and look for the others. The master of the Sandford, who certainly ought to know, testified positively that it was not until some time after the hawser parted. The master of the Hokendauqua says merely that the condition of the tow looked all right to him—it was a dark night—and that he supposed the whole nine were there. But he also says that when he arrived they were “pulling along for New Haven.” The hawser broke when they were near Faulkner Island, and when it broke they were heading for the Long Island shore “somewheres around S. W.” They did not head “to the westward for New Haven” until after it parted.

The decree is affirmed on the opinion of the District Judge.

WEBB v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1913.)

No. 2,419.

PUBLIC LANDS (§ 120*)—PATENT—VACATION—FRAUD.

A mere preponderance of the evidence is insufficient to justify the vacation of a patent to homestead entry for and on account of fraud in the original entry and final proof; but the evidence of fraud must be so clear, unequivocal, and convincing as to necessarily lead to the conclusion that fraud had intervened.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

Appeal from the District Court of the United States for the Eastern District of Louisiana; W. I. Grubb, Judge.

Proceeding by the United States against Mattie L. Webb to cancel a land patent. Judgment for the United States, and defendant appeals. Reversed and remanded, with instructions.

T. M. Miller and James L. Bradford, both of New Orleans, La., for appellant.

Charlton R. Beattie, U. S. Atty., of New Orleans, La.

Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. This is an appeal from a decree forfeiting and canceling a patent for land regularly issued by the United States on a homestead entry, for and on account of fraud in the original entry and final proof. We have read all the evidence, and therefrom conclude that it does not sufficiently sustain the charges of fraud against the appellant.

"We take the general doctrine to be that, when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence, which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful." *Maxwell Land-Grant Case*, 121 U. S. 381, 382, 7 Sup. Ct. 1029, 30 L. Ed. 949; *United States v. Stinson*, 197 U. S. 204, 205, 25 Sup. Ct. 426, 49 L. Ed. 724; *United States v. Clark*, 200 U. S. 601, 608, 26 Sup. Ct. 340, 50 L. Ed. 613.

The decree appealed from is reversed, and the case is remanded, with instructions to dismiss the bill.

**WEBER ELECTRIC CO. v. NATIONAL GAS & ELECTRIC
FIXTURE CO. (two cases).**

(District Court, S. D. New York. March 24, 1913.)

1. PATENTS (§ 30*)—INVENTION—WHAT CONSTITUTES.

When a desired result is sought by those working in the art and skilled therein, but not obtained for lack of efficient means, which such persons are unable to devise, that another, by some seemingly simple change or adaptation of an old means or element of a combination, accomplishes the desired result or a better one, and his device proves commercially successful and largely displaces all others, it constitutes patentable invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 34; Dec. Dig. § 30.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—INCANDESCENT LAMP SOCKETS.

The Weber patents, No. 743,206 and No. 916,812, each for an improvement in incandescent electric lamp sockets, construed, and held not anticipated, valid, and infringed.

In Equity. Suits by the Weber Electric Company against the National Gas & Electric Fixture Company. On final hearing. Decrees for complainant.

Frank C. Curtis, of Troy, N. Y., for complainant.

Francis C. Lowthorp, of Trenton, N. J., for defendant.

RAY, District Judge. Two suits were brought by the same complainant against the same defendant. The testimony was taken in each case and printed. The cases were argued together. Both patents relate to improvements in incandescent electric lamp sockets. Patent No. 743,206 is dated November 3, 1903, and was issued on application filed December 10, 1902, and patent No. 916,812 is dated March 30, 1909, and was issued on application filed in July, 1904.

Patent No. 743,206 has five claims, but claim 5 is not in issue. Claims 1 to 4, inclusive, read as follows:

"1. In a device of the class described, the combination with a pair of members comprising a sheet-metal sleeve having a slotted end and introverted tongues, and a cap adapted to telescopically receive the slotted end of said sleeve, said members having interengaging parts adapted to automatically interlock with a snap action when telescopically applied to each other, and to be released by compression of said sleeve, of an insulating base for electrical fittings loosely inclosed within said sleeve in engagement with said tongues, substantially as described.

"2. In a device of the class described, the combination with a base of insulating material having a peripheral recess, and an incandescent lamp support mounted thereon, of an inclosing case therefor comprising in part a sheet-metal sleeve having a portion of its wall introverted to occupy said base-recess, substantially as described.

"3. In a device of the class described, the combination with a base of insulating material having a peripheral recess, and a screw-socket fixedly mounted thereon, of an inclosing case therefor comprising in part a sheet-metal sleeve having a portion of its wall introverted to occupy said base-recess and prevent a relative rotative movement between said sleeve, base and socket, substantially as described.

"4. In a device of the class described, and in combination a pair of members comprising a sheet-metal sleeve having a slotted end, and a sheet-metal cap adapted to telescopically receive the slotted end of said sleeve, one of said members being provided with a recess, and the other having a correspondingly located transverse slit and the wall on one side thereof displaced to form a projection beveled or inclined toward said recessed member and terminating abruptly at said slit, whereby said members are adapted to automatically interlock with a snap action when telescopically applied to each other, and to be released by manual compression of said slotted sleeve, substantially as described."

Claim 1 calls for a pair of members comprising (1) a sheet-metal sleeve having a slotted end and *introverted tongues*, and (2) a cap adapted to telescopically receive the slotted end of said sleeve, said members having interengaging parts adapted to automatically interlock with a snap action when telescopically applied to each other, and to be released by compression of said sleeve; also in combination an insulating base for electrical fittings loosely inclosed within said sleeve in engagement with said tongues, all substantially as described.

Claim 2 calls for (1) a base of insulating material having a peripheral recess, (2) an incandescent lamp support mounted thereon, and (3) an inclosing case therefor comprising, in part, a sheet metal

sleeve having a portion of its wall introverted to occupy said base-recess, all substantially as described.

Claim 3 calls for (1) the same base as claim 1, (2) a screw-socket fixedly mounted thereon, and (3) an inclosing case therefor comprising in part a sheet-metal sleeve having a portion of its wall introverted to occupy said peripheral recess of the base and prevent a relative rotative movement between said sleeve, base, and socket, all substantially as described.

Claim 4 calls for (1) a pair of members comprising a sheet-metal sleeve having a slotted end and a sheet-metal cap to telescopically receive the slotted end of said sleeve, *one* of said members being provided with a *recess*, and *the other* having a correspondingly located transverse slit and the wall on one side thereof displaced to form a projection beveled or inclined toward said recessed member and terminating abruptly at said slit, *whereby* said members are adapted to automatically interlock with a snap action when telescopically applied to each other and to be released by manual compression of said slotted sleeve, all substantially as described.

In claim 1 the sheet-metal sleeve has "a slotted end and *introverted tongues*," while in claim 4 nothing is said about "introverted tongues." The introverted tongues on the sleeve are adapted to engage with the recess in the inclosed porcelain body, and the insulating base is loosely inclosed within the sleeve *in engagement* with said tongues. This engagement is "to prevent rotative movement" between the sleeve and base, the latter being contained within the sleeve; that is, supported and kept in position especially when the lamp is being inserted in or removed from such base, or the screw-socket fixedly connected to such base. This applies to the keyless sockets as the key in the key sockets is connected to the base and as matter of course supports and keeps the base in position and effectually prevents rotation. The claims, calling for introverted portions of the wall of the sleeve member in combination with a base of insulating material having a peripheral recess, furnish a construction where, in telescopically assembling the parts, one movement or motion inserts the projections or introverted portions into the recesses in the base and by a push and a snap action locks the whole securely together. For the locking means by snap action we have a simple device. In the key socket the sleeve has a slot to receive the key, and as the base is loosely seated in the sleeve the sleeve wall near this slot may be pressed inwardly a sufficient distance to accomplish the purpose about to be described, or the base at that point may be cut away. In the keyless socket there is a perpendicular slot in the wall of the sleeve to make it compressible. Near the upper or inner end of the sleeve and at two points substantially opposite each other a slit or cut is made in the metal of the sleeve, and above the slit the metal is pushed outwardly in such a manner as to form a sloping projection of metal. These projections have a clean-cut lower edge—metal cut. They are integral with the wall of the sleeve, and form a part of it. In effect they are the bolts of the lock, used to lock the cap to the sleeve by a snap action. In the cap member are two half-moon cuts through the walls of the cap, a little distance above the lower edge of the cap member and located to engage with the projections

described. The base of each half-moon aperture is clean-cut, metal cut. To assemble and interlock the two members, the sleeve member and the cap member, the sleeve is slightly compressed and inserted in the cap, and the projections on the sleeve, as the two are pushed together, enter and at once engage with the half-moon apertures in the cap. The two cut-metal edges engage. The two members cannot be separated without compressing by force the upper edge of the sleeve just below one of such projections. Such compression, so to speak, pushes back the bolt, disengages it from its socket, and the cap may be removed.

Patent No. 916,812.

I think it well at this point to take up the patent No. 916,812, infringement of which is alleged in the second suit referred to. It contains 14 claims, six of which are in issue, viz., 1, 2, 3, 8, 13, and 14. These claims read as follows:

"1. In a device of the class described and in combination, a pair of tubular, sheet-metal members, one adapted to telescopically receive the other, having mutually abutting cut-metal edges on the respective members to prevent relative rotative movement, and automatically interlocking means for preventing a telescopic movement of separation of one member from the other; said means permitting, without manipulation thereof, the telescopic application of the members to each other.

"2. In a device of the class described and in combination, a pair of interlocking, tubular, sheet-metal members, one adapted to telescopically receive the other, having mutually abutting cut-metal edges on the respective members to prevent a telescopic movement of separation of one member from the other when interlocked, and having other interengaging means for preventing a relative rotative movement of the interlocked members.

"3. In a device of the class described and in combination, a pair of tubular sheet-metal members, one adapted to telescopically receive the other, having mutually abutting cut-metal edges on the respective members to prevent relative rotative movement, and mutually abutting cut-metal edges on the respective members to prevent a telescopic movement of separation of one member from the other.

* * * * *

"8. In an incandescent electric lamp socket, the combination with the cap provided with an aperture in its end-wall and having its body slitted and portions thereof adjacent to the slits introverted on the side opposite said end-wall, of a washer of insulating material having a continuous circular periphery secured within said cap between the end-wall thereof and the cut-edges of said introverted portions.

* * * * *

"13. In a device of the class described and in combination, a pair of automatically interlocking tubular sheet-metal members, one adapted to telescopically receive the other, having mutually abutting cut-metal edges on the respective members to prevent relative rotative movement, and mutually abutting cut-metal edges on the respective members to prevent a telescopic movement of separation of one member from the other.

"14. In a device of the class described and in combination, a pair of members comprising a compressible sheet-metal sleeve, and a cap adapted to telescopically receive the slotted end of said sleeve, said sleeve and cap having interengaging portions adapted, when brought into line with each other, to automatically interlock with a snap-action when the sleeve and cap are telescopically applied to each other, one of said members being provided with a pair of longitudinal slits and having the metal between said slits displaced to one side of the body of the member, the other of said members being provided with a cut-away portion adapted to receive said displaced

portion to prevent rotative movement of one member upon the other when said members have been interlocked by telescopic application of one member to the other."

Practically speaking, all these claims in issue, except claim 8, relate to the same means for interlocking a cap member with a sleeve member carrying a base which has been roughly described in connection with patent No. 743,206; but we have an added element, viz.:

"Mutually abutting cut-metal edges on the respective members to prevent relative rotative movement," or "other interengaging means for preventing a relative rotative movement of the interlocking members."

Possibly claim 14 of this patent, in this connection, may be most important. Claim 14 calls, in combination, for a pair of members comprising (1) a compressible sheet-metal sleeve; (2) a cap adapted to telescopically receive the slotted end of said sleeve; (3) said sleeve and cap having interengaging portions adapted, when brought into line with each other, to automatically interlock with a snap-action when the sleeve and cap are telescopically applied to each other; (4) one of said members being provided with a pair of longitudinal slits and having the metal between said slits displaced to one side of the body of the member, that is, pressed outwardly to form a projecting portion with cut-metal edges; (5) the other of said members being provided with a cut-away portion adapted to receive said displaced portion to prevent rotative movement of one member upon the other when said members have been interlocked by telescopic action of one member to the other.

In addition to interlocking means by snap-action, the interlocking means being integral with and forming a part of the two members (cap and sleeve), as found in patent No. 743,206, to maintain telescopic union, we have here interlocking means by snap-action, the interlocking means being integral with and forming a part of the said two members, to absolutely prevent rotation of the one member on the other and their possible disengagement as a result.

It cannot, under the evidence in these cases, be successfully disputed that these structures have largely displaced those of the prior art. They present new and novel features in this art, have proved a commercial success, and are less expensive in construction and also safer. They are easier of assembling. Substantially all the sockets now on the market have the snap-shell construction, and the evidence establishes that at least 85 per cent. of such sockets are made by the Webers and their licensees.

Date of Invention, No. 743,206.

As early as January 1, 1898, Weber had this invention completed and embodied in a practical form. He had also successfully tested and demonstrated it in connection with an inserted lamp. This is demonstrated by testimony, books, and physical exhibits. The time intervening between the completion of the invention and the filing of the application for a patent therefor is satisfactorily accounted for. I do not deem it necessary to go into the evidence on these subjects. There was no abandonment.

It is contended that patent No. 743,206, discloses no invention in view of the prior art, and that Fowler, No. 659,061, of October 2, 1900 (electric lamp), Bray, No. 170,703, of December 7, 1875 (paint can), Oetting, No. 642,825, of February 6, 1900 (sockets for incandescent electric lamps), and Kenny, British patent, No. 10,429, of May 15, 1896 (holder for electric glow lamps), anticipate. Weber in invention antedates (both issue and application dates) the Fowler patent, both of Kenney's United States patents, No. 712,685 and No. 712,686, of November 4, 1902 (sockets for incandescent lamps), the Oetting patent, and the Paiste patent, No. 696,261, of March 25, 1902 (incandescent lamp socket). The Bray patent of December 7, 1875, and the Kenny British patent, of May 15, 1896, were part of the prior art when Weber made his invention. The others referred to were not. Weber's application was filed December 10, 1902. The Fowler patent was issued October 2, 1900, the Bray patent December 7, 1875, the Oetting patent February 6, 1900, and the Kenny British patent May 15, 1896, more than two years prior to December 10, 1902.

The Kenny British patent shows that it was not new to slit sheet metal and form tongues by cutting out portions of the metal. These tongues could be bent outwardly or inwardly. Parts of same could be bent so as to form hollows in which a lamp shade could rest. Says the patent:

"By my improvement I form the holder in one piece, forming the outside of same with an even surface. In order to attach a shade to my improved holder, I stamp or form in one piece in any convenient manner a tube or ring consisting of a number of spring tongues. The parts of the spring tongues which engage with the shade are bent inwards to form a series of hollows in which the shade top rests. The opening in the top of the shade may be easily passed over the said spring tongues, and on forcing the *said tube* over the lamp holder (with smooth surface) the spring tongues are expanded radially (forced outwardly) and grip the holder and shade, firmly securing the latter in position."

I find nothing in this patent that could have suggested the combination of the Weber patents or the mode and manner of forming the interlocking means employed by the inventor.

The Bray patent is for a "paint can," and the "invention relates to a self-sealing can." So far as applicable here, it provides in claim 2 for—

"a can-cover provided with two or more spring-catches, *d'*, formed by cutting two or more openings through the vertical flange of the cover, and bending the upper edges of the stock below said openings inward, as set forth, in combination with a can having two or more recesses, *c c*, formed in its vertical sides, and adapted to engage with said spring-catches to lock the cover on, substantially as described."

This provides, as more particularly described in the specifications, for locking the can-cover to the body of the can. It is done in the following manner: Two or more indentations are made in the can-body near its top, of course, "without cutting," which upset or stretch the metal and form what the claim calls "recesses." There is no cut-metal edge here. Two or more openings, to correspond with the recesses, are cut in the flange of the can-cover and the portion of the can-body immediately below the cut is pushed and bent inwardly.

When the cover is pushed down on the can, the cover telescopically receiving the upper part of the can-body, the inwardly bent portions enter the recesses. As the cover is pushed down, these "catches" or bent-in portions are pushed out until they reach the recesses, when they spring back into position and enter the recesses. This device for holding the can-cover to the can is more frictional than otherwise. We have no cut-metal edge engaging another cut-metal edge for any purpose, and the patentee states that the cover is disengaged from the can by giving the former—

"a partial rotation, so as to remove the catches *d'* from the recesses 2, when the cover may be removed without hindrance."

Such a locking device transferred to the lamp sockets would be wholly ineffectual and inoperative for the uses of Weber. But I am of the opinion that the art of paint-can construction, or can construction in general, is not an art at all analogous to that of incandescent electric lamp socket construction. While an inventor in the latter art is presumed to know what has been done before in that art, he is not required or presumed to be familiar with can construction of any sort, especially those designed for some special use. One of the main and controlling ideas of these Weber patents is that the unlocking of the parts is done, not by a rotation of either of the parts, but by, so to speak, an unbolting process; that is, by pressing the bolt back out of its socket and then pulling the sleeve away from the cap. This process in the Weber patent has been described heretofore and need not be repeated.

[1] When a desired result is sought by those working in the art and skilled therein, but not obtained for lack of efficient means, which such persons are unable to devise, and another comes into the field and by some seemingly simple change and adaptation of an old means or element in a combination of elements to the doing of the work is able to do the desired work, accomplish the desired result, a new result, or a better result, by such new means operating differently from anything known in that art, or an analogous art, and such device proves commercially successful, and largely displaces all others, and is more efficient and just as durable, or even more durable, and is less costly in construction, do we have invention, or do we not? The electrical art is not old. The construction of electrical appliances is in its youth. True, Weber did not startle the electrical world, or make a daring plunge into the unknown; but he did conceive and make an improved and a safer and a less expensive incandescent electric lamp socket, which, on its merits, has gone into general use and substantially monopolized the trade. All this is persuasive evidence of invention. He "added something of value to the sum of human knowledge," he "made the world's work easier, cheaper, and safer," and "a return to the prior art would be a retrogression." The device has achieved undisputed success, and accomplishes a result not obtained before in this important field. The device is new, useful, and in large demand. Therefore the device is patentable, and there was invention. *O'Rourke Eng. Co. v. McMullen* (C. C. A. 2d Circuit) 160 Fed. 933, 88 C. C. A. 115.

September 16, 1899, when Oetting filed his application for his patent, No. 642,825, dated February 6, 1900, Weber had already made his invention. The Oetting patent was not a part of the prior art, but was cited in the Patent Office, having been granted when Weber filed his application for patent No. 743,206. Weber then differentiated Oetting, and it is now claimed that Weber is precluded from having his patent so construed as to cover the device of the Oetting patent. The Oetting patent has a cap and a shell and an inclosed base. What is spoken of in Weber as a "sleeve," generally speaking, is spoken of in Oetting as—

"sheet-metal socket 3 * * * provided with the body portion 5, which is circular in cross-section and has at the open end 5', opposite the globe 2, a series of spring catches 6. These spring catches are formed by cutting lengthwise (perpendicular cuts) into the metal of the body portion 5 of the socket a sufficient distance from the open end 5', as at 8, and then *bending down the end of the metal between the cuts 8 to form the flanges or lips 9 of the catches 6.*"

If desired, these lips of metal can be reinforced or bent outwardly from the face of the body portion of the socket, so as to project therefrom slightly. That is, we have two perpendicular slits in the upper end of the socket, and the metal between the slits is bent over outwardly, so as to form the catches designed to engage the cap. If this bent-over portion is bent outwardly, more force must be applied both in engaging and in disengaging the socket and cap. The flange of the cap which fits over the upper end of the body portion of the socket has openings or slots formed or cut therein to correspond with the catches in the socket, just described. These cuts or slots are at right angles to the cuts in the body portion of the socket. That is, horizontal slots or bolt sockets are cut out of the cap at appropriate points to receive the catches before described. The cap and socket are engaged or assembled as follows: The catches are and must be pressed in by hand and manually held until the cap is fitted over the body portion of the socket, and until the socket is pushed far enough into the cap to engage and hold back the catches. This is a somewhat difficult thing to do. When this has been done, the socket is pushed into the cap, or the cap onto the socket, until the catch on the socket enters the slot in the cap. To disengage or remove the socket from the cap, the operator must push back these catches with his fingers, or some instrument, so as to entirely disengage one or more from the slots—a difficult operation. To show the wide dissimilarity of Oetting from Weber, as well as the vast superiority of Weber over Oetting, I quote from the Oetting specifications:

"The use and operation of my improved socket for incandescent electric lamps is as follows: After the globe 2 has been inserted within the socket 3 of the lamp 1, which contains the device for holding the wires and the other parts for operating the lamp 1, and it is desired to place the cap 4, encircling the wires, onto the body portion 5 of the socket 3, all that is necessary is to insert the open end 5', on the body portion 5 of the socket 3 within the flange 4' of the cap 4 and bring the slots 11 in said flange 4' opposite the spring-catches 6. The operator can then force inward the catches 6 by pressing with his fingers on the bent portions 10 thereof, when the flange 4' on the cap 4 can be slipped or pushed farther onto the body portion 5 of the

socket 3, which will allow the lips 9 on the catches 6 to spring into the slots 11 on the flange 4' of the cap 4 and secure said cap 4 on the said body portion 5 of said socket.

"In case it is desired to remove the cap 4 for any purpose, all that is necessary is for the operator to press with his fingers against the catches 6, which will cause said catches 6 to be forced inwardly and free the lips 9 thereon from the slots 11 in the flange 4' of the cap 4, when the cap 4 can be removed from the body portion 5 of the socket 3 and so allow the catches 6 to spring back to their normal positions. The slots 11 in the flange 4' of the cap 4 are made slightly longer than the lips 9 on the catches 6, in order to give sufficient play for the lips 9 therein, and when the outwardly-bent portions 10 on said catches 6 are used they act to enable the operator to press the catches inward more easily and quickly."

In Weber neither in assembling nor disassembling is any finger, digital, or instrumental manipulation of the spring catches themselves required. The cap and socket of Oetting are *not* "*adapted to automatically* interlock with a snap action when telescopically applied to each other," in the sense of or within the meaning of the Weber patent, where we have no spring catches and no manipulation thereof whatever. The catches, beveled projections, move with the walls of the socket, not independently of them, as in Oetting. The body of the socket is slightly inserted in the cap and the two are pushed together; the flange of the cap riding over the projections or catches (not spring catches) of the socket until the two parts automatically engage with a snap action.

The contention of the defendant on this branch of the case seems to be that, while the Patent Office did not regard either Oetting or Kenny as an anticipation, it did consider that there was no invention in Weber in view of those patents, unless Weber was restricted to the specific forms of interlocking projections disclosed by him. After referring to the amendments made by Weber, the conclusion of defendant seems to be that, limiting Weber to the specific forms described, the defendant does not infringe.

Defendant's Structure.

The defendant has the sleeve and the cap, and the base of insulating material seated in the sleeve, which is compressible on such base; that is, the base is so formed that the sleeve may be easily compressed by thumb or finger pressure to release the lock—disengage the bolt or projection. The defendant has no projection outwardly or inwardly on the sleeve member. It has transferred this feature to the cap. It has transferred the recess or bolt socket to the sleeve. But claim 1 of patent No. 743,206 says:

"Said members having interengaging parts adapted to interlock with a snap action," etc.

And claim 4 says:

"One of said members being provided with a recess and the other having a correspondingly-located transverse slit and the wall on one side thereof displaced to form a projection beveled or inclined toward said recessed member and terminating abruptly at said slit, whereby," etc.

It is immaterial, so far as infringement is concerned, which member is recessed and which has the projection; and it is equally immaterial

whether the wall on one side of the transverse slit is displaced outwardly or inwardly, provided it be inclined or beveled toward the recessed member and terminate abruptly. Defendant's device or socket complete has: (A) A pair of members, comprising (1) a sheet-metal sleeve having a slotted end, and (2) a sheet-metal cap adapted to telescopically receive the slotted end of said sleeve. (B) One of such members in defendant's device, the sleeve, is provided with a recess—two recesses, in fact, as the recess of the same shape as that shown in complainant's device is divided by a bridge of metal (metal not cut out) for a purpose to be described. But this recess or these recesses have the cut-metal edge adapted to engage with the bolt or projection of the other member at its cut-metal edge, or one of its cut-metal edges; there being two bolts or projections, separated by a slit or opening made to receive the said bridge of metal on the other member. (C) This other member has "a correspondingly-located transverse slit—four slits, in fact, two perpendicular and two horizontal, so that a portion of the metal is cut out of the flange of the cap to form the opening which receives the metal bridge spoken of when the members are assembled. (D) The wall of this cap member on each side of this opening, formed by the cut-out portion, is displaced by being pressed inwardly to form a projection on each side of such opening, and does form such projections—projecting inwardly to engage with the openings or recesses in the walls of the sleeve (other member) when telescopically assembled. (E) These projections, as we look at the cap from the outside and from beneath the projections, are actually inclined *toward* said recessed member, the inclosed sleeve, and terminate abruptly at the slit. Looking at these projections from the interior of the cap, each terminates abruptly at the slit, or *slits*, in fact, and each projection, each of them, is beveled or inclined toward said inclosed recessed member. The result is that, when the end of the recessed sleeve is inserted in the open end of the cap and the two members are pushed together, the bridge (described) enters between the two projections on the interior face of the cap, and as cut-metal edge meets cut-metal edge rotation of the one member on the other is impossible.

As the members by a push are forced together, the outer face of the sleeve above the recess *rides up* the slope or beveled face of the projections on the inner face of the cap; the wall of the sleeve being gradually forced inward until the projections suddenly drop into the recesses of the sleeve with a snap-action, the wall of the sleeve suddenly resuming its normal position. The cut-metal edge of the transverse slit in the sleeve now engages the cut-metal edge of the transverse slit in the cap, or rather the edge of the projection which terminates abruptly at such slit. To disengage and remove the cap, the wall of the sleeve near the lock is pushed inwardly and away from the flange of the cap which carries the projections; that is, the recess or socket for the bolts of the lock are pushed away from the bolt, instead of the bolt being withdrawn from the recess or bolt socket. With some ingenuity the maker of the defendant's device has combined at substantially one point of the socket (spoken of as an assembled whole) the transverse and perpendicular cuts or slits and projections of complainant's device.

But everything shown and described and claimed by the complainant is found in defendant's device, and in its combination, operating in substantially the same way to produce the same result. There are changes in form and location, but that is all. The two devices work in obedience to the same laws and on the same principle. It seems to me that defendant's expert substantially admits the presence in defendant's socket of each and every element of complainant's two patents in suit, operating in substantially the same way to produce the same result.

Defendant has not followed or copied Kenny or Oetting, but has followed and copied substantially the two patents in suit. Above I have described the exhibit "Complainant's Exhibit, Defendant's Key Socket." In substance I have also described the exhibit, "Complainant's Exhibit, Defendant's Keyless Socket." The exhibit, "Defendant's Exhibit, Defendant's Keyless Socket," is a somewhat different structure. Here we have cap and sleeve and inclosed base, with a cut-out portion in the sleeve to make it compressible. The recesses of peculiar shape forming part of the interlocking means are in the flange of the cap, instead of in the sleeve. A recess is cut perpendicularly in the base to receive an inwardly turned portion of the wall of the sleeve, cut for the purpose, and the function of this projection is to prevent the turning of the shell about the base. The recesses referred to are cut in the shape of a flaring dish, the cuts on each side of the opening being, for about two-thirds the distance from base to top, at an angle of some 45 degrees and then perpendicular. The base cut or slit is transverse. The top slit, starting at one side, runs for a distance parallel to the base slit, then downward towards and to the center on the same angle with the sloping side, then upward and outward on the same angle as the slope of the other side to the surface line and then out to the side.

Here we have a cut-out opening or aperture in the flange of the cap with no less than nine sides, so to speak; that is, two top slits, one bottom slit, and five side slits. To an extent corresponding slits are made in the walls of the sleeve near its top, and the metal, so far as released by these cuts, is forced outwardly, forming a dish-shaped projection with cut-metal edges, which, when the cap and sleeve are telescopically assembled, coact or engage, cut-metal edge to cut-metal edge, with the recessed cut, and effectually prevent the rotation of the cap on the sleeve, or rotation of the sleeve within the cap, and also the removal of the cap from the sleeve until the wall of the sleeve is pressed inwardly to disengage this projection from the recess. This projection is also beveled or inclined towards said recessed member. Here are the same elements, in the same combination, operating in substantially the same way, and in obedience to the same laws, to produce the same results as are called for by complainant's patents. I cannot escape the suspicion, if not conclusion, that this was a studied attempt to copy, but still evade the *letter* of, the applicable claims of the patents in suit.

Dr. Hering, defendant's expert, seems to contend that the fourth claim of Weber was only allowable and allowed only when the words

"transverse slit and the wall on one side thereof displaced to form a projection" were inserted. He then says, in substance, that:

"Defendant's structure shows a T-shaped opening cut in the wall of the flange of the cap and the walls adjoining this opening formed into, *not one, but two projections*, beveled or inclined towards the recessed member, and each terminating abruptly in two different sides."

Assume this to be so; has defendant escaped infringement? He has used the spirit of complainant's invention; its principle and its elements all operating in the same way to produce the same result. Weber is not limited in the number of his projections, and if the projection is formed by making a transverse slit and displacing the metal of the wall on one side thereof, such projection being beveled or inclined towards the recessed member and terminating abruptly at the slit, can defendant escape infringement by meeting the transverse slit with a perpendicular slit, and displacing the wall on one side of each slit at the angle thus formed, so as to form a projection; such projection being beveled or inclined toward the recessed member *in two directions*, and then forming another similar projection in the other angle of the T-shaped cut or slits? I think not. It may be an improvement, and it may not be; but infringement is not avoided by mere change of form or location, or by merely adding something, without changing the mode of operation or result.

The functions of the slits, displacements, projections, and recesses are the same as in complainant's claims. The head of the T in "Defendant's Keyless Socket" is a transverse slit, and the wall on the lower side thereof is displaced inwardly to form a projection, which is beveled or inclined towards the recessed member, and it terminates abruptly at the slit. By cutting out a portion of the metal below the slit forming the head of the T and forming a stem (open or cut-out stem) the inward projection is divided into two. The purpose of this is obvious, on looking at the quadrant-shaped openings or recesses in the sleeve, made quadrant-shaped instead of semilunar by leaving the metal bridge or rib, and which rib engages the cut-metal edges formed by dividing the projection. By dividing the projection, this bridge is given a function. The cut-out portion, which divides the projection, is the equivalent of a similar cut-out portion found in complainant's exhibit, "Complainant's Socket No. 2," to the left of the semilunar opening, and the bridge or rib is the equivalent of the slitted and displaced portion just below in the wall of the sleeve. The openings in the sleeve wall have no added or new function, and the projections perform the old function. The cut-out portion of the projection forms an opening, and the bridge across the opening or recess in the sleeve has a function, viz.: It engages with the opening in the flange of the cap and which divides the elevation.

If defendant intends to make a point on the *mere form* of complainant's device, including slits and recesses and elevations, it is sufficient to say that the allowed claims of the patents in suit are not confined to any particular form, except in the particulars mentioned, and so far as limited the defendant has substantially copied.

The claims calling for the introverted parts of the wall of the sleeve

to engaged with the base are attacked, as is the claim for means to hold the washer of insulating material in the cap member, being claim 8 of patent No. 916,812. When we consider the importance of this washer of insulating material, and its position in the cap, and the necessity for noncumbersome and efficient means for holding it in place, combined with ease and speed in placing it in position, I am of the opinion that claim 8 discloses invention and is valid. The defendant has copied this feature exactly. This and infringement by others and commercial success and the fact that it had not been done before in this manner indicate more than the skill of the mechanic. While an introverted tongue of metal cut from the walls of the inclosing case and engaging with a recess in the wall of the base of insulating material may not disclose a high order of invention, still I think, in view of the prior art, that these claims are valid. The Fowler patent, No. 659,061, dated October 2, 1900, and applied for October 26, 1898, shows "the base of the (a) lamp consisting of a cylindrical or other shaped shell and having located therein the slots or openings *F*" (cut-out portions), two in number and located opposite each other; also a collar with tongues cut therein at such points that they will be exactly opposite or align with the slots or openings when the collar carrying the lamp globe is slipped within the shell. The collar is then fastened to the shell by bending over the tongues into the slots. These tongues may be made long enough so that they may be bent a second time and "clinched upon the base." The patent says:

"The base *E* being slipped upon the collar *D* so that the tongues *G* will align with the openings *F*, said tongues being then deflected by means of a suitable implement *J*, so that," etc.

The Paiste patent, No. 696,261, shows the cap and sleeve held together by means of screws, a concededly insecure fastening, and these screws project into slots in the insulating lining or bushing, and the old bayonet joint. These screws enter far enough to enter recesses in the porcelain body, so as to maintain the whole in a fixed position; that is, prevent rotation.

I mention these things to show that they have been considered with other devices not mentioned, and also to show the cumbersome, expensive, insecure, and unhandy condition of this art prior to the Weber invention. I do not think it inapt to say that Weber revolutionized this art. All these things are used in combination, and to complete and make useful and effective and efficient one whole—an incandescent electric lamp socket. All these devices coact to one end and purpose—the production of electric light. They are assembled and used as one whole to produce a given result, and I see no merit in the contention that we have an aggregation and not a combination. The insulating base, the sleeve, the cap, and means mentioned for effectively permitting them to be assembled and held together when in actual use and disassembled for various purposes, all go together as one device, and must be considered as one whole.

Much was said on the argument and considerable discussion is found in the proofs as to the construction and meaning of the words "supported within the sleeve" and "to assist in supporting the same within

the sleeve," found in the specifications of patent No. 743,206. I do not find the words or their equivalent in the claims. The patent says:

"If desired, the loosely-fitting insulating base 3 may be supported within the sleeve by means of one or more tongues 15, formed by slitting and bending inwardly portions of the sleeve-wall adapted to engage said base, which may be provided with a groove or recess 16, adapted to receive the several tongues.

"In Fig. 3 I have shown a keyless socket, the sleeve 17 being provided with no slot for a key, but with a narrow slot 18, adapted to render the inner end of the sleeve compressible. The cap 19 is provided with inward projections 20, inclined inwardly toward and terminating abruptly at their inner ends, whereat the shell is slitted, and adapted to enter apertures 21, formed in the sleeve by cutting and introverting portions thereof to form tongues 22 which enter grooves or recesses 23 in the inclosed loosely-fitting insulating base 24 to assist in supporting the same within the sleeve and to prevent rotative movement between said sleeve and base when a lamp is being inserted in or removed from the screw-socket 25, fixedly connected to said base."

I can see but one meaning to be given the words quoted, and that is that, as the insulating base is "loosely inclosed" in said sleeve, it would be important to prevent the rotation of the sleeve about the insulating base, and also the tipping and rattling of such base within the casing or sleeve and cap. Provide the base with a groove, slit and bend inwardly portions of the sleeve wall into engagement with the groove, and you have effectually accomplished both objects. I think the effort to give these words any other meaning far-fetched and imaginative. Owing to the shape of the sleeve, its construction, no other support is or can be required. It cannot drop out unless the cap is removed, and when this is done it is for the purpose of getting at and removing the base. You may have a support for a barn by building a wall under it or placing posts on the earth underneath the sills. You may support a tree by a wire attached to it and some neighboring object. You support transverse beams in a structure by walls or posts under them, and you support uprights by resting them on the sills, and also by means of braces reaching from sill to upright at a distance above, or by nailing boards across at right angles, and in other ways. Here the main purpose of these introverted tongues was to prevent rotation, and then, incidentally and perhaps necessarily, to secure good results, prevent the tipping and rattling of the insulating base within the inclosing metal case, sleeve, and cap.

In relation to patent No. 916,812, the defendant contends that there is no coercion whatever between the means described for preventing separation of cap from sleeve and those for preventing relative rotative movement of cap and sleeve; that each is a distinct and separate device. It also contends that, while the application for this patent did recognize that the device which prevents rotation would prevent relative rotation of cap and sleeve, the *intended* function was the guiding function; that is, that the slot in the cap, coacting with the outwardly bent portion of the sleeve, would serve as a sure guide for the entrance of the projection with cut-metal edge into the semilunar opening in the cap. It does serve as such a guide, and hence for the effective working of the device as a whole the two openings in the cap and the two projections in the sleeve coact to produce a single

result. But in point of fact it does more than act as a guide, for it effectually prevents relative rotation and possible disengagement of the other interlocking means, and consequent separation of cap from sleeve, and hence all these slits, openings, and projections act together, in unison and harmony, to securely and effectually interlock cap and sleeve. Without the guide device spoken of there is a quite sure interlocking against both telescopic movement of separation and relative rotary movement; but both together make the device more safe and secure—more perfect and useful. And when Weber saw what these added slits, etc., would do, he was entitled to claim all the benefits of his invention, all that it would and does accomplish. No one can defend against infringement on the ground the inventor did not at first comprehend, understand, and claim all that his invention would accomplish, provided he does claim it and secure his patent within the time limited by statute. Defendant concedes that in writing his claims the patentees were within their rights, notwithstanding the long delay in the Patent Office.

[2] On careful study of the patents and testimony, with many physical exhibits, and the prior art, and a careful reading and consideration of the able and voluminous briefs submitted, I arrive at the conclusion that the claims of the patents in issue are valid and infringed, and there will be decrees accordingly, with costs.

As to the motion to consolidate, it seems to me little, if anything, will be gained by such action. The testimony was taken in both cases and has been printed. On appeal, but little can be omitted. The Circuit Court of Appeals will, of course, hear both cases at the same time, if an appeal is taken, and regulate costs as justice demands.

CONLEY v. THOMAS.

(District Court, W. D. Pennsylvania. March 7, 1913.)

No. 130, in Equity.

1. PATENTS (§ 327*)—SUIT FOR INFRINGEMENT—PREVIOUS ADJUDICATION OF VALIDITY.

Where a patent has been sustained by an appellate court, its validity must be assumed by a subordinate court in a subsequent suit, unless the record contains new evidence which presumably would have produced a different decision if it had been before the court in the prior suit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620-625; Dec. Dig. § 327.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—GUIDE FOR PUNCHING PRESSES.

The Conley & Conley patent, No. 701,544, for a guide for punching presses, *held* not anticipated and valid, but not infringed by the machine of the Thomas patent, No. 908,818.

In Equity. Suit by Thomas Conley against George P. Thomas, trading as the Standard Bridge Tool Company. On final hearing. Decree for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Connolly Bros., of Washington, D. C., for complainant.
Christy & Christy, of Pittsburgh, Pa., for defendant.

YOUNG, District Judge. The complainant sets up in his bill that the patent No. 701,544, granted to Thomas and John R. Conley, dated June 3, 1902, and duly assigned to complainant, has been infringed by defendant's device made in conformity with patent No. 908,818, granted to George P. Thomas and dated January 5, 1909. The defenses are invalidity of the Conley patent and noninfringement.

[1] The Conley patent was before the court in the case of *Conley v. King Bridge Co.* (C. C.) 175 Fed. 79, and upon appeal from that decision was in the United States Circuit Court of Appeals for the Third Circuit, 187 Fed. 137, 109 C. C. A. 412, where the patent was sustained, and we must therefore assume that the patent in suit was a valid patent, unless there appears in the evidence other patents or devices in public use than those considered by the court in the *King Bridge Case* and which, if brought to the attention of the court, it is presumed would have resulted in a different decision. The rule which governs us in considering this case as to the validity of the patent is well laid down in *Badische Anilin & Soda Fabrik v. A. Klipstein & Co.* (C. C.) 125 Fed. 543, where the learned court says:

"When a patent has once been sustained by an appellate court, a subordinate court dealing with the same patent subsequently inquires, first, whether the second record contains anything not before the appellate court, and, if it finds something new, inquires next whether the new matter is of such a character that it may be fairly supposed that the appellate court would have reached a different conclusion had it been advised of its existence. The authority of its decision is not limited to the facts and defenses discussed in its opinion, but extend to all that were before it in the record."

[2] Not only are we bound by the decision in the *King Bridge Case*, but a careful consideration of the opinion of Judge Cross in the District Court and of Judge Buffington in the Court of Appeals leads us irresistibly to one conclusion, and that is that the Conley patent is a valid patent for the device set out in its claims, and that no patent and no device testified to in that case contains the original and novel features of that patent. The novel features of that patent were, as stated in claims 1, 3, and 4, which by the admission of counsel are the only claims involved in this suit, as follows:

"1. The combination with a punch or drill press, of a carriage, a reciprocating rod mounted on said carriage, and a series of separately adjustable stops adapted to contact with said rod and stop the carriage at predetermined points."

"3. The combination with a punch or drill press, of a carriage, means for holding work in position on said carriage, a series of separately adjustable stops, for stopping said carriage at predetermined points, and a manually-operable detent carried on the carriage and adapted to engage with said stops. * * *

"4. The combination with a press and a movable carriage of a guide for stopping said carriage consisting of a rail or rod provided with adjustable stops and adapted to stop the movement of the carriage at predetermined intervals."

The novel features of these claims can perhaps be better understood by considering the testimony of F. L. O. Wadsworth, where on pages 27, 29, and 31 of complainant's record he analyzes them as follows:

"1. A combination with (1) a punch or drill press of (2) a carriage, (3) a reciprocating rod mounted on said carriage and (4) a series of separately adjustable stops adapted to contact with said rod and stop the carriage at predetermined points."

"3. The combination with (1) a punch or drill press of (2) a carriage, (3) means for holding work in position on said carriage, (4) a series of separately adjustable stops for stopping said carriage at predetermined points, and (5) a manually operable detent carried on the carriage and adapted to engage with said stops.

"4. The combination with (1) a press and (2) a movable carriage of (3) a guide for stopping said carriage consisting of a rail or rod provided with adjustable stops and adapted to stop the movement of the carriage at predetermined intervals."

It will be observed, as said by Prof. Wadsworth (C. R. 29):

"In this claim (referring to claim 3) the parts set forth as elements (1) (2) are the same as those referred to in the corresponding elements of claim 1. The third element comprises the parts which are indicated by the reference character *E* in the drawings and description of the Conley patent, these being the parts which grip or clamp one end of the piece of work and hold it in position in or on the carriage so that it will be drawn along with said carriage and stopped when the carriage stops. Element (4) of claim 3 comprises the same parts as are referred to in the correspondingly numbered element of claim 1, to wit, the series of removable and separately adjustable stop blocks *G G*, etc., which are set in advance at predetermined intervals apart corresponding to the longitudinal intervals between the holes to be punched in the piece of work which is held on the carriage by the means specified in element (2) of this claim. Element (5) of the claim now under consideration is the part which in Conley's illustrative embodiment of his invention is indicated by the reference character *I*, this part being 'manually operable' through the medium of the handle *J*, which draws the finger or stop bar *I* out of contact with the stop block for the purpose of allowing the carriage and the work carried thereby to be moved forward the proper interval for the punching of the succeeding hole."

Referring to claim 4 (C. R. 31) Prof. Wadsworth says:

"In this claim elements (1) and (2) are the same as the correspondingly numbered elements of the preceding claim. The third element comprises the parts which in Conley's illustrative embodiment of his invention are indicated by the reference characters *F* and *G G*, etc. It will be observed that this claim does not specify or describe any particular mechanism, by the co-operation of which with the blocks *G*, the carriage is stopped at the predetermined intervals required for the production or reproduction of the desired series of punch holes in the work."

It will be seen that the vital elements of these claims are a series of separately adjustable stops for stopping the carriage at predetermined points and a manually operable detent carried on the carriage and adapted to engage with the stops.

Let us now examine the new matter in order to determine whether or not, if it had been before the court, it is supposed that its decision would have been different. The following patents, publications, and machines alleged to have been in prior use have been set up by the defendant in his answer and amended answer, viz.: Defend-

ant's Exhibit No. 4, Phoenix Column Segment Machine (D. R. 417); defendant's photograph of Carnahan's machine, Exhibit No. 6 (D. R. 429-431); Defendant's Exhibit No. 8, detail Carnahan machine (D. R. 421); the Greenlee catalogue, 1892, Defendant's Exhibit No. 11; Greenlee catalogue, 1895, Defendant's Exhibit No. 12; the Long & Allstatter catalogue, Defendant's Exhibit No. 29—and the following letters patent; Carnahan's patent, No. 651,233, of 1900 (D. R. 421), Defendant's Exhibit No. 9; Greenlee patent, No. 283,341, of 1883, Defendant's Exhibit No. 13 (D. R. 310); Greenlee patent, No. 418,978, of 1890, Defendant's Exhibit No. 14 (D. R. 324); Bill patent, No. 39,209, of 1863, Defendant's Exhibit No. 23 (D. R. 264); Carroll et al. patent, No. 164,673, of 1875, Defendant's Exhibit No. 24 (D. R. 268); Harris patent, No. 494,140, of 1893, Defendant's Exhibit No. 26 (D. R. 348); Morgan patent, No. 173,132, of 1876, Defendant's Exhibit No. 30 (D. R. 280); Morgan patent, No. 213,770, of 1879, Defendant's Exhibit No. 31 (D. R. 284); Seller's patent, No. 236,096, of 1880, Defendant's Exhibit No. 32 (D. R. 298); Crawford patent, No. 584,673, of 1897, Defendant's Exhibit No. 34 (D. R. 392); Van Wageman patent, No. 484,832, of 1892, Defendant's Exhibit No. 37 (D. R. 336); Henderson patent, No. 524,203, of 1894, Defendant's Exhibit No. 38 (D. R. 364).

The Van Wageman patent, No. 484,832, and the Henderson patent, No. 524,203, must be excluded as new matter, as they are both referred to in the file wrapper of the Conley application, and must be presumed to have been considered by the court, under the decision we have referred to, as having appeared in the record on the former consideration of the case.

In a consideration of this new matter we are to be controlled by and make our examination of them in the light of the conclusion of the Court of Appeals, as stated in its opinion in *King Bridge Case*, *supra*, regarding the patent in suit, where it is said on page 139 of 187 Fed., page 414 of 109 C. C. A.:

"By means of this device the precise location of the hole is figured out in advance, the stops set to make the hole center accordingly, and, when the machine is thus set, an unskilled attendant can punch with great rapidity, in any number of successive beams, holes uniformly located. Moreover, the range of adjustability is such that either uniform or varying spaces can be left between the holes. This device was new in the metal punching art."

And again on page 140 of 187 Fed., page 415 of 109 C. C. A.:

"Nor is there anything in the file wrapper proceedings in Conley's patent to restrict protection of his device to the full extent of its disclosure, for it will be observed that, while the Morgan patent cited was rightly held to preclude Conley from obtaining the five broad claims which would have covered all punching machines with stops, yet it will also be observed that the original sixth claim, which had the limitation of adjustable stops and predetermined intervals, was at once granted and retained through all the proceedings in the Patent Office, and is claim 4 below."

Complainant's expert (C. R. 30) has thus briefly described the patent:

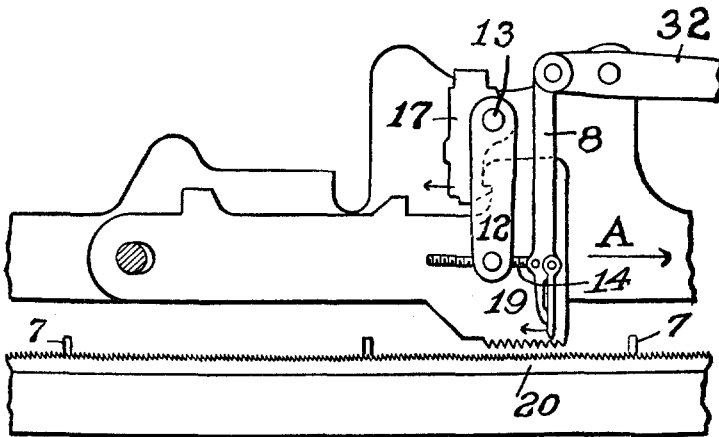
"The prime object of the combination is to provide a simple, easily controlled, and accurately operating mechanism, whereby, as already explained,

a series of holes can be punched in a piece of work at regular or irregular intervals determined in advance by the setting or adjustment of a series of blocks or elements, and this series of holes reproduced with great accuracy and speed in any number of pieces of work."

A careful examination and consideration of these machines, publications, and patents shows that no one of them contains the original and novel feature of separately adjustable stops, which may be adjusted with the micrometric accuracy of which the Conley device is susceptible. Much less can they be said to have solved the problem which Conley solved by his device, viewed in the light of the decision of the Court of Appeals, as we have noted above. We therefore conclude, as was said in the King Bridge Case:

"The Conley patent, No. 701,544, is a valid patent to the full extent of its disclosure, as set out in the four claims."

Let us now see if the defendant's machine infringes the patent sued on. We have seen that the real feature of the patent is the combination with a press and movable carriage of a guide for stopping said carriage consisting of a rail or rod provided with adjustable stops and adapted to stop the movement of the carriage at predetermined intervals. The defendant's machine is admitted to be in conformity with his patent No. 908,818, as stipulated by the parties (C. R. 33). The patent is found in complainant's record, page 258, and a simplified drawing and description thereof is found in defendant's brief, page 20, which we may adopt in examining the infringing device:



"In this drawing (Fig. 6), 8 is the trigger, 14 is a connecting rod between trigger 8 and a crank 12, crank 12 is rigid on the rotatable shaft 13, and shaft 13 (as has already been explained) carries latch 17. 32 is a hand-operated releasing lever.

"As carriage A advances, trigger 8 engages a pin 7 and swings; as trigger 8 swings, shaft 13 is turned, catch 17 swung, and detent 19 released to fall and engage toothed plate 20. After such engagement has taken place and the carriage has stopped and after the ensuing punching operation has been performed, hand-lever 32 is swung. On the swinging of lever 32 the follow-

ing movements follow: First, (through connections not shown on the diagram) detents 19 are raised again to normal inoperative position, and, second, trip or trigger 8, now raised above stop 7, swings forward, and with it the connected parts 12 and 17 turn on their shaft 13 to bring latch 17 again to detent-locking position; lever 32 is then released, and trip or trigger descends again to a position where on further advance of the carriage it will engage the next pin 7."

The machine is a movable carriage provided with means for gripping the material to be punched, and provided with a templet fastened along the side of the toothed plate 20 in which templet are placed pins at predetermined intervals, so that as the carriage moves the finger 8 will strike the pin 7 and release the latch 17, which in turn, will release the detent 19, and cause the detent to engage with the toothed plate 20, thus arresting the carriage. The pins 7 are set in the templet 6 (Fig. I. C. R. 258), but the pins are not separately adjustable. The templet is prepared by fastening in it the pins at the intervals required for the work of a certain design, and, if a new design of work is required, then a new templet must be prepared either by withdrawing the pins and replacing them or by substituting another templet with a new arrangement of pins, and of course this rearrangement, even if it be called a separate adjustment, is incapable of the micrometric or microscopic adjustment which is so peculiarly advantageous in the Conley device. There is not thus provided a rail or rod or guide with separately adjustable stops. The Thomas patent, in respect of the templet and pins, resembles the stopping device of the spacing tables of the Phoenix Iron Company, Defendant's Exhibit No. 3 (D. R. 415), of the King's Bridge Company, Defendant's Exhibit No. 10 (D. R. 423), and of the Union Bridge Company, Defendant's Exhibit No. 5 (D. R. 419), considered by Judge Cross in the lower court, but not referred to by the Court of Appeals, and the Phoenix Column Segment Machine, Defendant's Exhibit No. 4 (D. R. 417), now introduced as new matter, more than it does the separately adjustable stopping device of the Conley patent, for the Thomas templet and pins are more in conformity with the spacing tables referred to than with the Conley device, and, if the Thomas templet and pins are regarded as an infringement of the Conley patent, then clearly it follows logically that that is held to be an infringement which would have anticipated the Conley patent; but it has been held by the lower court and because not referred to it must be assumed that the appellate court in making its decision considered and concluded that the spacing tables of the Phoenix Iron Company, King Bridge Company, and Union Bridge Company did not anticipate the Conley device. Therefore the Thomas device cannot be regarded as an infringement of the Conley patent. The pins are not stops in the sense in which those appliances were used in the Conley patent. The Conley patent says of these stops in the first claim, "and a series of separately adjustable stops adapted to contact with said rod and stop the carriage at predetermined points"; in claims 3, "a series of separately adjustable stops for stopping said carriage at predetermined points"; and in claim 4, "a rail or rod provided with adjustable stops and adapted to stop the movement of the carriage at predetermined intervals."

We thus see that in the Conley patent the stops are designed and adapted for the purpose by the manually operated detent coming in contact with them of physically arresting the carriage. But it is said the contact of the finger 8 with the pin 7 in the templet 6 does stop the carriage, because the striking of the finger 8 against the pin 7 releases the latch 17, and thus causes the detent 19 to engage with the toothed plate 20, and thus stop the carriage. The difficulty here is that the toothed plate 20 is only capable of a certain number of stops, and, if its indentations are to be regarded as the stops, then they are not adjustable to any desired space, as was said of the Roberts' patent by the Court of Appeals in the King Bridge Case, "for Roberts' stops could only be used in multiples of the length of the device's teeth, while Conley's are adjustable to any desired spacing." While there are many points of resemblance between the Conley and Thomas patents, as shown by the voluminous testimony of both complainant's and defendant's experts, and many points of differences as shown by the same testimony, the resemblance arises, we think, from the fact that both patents were designed as improvements over the prior art, and therefore not only resemble machines in the prior art, but each other. We do not find in the Thomas machine any infringement of the Conley patent, viewing it as "a combination with a press and a movable carriage consisting of a rail or rod provided with adjustable stops and adapted to stop the movement of the carriage at predetermined intervals."

For the reason, then, that the device of the defendant made in conformity with the Thomas patent No. 908,818 does not infringe the Conley patent No. 701,544, the bill will be dismissed, with costs.

PATENTS SELLING & EXPORTING CO., AKTIESELSKAB, v. DUNN.
(District Court, S. D. New York. January 20, 1913. Supplemental Opinion,
February 14, 1913.)

No. 6—240.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DUST-EXTRACTING MACHINE.

The Schiodt patent, No. 854,670, for a dust-extracting machine, held not anticipated, valid, and infringed as to claims 1, 2, 3, 5, and 10.

2. PATENTS (§ 72*)—ANTICIPATION—STRUCTURES IN DIFFERENT ART.

A chimney for extracting gases from blast furnaces, although it also incidentally extracts dust, is not a dust-extracting machine in any true sense, so as to be an anticipation of a patent for an apparatus for extracting dust from carpets, furniture, etc.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 86-91; Dec. Dig. § 72.*]

In Equity. Suit by the Patents Selling & Exporting Company, Aktieselskab, against Elias B. Dunn, doing business under the name of Dunn's Improved Vacuum Systems, for infringement of letters patent No. 854,670, for an apparatus for extraction of dust from carpets and other articles, granted to F. V. Schiodt on May 21, 1907. On final hearing. Decree for complainant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Timothy D. Merwin, of New York City, for complainant.
Edwin J. Prindle, of New York City, for defendant.

HAND, District Judge. The only issue in the case is the validity of the patent and that depends upon a very limited art. Kenney's two patents, 807,283 and 847,948, are much the nearest references, because they are in the art of dust extracting. Mr. Prindle very correctly states the exact novelty of Schiodt when he says that it—

"consisted in the idea of running the water and dust through the pump with the air, instead of separating them from the air before allowing the air to go through the pump."

I do not understand that he asserts that this is not enough alone to support a patent, and if he did I should disagree with him about it. Whatever the changes necessary to make over Kenney, 847,948, into Schiodt, they would altogether change the theory on which the machine operated. No one before Schiodt had kept the dust-laden water continually churned up by the pump, and had sent it through the pump valves and out of the air escape along with the air. Kenney had to effect a substantially complete removal of dust from the air if his machine was to work, while in Schiodt's machine the water washed the pump of itself, even if the air had not lost to the water all its dust. Again, in Schiodt, the washing of the machine was effected as the work proceeded, and it need not be stopped to be cleansed. In Kenney, to open the valve, 41, would break the vacuum and make the machine inoperable. It could be run only till the water in 32 became too foul for further use. In Schiodt, one has only to set the cock, X, in Fig. 4 so that the flow will be enough for the dustiest places to be cleaned and the machine is operable continuously.

[1] However, Kenney is enough to dispose of claim 9, and also, I think, of claim 11, though that is more doubtful. There remain claims 1, 2, 3, 5, and 10. Of the anticipations, De La Verne, 233,736, although somewhat strikingly similar in structure, is too remote in purpose to be serviceable. Zellweger, 679,587, and Thwaite, 731,395, is each an apparatus for extracting gases and dust from blast furnaces; neither is a "dust-extracting" apparatus in the sense that the patent in suit uses that term, or in the sense that Kenney's machine is such. It is quite true to say that if you go to these patents, especially to Thwaite, you would get suggestions from which you could probably make Schiodt's machine, though the water supply in each appears to be a good deal smaller than Schiodt's required; but to do so you must already have conceived the idea that in a dust-extracting machine it was advisable to carry the liquid and dust through the pump or other extracting means along with the air.

[2] However, a chimney for gases is not a dust-extracting machine in any true sense at all, even when the gas contains dust. Schiodt was concerned with taking dust out of carpets and furniture and the like, by means of as high a vacuum as he could get through a very constricted inlet. The gas—air—was only the medium and means by which the dust was to be removed. Is it not really a pervers-

sion of language to call a chimney a dust-extracting machine, because the dust will continue to come up with the gas and so cause trouble? This is a dust-extracting art of quite dissociated and independent purposes and development, practically as remote from chimney construction as it is from hydraulic presses. The usual way in such cases is for every one to improve in detail on what has been done up to that time, and if he adopts a new method and strikes into a new idea, it is irrelevant that in arts not associated a similar problem has been dealt with in a similar way. Once Schiodt thought of carrying everything through the pump, it certainly was not difficult to work out the details, even without Thwaite, and his invention, assuming he made any invention at all, consisted in thinking of that new way. These two patents are relevant only in so far as they would have suggested that way of dealing with the dust and water in such a machine, and for that I think they were too remote.

After all, the required standard of originality is only that of the ordinary skilled artisan. I should be much more willing to say that a good deal of mechanical ingenuity which followed along established lines was within the power of such a one, than to say that he would stop and look to other such arts to see what they suggested. Chimneys do operate by partial vacuum, in a scientific sense; but whoever thinks of them in that way? Thwaite's machine was no doubt more than that; it did pull the air out of the chimney, but the purpose was not to get the dust out of the fire; the dust was an unavoidable incident to the fire, and if any one could have devised a way of keeping it where it was, Thwaite's patent and Zellweger's would have been unnecessary. Therefore it seems to me that it is imputing a good deal more of originality than he has to the everyday artisan, when he is confronted with a dust extractor as Kenney left it, to suppose that a knowledge of the gas chimney art would have been enough for him. I think he would have naturally thought that too far afield from what he had to do with.

As for the question of a "relatively large quantity of liquid," it falls out of the case, since infringement has now been conceded. It has no effect upon validity. I should myself not have regarded Dean, 796,415, as an anticipation, and it is not now urged as one.

The usual decree may pass in claims 1, 2, 3, 5, and 10. No costs.

Supplemental Opinion.

It now appears that the defendant does not concede infringement in this case, so that the matter must be reheard. The defendant's position is that the words, "a relatively large quantity of liquid sufficient to slime the dust, but insufficient to break the vacuum," must be interpreted in view of Dean's patent, 796,415. Those words, he says, mean the proportion of water to the capacity of the pump cylinder, and that proportion in the case of pumps like Dean is about 36 per cent. of the capacity of the cylinder. So, he says, since the patentee made Dean his standard, no pump can infringe in which the quantity of water in the cylinder is less than say 40 per cent. of the volume of the cylinder. In his case the quantity is about one-tenth of 1 per cent.

Now, in the first place, I should entirely refuse to go into this matter at all, because the words of the claims are perfectly plain in this respect as they stand, whatever the examiner thought about Dean. They mean that enough water shall be sure to get into the cylinder to keep the resulting mixture so liqueous as to pass through the pump without danger of clogging the valves; the capacity of the chamber has nothing whatever to do with the matter. Viscosity was obviously dangerous; it must be avoided. The water inlet must be so large as to admit enough water to avoid this viscosity. This may be a very obvious qualification, and it may be somewhat ambiguous, too; but its ambiguity resides in the fact that the proportion between dust and water will vary. Those are the only two factors which control, and to import into the matter a third factor, the size of the chamber, is wholly without any warrant in the words themselves.

Besides, I do not think that the examiner had any idea that the size of the chamber had anything to do with the matter, though, as I have said, the words are clear, whether he did, or whether he did not. I think the defendant has been misled by too great subtlety. The examiner cited Dean, because he thought it could be used as a dust extractor as it stood. The applicant answered that, although the amount of water injected into the chamber is not shown, it would not be enough to slime the dust which came in with it. He said that his own water inlet was enough to do this, and he got through his patent, apparently on that distinction. So the parties were talking about the liqueousness of the mixture which depends upon the proportion of liquid to dust, and not in the least upon the proportion of the cylinder filled by the mixture. That depends upon the length and rapidity of the pump stroke to the inflow of the mixture, unless there be a separate entrance chamber as in Dean's figures, in which case the size of that also enters.

But the proportion of the cylinder occupied has absolutely nothing to do with what they were talking about, and merely beclouds the issue here. The applicant satisfied the examiner that in the usual condensers of Dean's type the spray was not enough to make a liqueous mixture which would pass through the pump. That was very important to the operation of the pump; but it was not of the least consequence that the mixture should occupy at least a given proportion. It is true that it was of consequence that the mixture should occupy not more than a given proportion, else it would break the vacuum; and the only plausible reason I can see for interpreting this clause as referring to the capacity of the pump is its association with the second clause, "insufficient to break the vacuum," which certainly does refer to capacity. However, while this association might help where the matter was not clear, the form of words used and the obvious reason for their use leaves no doubt of their meaning. It seems to me to be unreasonable to construe them so as to effect a result which could have no possible relation to the operation of the machine and would render infringement so easy.

I am of opinion that infringement was proved.

TERRY STEAM TURBINE CO. v. B. F. STURTEVANT CO.

(District Court, D. Massachusetts. March 15, 1913.)

No. 319.

PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—"COUNTERCLAIM"—CONSTRUCTION OF RULE.

The provision of rule 30 of the new rules in equity (198 Fed. xxvi, 115 C. C. A. xxvi) that an answer "may without cross-bill set out any * * * counterclaim against the plaintiff which might be the subject of an independent suit in equity against him," applies only to a counterclaim proper, arising out of the transaction which is the subject-matter of the suit, as described in the words immediately preceding, and a defendant in an infringement suit cannot set up as a counterclaim in his answer a cause of action for infringement by plaintiff of a different patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*

For other definitions, see Words and Phrases, vol. 2, pp. 1645-1650; vol. 8, pp. 7620, 7621.]

In Equity. Suit by the Terry Steam Turbine Company against the B. F. Sturtevant Company. On motion by defendant for leave to file supplemental answer. Denied.

John P. Bartlett and Bartlett, Brownell & Mitchell, all of New York City, for complainant.

Benjamin Phillips and Horace Van Everen, both of Boston, Mass., for defendant.

DODGE, Circuit Judge. The plaintiff's bill charges the defendant with infringement of United States patents 741,385 and 793,857, to Edward C. Terry, both for improvements in steam turbines. It asks for an injunction and an account. It was filed March 4, 1912. The case was at issue in June, 1912. The plaintiff's testimony has been taken, the defendant's is not yet completed. There have been no orders of court limiting the time for taking testimony on either side.

The new equity rules of the Supreme Court having gone into effect, the defendant now asks leave to file a supplemental answer, which is to charge the plaintiff with infringing United States patent 748,678, to Herman Wolke, for an improvement in turbines, and which is to ask for an injunction against the plaintiff and an account. The defendant contends that this is "a counterclaim against the plaintiff which might be the subject of an independent suit in equity" against it, and which may therefore be set out in its answer, to be heard and determined as a cross-suit under rule 30 of the new rules. 198 Fed. xxvi, 115 C. C. A. xxvi.

In its original answer, filed June 3, 1912, the defendant set up the Wolke patent as an anticipation of the Terry patents whereon the plaintiff sued, and alleged also, under Rev. Stats. 4920 (U. S. Comp. St. 1901, p. 3394), that Terry had surreptitiously or unjustly obtained his patents for that which was in fact invented by Wolke, who was using reasonable diligence in adapting and perfecting the same. No

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

other connection appears between the subject-matter of the plaintiff's suit and that which the defendant seeks to institute against the plaintiff.

If the defendant has, under these circumstances, what may be properly described as a counterclaim against the plaintiff, which he might have set up in his original answer under rule 30, the court has discretionary power, under rule 34 of the new rules (198 Fed. xxviii, 115 C. C. A. xxviii), to let him set it up in a supplemental answer. Either party may be allowed under rule 34 thus to allege material facts occurring after his former pleadings, and the defendant's proposed supplemental answer alleges that it has acquired the Wolke patent since its original answer was filed. The first question is, however, whether or not the proposed supplemental answer states a "counterclaim" within the meaning of rule 30.

The material part of this rule is as follows:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims."

The defendant does not and could not say that its claim for infringement of the Wolke patent is a "set-off" in equity against the plaintiff's claim for infringement of the Terry patents. While set-offs in equity need not necessarily arise out of the same transaction, they are allowed only upon mutual contract debts between the parties, in the same right, and, generally speaking, the demands must be liquidated. When unliquidated demands are allowed to be set off, it is for special equitable reasons, as the insolvency or nonresidence of the opposing claimant. See *North Chicago, etc., Co. v. St. Louis, etc., Co.*, 152 U. S. 596, 615-617, 14 Sup. Ct. 710, 38 L. Ed. 565. No authority is found for the proposition that a claim arising from a tort may be an equitable set-off. Both claims here in question arise from torts; neither is primarily a claim for damages, still less for liquidated damages, but each is primarily for an injunction; an accounting for profits and damages being sought as incidental relief.

The defendant's allegation is that it has a counterclaim against the plaintiff's demand. But since it cannot contend that its so-called counterclaim arises out of the transaction which is the subject-matter of the suit, so as to come within the first clause of the above-quoted paragraph of rule 30, it is obliged to rely entirely on the following words:

"And may, without cross-claim, set out any set-off or counterclaim which might be the subject of an independent suit," etc.,

and to contend that by these words any cross-claim, even though it has no connection whatever with the plaintiff's cause of action, is permitted to be set up in the original suit.

The following considerations prevent me from believing that the rule is to be thus understood:

In the first place, the main purpose which the quoted part of rule 30 was intended to accomplish is evident. It is to dispense with cross-

bills, by requiring everything previously done by cross-bill to be thereafter done by answer only. The provision is, not that a defendant may set up any cross-claim whatever against the plaintiff, provided only that it might be the subject of an independent bill, but that any set-off or counterclaim answering that description may be so set up. The cross-claim, in other words, if not maintainable as a set-off in equity, must be of such a nature as to constitute a proper counterclaim in equity. The defendant's construction requires the assumption that "counterclaim" has two meanings in the rule—one limited expressly by the words "arising out of the transaction which is the subject-matter of the suit"; the other not thus limited, but including any cross-claim whatever, without regard to such connection. In provisions manifestly framed for the main purpose above considered evident, it is difficult to suppose that "counterclaim" can be intended in two different senses.

Further, to use "counterclaim" in the sense contended for by the defendant is to give the term a meaning so much broader than that in which it has heretofore been understood as to make it difficult to suppose that such a change in procedure has been left to be gathered from provisions apparently framed for a different purpose, instead of being expressly and plainly declared.

The terms "counterclaim" and "set-off" have often been used interchangeably; but since rule 30 uses both, it must mean by "counterclaim" any claim, not such as to constitute a set-off, which, in equity, a defendant might assert against the plaintiff, in the same suit. As will hardly be disputed, the rule has been that no cross-claim can be thus asserted, unless its subject-matter grows out of, and the relief sought depends upon, the subject-matter of the plaintiff's bill. These conditions existing, whether the cross-claim be in tort or contract, and whether for liquidated or unliquidated damages, the defendant may obtain affirmative relief against the plaintiff in the same suit; or, in the words of rule 30, the court can pronounce a final judgment in the same suit both on the original and cross claims. Cross-claims of this kind only have been what are recognized as "counterclaims" in equity. The term appears to have come into general use through the Codes of Procedure adopted in many states. In them, speaking generally, "counterclaim" is expressly defined as a cross-claim of the kind above described. See section 501 of the New York Code, which uses "counterclaim" to include "set-off" and thus defines it:

"1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

"2. In an action on contract, any other cause of action on contract, existing at the commencement of the action."

To make "counterclaim" include all cross-claims upon which the defendant might sue the plaintiff in equity, even if having no connection, however remote, with the plaintiff's cause of action, is to permit two original bills in the same suit, which is certainly in violation of well-settled principles. See *Stuart v. Hayden*, 72 Fed. 402, 410, 18 C. C. A. 618; *Id.*, 169 U. S. 1, 18 Sup. Ct. 274, 42 L. Ed. 639. Had so radical a change in these principles been intended by rule 30, the

reasonable supposition is that it would have been unmistakably declared.

It is said that rule 30 does unmistakably declare such an intention in the words "which might be the subject of an independent suit in equity against him" (i. e., the plaintiff), and by the provision "shall have the same effect as a cross-suit." But the words and the provision relied on relate, as they stand in the rule, not to cross-claims in general, but to counterclaims in equity only. So used, it seems to me that they are more probably to be understood as a requirement that affirmative relief sought upon a counterclaim must be within the equitable jurisdiction of the court. See *Jackson v. Simmons*, 98 Fed. 768, 39 C. C. A. 514. The new rules cannot, of course, be construed to affect in any way the distinction between law and equity imposed by statute upon the federal courts.

It is said that the new rules are based to a considerable extent on the modern English chancery practice, that in England order XIX, rule 3, Annual Practice 1913, p. 312, is substantially to the same effect as the clause of rule 30 under consideration, and that *Beddall v. Maitland*, 17 C. D. 181, shows how the English rule is construed. In that case the bill sought to restrain the defendant from representing himself a partner in the plaintiff's business or selling any of the stock in trade; and the defendant was allowed to maintain a counterclaim for damages to himself and his goods, due to his unlawful ejection from the premises by the plaintiff. But to my mind order XIX, rule 3, notwithstanding the similarity of part of its language, cannot be regarded as having the same effect with rule 30, because it contains no requirement that the counterclaim be based on the subject-matter of the suit, like that found in rule 30. Moreover, the modern English practice is not understood to distinguish between law and equity, as the federal courts are required to do by statute; and, this being the case, the term "counterclaim" can hardly be understood here as it might be, were there no such distinction to be observed.

I must therefore regard the provision, "and may, without cross-bill, set out any set-off or counterclaim," etc., as applying only to any such counterclaim as is described in the words immediately preceding; i. e., any counterclaim arising out of the transaction which is the subject-matter of the suit. That the defendant's proposed counterclaim is not of this character is obvious. He could not have set it up by cross-bill. See *Stonemetz, etc., Co. v. Brown, etc., Co.* (C. C.) 46 Fed. 851, 852.

The petition for leave to file the proposed supplemental answer is therefore denied.

UNITED STATES v. NEW DEPARTURE MFG. CO. et al.

(District Court, W. D. New York. March 12, 1913.)

1. MONOPOLIES (§ 31*)—SHERMAN ANTI-TRUST ACT—VIOLATION—INDICTMENT—“ENGAGE IN CONSPIRACY.”

Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), provides that every contract, combination, or conspiracy in restraint of trade or commerce among the several states is illegal, and that every person who shall make any such contract or engage in any such combination or conspiracy shall be guilty of a misdemeanor. Section 2 declares that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce within the several states, or with foreign nations, shall be guilty of a misdemeanor. *Held*, that the phrase “engage in such combination or conspiracy,” in section 1, was used in a broad sense, and included, not only such persons as initiated such a conspiracy, but also those who afterwards engage therein; and hence an indictment, charging that defendants were engaged in a conspiracy among themselves to control and monopolize interstate commerce in the manufacture and sale of coaster brakes among the several states, followed by an allegation of overt acts tending to effectuate the conspiracy, was not defective for failure to charge directly the formation and existence of the conspiracy, the words “engage in,” as so used, signifying to embark in, take part in, or enlist in, meaning substantially the same thing as to conspire.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

2. MONOPOLIES (§ 31*)—COMBINATION IN RESTRAINT OF TRADE—INDICTMENT—LAWFUL PURPOSE.

Where an indictment for violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), charged that defendants were engaged in a combination and conspiracy to monopolize and control the trade in and manufacture and sale of coaster brakes in the United States, and that for this purpose defendants, in combination with an association, had committed certain specified acts tending to restrain competition among themselves, including the assignment of pretended patent license rights, tending toward the establishment of uniform prices for the products, and an agreement between them for noncompetitive discounts to jobbers, dealers, etc., all of which were alleged to have been done with an unlawful intent to control the market, the indictment was not defective, on the theory that the acts charged were in perfect harmony with a lawful purpose.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

3. MONOPOLIES (§ 31*)—SHERMAN ANTI-TRUST ACT—COMBINATION IN RESTRAINT OF TRADE—PATENT RIGHTS—INDICTMENT.

In a prosecution of manufacturers of coaster brakes for combination in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), certain counts of the indictment alleged that defendant, the N. D. Company, was the owner of a basic patent for making such brakes, and issued licenses to manufacture thereunder, charging, however, that the defendant corporations were separately the owners of patents and patent rights for improvements in the coaster brake and other bicycle and motor cycle accessories, but that the defendants, to effectuate their plan to restrain trade, feigned the making of a license agreement ostensibly covering a part, but not the whole, of the coaster brake manufactured by the N. D. Company, charging that the pretended license agreements, which were to be en-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tered into simultaneously by the N. D. Company as ostensible licensor with the remaining corporation defendants as ostensible separate licensees, were to be in all respects uniform in character, were to contain schedules of uniform and noncompetitive prices, restrictions upon all sales, etc. *Held*, that such averments negated an inference that the licenses were for a basic patent, but that the conditions were imposed on competitors in good faith and without an intention to violate the statute, since the fact that patents are issued to various persons or corporations, does not entitle them to combine to restrain the manufacture or sale of the patented article or to enhance prices in restriction of commerce.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 20; Dec. Dig. § 31.*]

4. STATUTES (§ 47*)—VALIDITY—DEFINITENESS—SHERMAN ANTI-TRUST ACT.

Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), providing that every contract, combination, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is illegal, and that every person who shall make such contract or engage in such combination or conspiracy shall be guilty of a misdemeanor, and that every person or persons who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, shall be guilty of a misdemeanor, is not unconstitutional because of indefiniteness.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 47; Dec. Dig. § 47.*]

5. INDICTMENT AND INFORMATION (§ 87*)—TIME OF OFFENSE—LIMITATIONS.

Where an indictment, charging a conspiracy in restraint of interstate trade or commerce in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), alleged that defendants continuously, during the period from July 1, 1907, to January 8, 1912, committed the unlawful acts specified, it sufficiently alleged that an offense was committed within the three-year statute of limitations.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 244-255; Dec. Dig. § 87.*]

6. INDICTMENT AND INFORMATION (§ 99*)—COUNTS—INCORPORATION OF PREVIOUS COUNTS—REFERENCE.

It is proper to incorporate in a subsequent count by reference facts alleged in a previous one.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 270, 270½; Dec. Dig. § 99.*]

Indictment against the New Departure Manufacturing Company and others for alleged violation of sections 1 and 2 of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Demurrer to indictment overruled.

See, also, 195 Fed. 778.

John Lord O'Brian, of Buffalo, N. Y., for the United States.

Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y., Gross, Hyde & Shipman, of Hartford, Conn., and Holmes, Rogers & Carpenter, of New York City (Delevan A. Holmes, of New York City, Wm. Waldo Hyde, of Hartford, Conn., Lyman M. Bass, of Buffalo, N. Y., and Louis E. Hart, of Chicago, Ill., of counsel), for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HAZEL, District Judge. The defendants, the New Departure Manufacturing Company and 5 other corporations and 18 individuals, have been indicted in eight counts for the violation of sections 1 and 2 of the Sherman Anti-Trust Act, passed July 2, 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), being charged with unlawfully engaging in a conspiracy in restraint of interstate trade and commerce among the several states and foreign nations, and with attempting to monopolize such interstate trade and commerce.

The indictment, to which the defendants have demurred, after charging in general terms that the corporation defendants were separately engaged in different states in the business of manufacturing bicycle and motor cycle coaster brakes and accessories, of a distinctive type and design from those manufactured and sold by any other of the corporation defendants, under certain letters patent and certain patent license rights owned by them separately, alleges that the individual defendants were officers of the said corporations, vested with power and authority to do and perform the unlawful acts and purposes of the conspiracy, with the exception of Huntington and Jackson, who, however, were possessed of similar power and authority to accomplish the unlawful acts and purposes of the conspiracy by reason of their appointment as arbitrators of the association formed by the said corporations; that the defendants produced in the aggregate 85 per cent. of the entire output of bicycle and motor cycle coaster brakes and accessories consumed in the United States, and had power, by association and co-operation, to fix and control the prices thereof in the United States markets. The indictment substantially avers that said corporations were separate and distinct entities, and should each have conducted its business in competition with the others as to prices, rebates, discounts, and conditions of sales, and that such businesses would have been free from unlawful restraint if the defendants had not engaged among themselves in the conspiracy complained of.

The direct accusation is that continuously from the 1st of July, 1907, down to the date of the indictment, the defendants unlawfully, knowingly, and with intent to do so engaged in a conspiracy among themselves in undue, unreasonable, direct, and oppressive restraint of interstate business, trade, and commerce. The first count of the indictment charges the defendants with engaging in a conspiracy among themselves to restrain interstate trade; the second, to restrain the interstate trade of their competitors; the third, to restrain the interstate trade of the corporation defendants and individual jobbers and manufacturers of coaster brakes; the fourth, fifth, and sixth counts detail acts of conspiracy without referring to the proposed patent license; while the seventh and eighth counts, after properly referring to the facts of the preceding counts, allege an unlawful attempt on the part of the defendants to monopolize the interstate trade and commerce in the said articles. A summary of the particular methods detailed in the indictment for effectuating the claimed conspiracy follows:

(1) By agreeing upon prices for the products manufactured by the corporation defendants, and maintaining them; (2) by establishing uniform and noncompetitive discounts to be offered to manufacturers, jobbers, and deal-

ers; (3) by selling the manufactured product at noncompetitive prices, rebates, and discounts largely in excess of the prices which would have prevailed if the defendants had not engaged in the conspiracy; (4) by refusing to sell coaster brakes except on the terms and conditions agreed upon by defendants; (5) by agreeing upon a form of contract with prospective buyers; (6) by refusing to sell products to any manufacturer or jobber not agreeing not to deal in similar products manufactured by others; (7) by instigating patent litigation, or threatening with prosecution dealers in the commodity of a competitor; (8) by devising a pretended license agreement, under which the New Departure Manufacturing Company was to act as ostensible licensor, and the other corporation defendants as licensees, for the manufacture and sale of said coaster brakes and accessories under patents claimed to be owned by the former, and covering only parts thereof; (9) by entering at the same time into license agreements whereby the licensor agrees not to grant additional licenses without the consent of the licensees; (10) by granting uniform licenses containing schedules of noncompetitive prices, discounts, and restrictions on sales to outside dealers; (11) by the discontinuance of pending litigation between the various defendants, and agreement not to question the validity of any patents owned by licensees; (12) by the payment of pretended royalties to the New Departure Manufacturing Company, which were credited back in return for the use of other letters patent; (13) by arranging for the deposit with an arbitrator of a guaranty fund to insure against breach of license agreement between licensor and licensees, and for the settlement of all disputes arising among the defendant corporations by said arbitrator; (14) by agreeing upon arbitrary noncompetitive prices for the sale and resale of coaster brakes and accessories by jobbers, and by agreement to sell only to listed jobbers as per arrangement; (15) by giving discounts only to such manufacturers and jobbers as the defendant corporations should jointly sanction; and (16) by carrying on litigation against competitors, and by preventing members of the combination from selling to competitors.

The general claim of the government is that it was the purpose and intention of the defendants to discourage and destroy competition by intimidation and coercion, by the institution of litigation against infringers of patents, and by the pretense of a basic license arrangement, running exclusively to the defendant corporations, binding each to a strict observance of the selling prices of the manufactured product, future prices, restrictions on sales to jobbers, retail dealers, and customers, etc.

Defendants contend that the indictment is fatally defective because it fails to charge, first, the formation of a conspiracy in violation of the act under consideration, as an averment that the defendants "are engaged in a conspiracy among themselves" to accomplish an unlawful end is not the equivalent of a direct charge of the formation or existence of a conspiracy; second, that the act is too indefinite to sustain a criminal prosecution; and, third, that the facts upon which the government relies are equally as consistent with a lawful agreement to restrain interstate trade and commerce as with an unlawful agreement.

[1] With respect to the asserted failure to charge a conspiracy, there was considerable discussion at the bar; it being contended, *inter alia*, that the existence of the conspiracy cannot be shown by the averment of the commission of overt acts. Sections 1 and 2 of the federal Anti-Trust Act read as follows:

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with

foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The first part of section 1 states that every contract, combination, or conspiracy in restraint of trade or commerce among the several states is illegal, while the sentence following is declarative of the character of the offense. Was it necessary to directly charge the existence or formation of a conspiracy upon which to base an accusation that the defendants engaged in a combination or conspiracy? The quoted provision is perhaps not as clearly expressed as it might be; but I think the phrase "engage in such combination or conspiracy" is used in a broad sense, and includes, not only such persons as initiate a conspiracy, but also those who afterwards engage therein. In *United States v. Greenhut* (D. C.) 50 Fed. 469, the indictment was held insufficient, because the crime was not charged in the language of the statute or its equivalent. In this case the precise language of the statute is used to charge the offense, and in addition the particular acts done or to be done by the defendants to effectuate the crime are set forth. It is a cardinal rule of criminal law that an indictment is not invalid for insufficiency, if it embraces the language of the statute and covers and includes the essential ingredients of the offense with sufficient certainty to apprise the defendant of the charge that he will be called upon to meet. *United States v. Britton*, 108 U. S. 193, 2 Sup. Ct. 525, 27 L. Ed. 703; *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; *United States v. Patterson* (D. C.) 201 Fed. 697, opinion by Hollister, J.

It is true that indictments under section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676) must contain a definite charge of conspiracy to defraud the government or to commit an offense against the United States, and resort cannot be had to a statement of overt acts to compensate for such omission; yet this rule of pleading, repeated in many adjudications cited in defendants' brief, is not believed to be controlling in a prosecution charging the violation of the Sherman Act, which evidently does not require the averment of an overt act to constitute the offense the gravamen of which is to combine or conspire, or to engage in a combination or conspiracy. *United States v. Kissel* (C. C.) 173 Fed. 823; *United States v. Patten* (C. C.) 187 Fed. 664, affirmed by the Supreme Court, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. —. In legal parlance, the words "engage in" signify embark in, take part in, or enlist in, and when they are used in connection with the words "combination or conspiracy," as in the act,

they mean substantially the same thing as to conspire; for one who engages in a conspiracy becomes a conspirator, regardless of whether or not the conspiracy has previously been initiated. In describing the offense without limitations, or without the inclusion of a condition that an overt act need be first committed to complete the offense, Congress doubtless had in mind this definition. When the Patten Case, *supra*, was decided by the Supreme Court, a writ of error having been sued out by the government, Mr. Justice Van Devanter, who delivered the opinion of the court, said that such act made it a criminal offense to "engage in" a "conspiracy in restraint of trade or commerce among the several states." The particular phrasing of the indictment against Patten is not mentioned, but it was apparently considered that the offense consisted of engaging in a conspiracy.

[2] Counsel for defendants have elaborately argued that the averments in the indictment are in perfect harmony with a lawful purpose, and that the conclusion that the defendants intended to destroy competition among themselves is insufficiently supported; but in this I do not agree. The acts committed, or to be committed, by the defendants, in combination with an association, the assignment of pretended license rights tending towards the establishment of uniform prices for the products, and the agreement upon noncompetitive discounts to jobbers, dealers, etc., are evidential features from which the intention of the defendants must be ascertained. As said in *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518:

"Where acts are done with an unlawful intent and an unlawful combination results, the offense is committed, even though the acts done were in themselves perfectly innocent and lawful. But this act directs itself against the dangerous probability, as well as against the completed result."

[3] Upon this feature of the controversy it will be enough to briefly advert to the contention by defendants that inferentially the indictment (counts 1, 2, and 3) alleges that the defendant, the New Departure Manufacturing Company, was owner of a basic patent for making coaster brakes, and issued licenses to manufacture thereunder. Reference to the indictment, however, discloses that the patent license agreement, separately considered and unconnected with any pretense, is not claimed to have been an element of unlawfulness. Careful reading thereof shows that the asserted culpability of the defendants is primarily based upon the allegation that the defendant corporations were separately owners of patents and patent rights for improvements in the coaster brake and other bicycle and motor cycle accessories, differing from those held by the other corporation defendants, but that the defendants, to effectuate their plan or scheme to restrain trade, feigned the making of a license agreement ostensibly covering a part, but not the whole, of the coaster brake manufactured by the New Departure Manufacturing Company. Importance is attached to that part of the indictment charging that:

"The said pretended license agreements which were to be entered into simultaneously by the said New Departure Manufacturing Company as ostensible licensor with the remaining corporation defendants as ostensible separate licensees were to be in all respects uniform in character, were to

contain schedules of uniform and noncompetitive prices, restrictions upon all sales of the aforesaid merchandise and products to be made by any of said corporations defendants to jobbers and manufacturers," etc.

This assertion, when considered with other averments, would seem to clearly negative the inference that the licenses were for a basic patent, or that conditions were imposed on competitors in good faith and without an intention to violate the statute under consideration. None of the separate patent rights owned by the defendant corporations hinged or depended upon license rights transferred by the New Departure Manufacturing Company, and the right to manufacture was not derived from it.

We are not at this time concerned with the scope of the claims of such license patent, or with the right to license others to manufacture or sell the patented articles, or to impose license conditions, or to fix the prices of sale to jobbers or dealers and by them to customers, and therefore the authorities cited by counsel for defendants, showing that patentees have the right to license others and to impose conditions as to price, etc., are not now applicable. Whether the plan was lawfully devised, without an intention to monopolize or engage in a conspiracy in restraint of interstate trade, is a question not now determinable, though it may be remarked that the general scheme by which the prices were to be fixed and controlled, assuming the truthfulness of the averment as to the grant of a pretended license, possesses an ingenious intermingling of various business interests, which no doubt justifies the conclusions of the indictment that the intention was to discourage and destroy competition and to attempt to create a monopoly.

In the Bath-Tub Trust Case, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. —, so called, a case recently decided by the Supreme Court of the United States, a situation somewhat similar to this in respect to quantity of output and license agreement was presented, and the court said:

"The trade was, therefore, practically controlled from producer to consumer, and the potency of the scheme was established by the co-operation of 85 per cent. of the manufacturers. * * * The agreements therefore clearly transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law."

The Supreme Court then pointed out the distinction between that case and the case of Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; but nevertheless the intimation in the opinion is clear that the monopoly secured to the patentee by the issuance of a patent cannot be designedly used to form a combination or conspiracy between manufacturers and dealers to accomplish a restraint of trade such as the Anti-Trust Act prohibits. Upon this subject the Circuit Court of Appeals for the Third Circuit, in National Harrow Co. v. Hench et al., 83 Fed. 36, 27 C. C. A. 349, 39 L. R. A. 299, has aptly said:

"The fact that the property involved is covered by letters patent is urged as a justification; but we do not see how any importance can be attributed to this fact. Patents confer a monopoly as respects the property covered by

them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other. The fact that only the patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales, and enhance prices. Such combinations are conspiracies against the public interests, and abuses of patent privileges."

The language quoted was cited with approval by Judge Coxe in *National Harrow Company v. Hench et al.* (C. C.) 84 Fed. 226.

In *Blount Manufacturing Co. v. Yale & Towne Mfg. Co.* (C. C.) 166 Fed. 557, of the patentees' privilege of combining their patent rights the court said:

"Where, however, each patentee continues to make his own goods under his own patents, and seeks to enhance his profits by agreement with creditors who make either patented or unpatented articles, then it seems to follow that the agreement of each to restrain his own trade cannot be regarded merely as an incident to the assignment of patent rights. The patentee then restrains his own trade, not for the purpose of enhancing the value of the license which he grants, but for the purpose of enhancing the value of his trade by removing competition."

So here, as claimed by the government, the license agreements were resorted to as a subterfuge to aid in stifling competition in trade and commerce, and to enhance the value of the respective businesses of the defendant, and to create a monopoly in their productions. In *Sanitary Manufacturing Co. v. United States* (the Bath-Tub Trust Case) the Supreme Court clearly supports the view that patentees' rights are limited by the Anti-Trust Act, as the following excerpt from the opinion shows:

"Rights conferred by patents are, indeed, very definite and extensive; but they do not give any more than other rights a universal license against positive prohibitions. The Sherman Law is a limitation of rights—rights which may be pushed to evil consequences, and therefore restrained."

[4] It is next objected that the Sherman Act is unconstitutional; but as to this ground of demurrer it is enough to say that since the hearing, or just prior thereto, Judge Hollister, in *United States v. Patterson* (D. C.) 201 Fed. 697, expressly held to the contrary, and stated in his opinion that, prior to his passing upon the constitutionality of the act, it had already been held constitutional by Judge Angel sitting at the trial of the Bath-Tub Trust Case, by Judge Hand in the Sugar Trust prosecution, and by Judge Putnam in the Shoe Machinery Trust Case (*United States v. Winslow* [D. C.] 195 Fed. 578). As such decisions are in complete accord with my own views, I am persuaded that the Anti-Trust Act as a criminal statute is a valid enactment.

[5] It is further objected that the offenses are not averred to have been committed within three years, and criticism is made of the phrasing "during said period" in the indictment; but as it is also alleged that the unlawful acts were committed by the defendants "continuously during a period of time from the 1st day of July, 1907, to the present 8th day of January, 1912," the time is stated within the

statutory limitations with sufficient definiteness. *Glendale Woolen Mills v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309.

[6] The seventh and eighth counts, which aver an attempt to monopolize the business carried on by the defendants, are also criticised as being too vague, uncertain, and indefinite. This objection has already been sufficiently answered by what has been said in passing upon the preceding counts. It was not improper to incorporate therein by reference the facts specified in counts 1, 2, and 3. *Crain v. United States*, 162 U. S. 634, 16 Sup. Ct. 952, 40 L. Ed. 1097; *Blitz v. United States*, 153 U. S. 315, 14 Sup. Ct. 924, 38 L. Ed. 725.

Assuming, then, as we must, that all the facts and circumstances as summarized herein are true, it is thought to be plainly shown that the continuation of such acts by confederation or concert of action on the part of the defendants tends towards the creation of a monopoly in the manufacture of the specified articles. Indeed, by the methods and acts complained of, the commingling of separate interests in separate patent rights, by the issuing of a pretended license for a pretended basic patent, with the intention of fixing uniform prices and discounts and imposing other conditions, benefits and advantages were secured which may be enjoyed only by a separate patentee in the protection of his true monopoly. It was such courses of procedure by industrial interests in whatever form or guise that the Anti-Trust Act was designed to check and prevent.

The demurrers are overruled on all grounds, and the defendant corporations and individuals are required to plead to the indictment at this regular term of court.

IN RE HALSTEAD & CO.

(District Court, D. New Jersey. April 5, 1913.)

CORPORATIONS (§ 590*)—CONSOLIDATION—CONTRACT—ASSUMED DEBTS.

A contract for the consolidation of a firm and certain other corporations provided that the assets of the firm should aggregate \$525,000, and on that basis the total amount of the firm's debts to be assumed by the consolidated corporation should not exceed \$100,000, but if the assets exceeded such amount the indebtedness to be assumed might also exceed to the same extent the amount of \$100,000, at the firm's option, and that any claim against the firm for work done or material furnished to their factory, building, or machinery would be assumed and paid by the consolidated company. *Held*, that such contract became functus officio as soon as the plan to consolidate was carried out, and that the consolidated company was therefore not liable for an indebtedness of the firm to certain architects for fees and services not included in the liabilities determined at the time of the consolidation, nor computed or considered at the time the corporation settled its obligation with the members of the firm under the consolidation contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2354, 2361–2367; Dec. Dig. § 590.*]

In Bankruptcy. In the matter of the bankruptcy proceedings of Halstead & Co., bankrupt. On petition to review a referee's order

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

allowing part and disallowing part of the claim of James E. Ware & Sons. Reversed.

McDermott & Enright, of Jersey City, N. J., for the trustee.

John W. Remer and Edo E. Mercelis, both of New York City, for the bankrupt.

CROSS, District Judge. This matter is before the court upon cross-petition to review an order of a referee, bearing date February 28, 1913, which confirmed another order of the same referee of like purport, bearing date February 19, 1912. One of the petitions for review is filed by James E. Ware & Sons, creditors of the bankrupt, whose claim was allowed by the referee in part and disallowed in part, and who complain of such disallowance. The other is filed by the trustee, who complains because of the allowance of any part of the claim of Ware & Sons. The claim in question is for architect fees and services alleged to have been performed by Ware & Sons for a partnership known as Halstead & Co., which partnership later became merged in the manner hereinafter described in the bankrupt corporation, also known as Halstead & Co. It is not claimed that Ware & Sons did any work or performed any services for the bankrupt, or that there is any direct privity of contract between them and the bankrupt. If they have any claim against the bankrupt's estate, it arises out of a clause in the agreement of consolidation, pursuant to which the bankrupt subsequently purchased the assets of the firm of Halstead & Co., and of other concerns hereinafter named. The bankrupt was originally incorporated June 14, 1901, under the name of Central Lard Company, and thereafter conducted the business of manufacturing lard at Jersey City. The partnership of Halstead & Co. had been in existence for nearly 40 years, during which time it was engaged in the meat-packing business, and in the course of such business had acquired land adjoining the factory of the Central Lard Company, with the intention of building a large packing house thereon, which it ultimately did. There was also in the vicinity a cooperage belonging to a corporation known as the Central Cooperage Company, and a stable with a large equipment of horses and wagons, which was owned by still another corporation known as the Central Trucking Company. In these latter corporations the firm of Halstead & Co. and the Central Lard Company had controlling interests. The firm of Halstead & Co. also had some interest in, but did not control, the Central Lard Company. The firm of Halstead & Co., during the period referred to, built a new packing house upon the land adjacent to the lard company's property, under the direction of Ware & Sons, and it was out of this employment that their claim now in controversy arose. Subsequently the partnership firm and the parties interested in the Central Lard Company proposed to merge the business of the firm of Halstead & Co., the Cooperage Company, and the Trucking Company into that of the Central Lard Company, and at the same time to change the name of the Lard Company into Halstead & Co. Pursuant to such intention, the consolidation agreement above referred to, bearing date

April 10, 1907, was entered into between the Central Lard Company, a corporation of New Jersey, the firm of Halstead & Co., composed of Ebenezer Hurd and James W. Halstead, the Central Cooperage Company, a New Jersey corporation, the Central Trucking Company, also a New Jersey corporation, and certain stockholders of the Central Lard Company, and other persons, whom it is unnecessary to name. It was thereby agreed that the assets of the partnership and of the several corporate parties to the agreement should be inventoried and appraised, and that from the valuations thus ascertained the indebtedness of the several parties, to an amount fixed by the agreement, might be deducted and assumed by the purchaser, and stocks and bonds in specified proportions of the purchasing corporation issued to each of the parties for the net value of the balance of its assets as thus ascertained.

The paragraphs of said agreement which relate to the appraisal and transfer of the property of the firm of Halstead & Co., and to the assumption by the purchaser of their debts, are as follows:

"III. The firm of Halstead & Company shall transfer to the new company its factory, its plant, its merchandise, stock in trade and raw and manufactured materials, its horses, trucks, wagons and harness, its dressed hog cars and all other property used by it in the transaction of its business as beef and pork packers and as slaughterers, and its accounts and bill receivable, and shall receive in payment thereof:

"First. One hundred and fifty thousand dollars (\$150,000) in par value of the second mortgage bonds of the new company.

"Second. One hundred and fifty thousand dollars (\$150,000) in par value in preferred stock of the said new company.

"And the remainder in common stock of the new company at par.

"IV. The valuation of the property transferred by the said firm to the new company shall be ascertained as follows: The real property, together with the plant, machinery, tools, appliances and equipments and their interest in real property owned as tenants in common with the Central Lard Company, and in the power house and machinery, tools, appliances and equipments thereof, and dressed hog cars, shall be taken at the actual costs thereof, as shown by the books. The merchandise and stock on hand, both raw material and manufactured, shall be inventoried at its market value. The accounts and bills receivable shall be taken at their face value, reserving therefrom such as were not incurred in the actual transaction of their business, and reserving also the accounts receivable of the slaughtering department to the extent sufficient to pay the debts of that department; the horses, trucks, wagons and stand in the market shall be taken at an appraised value; their interest in the stock of the Trucking Company and the M. Crane Co. shall be taken at par. From the total amounts so ascertained shall be deducted such of the debts of the firm as shall be assumed by the new company as hereinafter provided, and the balance shall be taken as the price of the firm's interest to be paid for in second-mortgage bonds, preferred and common stock at par, as above set forth. It is agreed that the assets of the firm shall aggregate in value, determined as above, the sum of at least five hundred and twenty-five thousand dollars (\$525,000); and upon such basis the total amount of the debts of the firm to be assumed by the new company shall not exceed the sum of one hundred thousand dollars (\$100,000); if the assets exceed such amount the indebtedness to be assumed may also exceed to the same extent at the option of the firm. Any claim against the firm for work done or material furnished to their factory, building or machinery will be assumed and paid by the new company."

At the time of the consolidation no liability to Ware & Sons appeared upon the books of the firm of Halstead & Co., which were

gone over by an accountant, and the net value of their assets was computed and turned into the new corporation without reference to any such liability, and stocks and bonds of that corporation were thereupon issued to the firm of Halstead & Co. without any deduction on account of their liability to Ware & Sons, if any.

The foregoing paragraphs taken from the agreement give the entire plan of consolidation as between the firm of Halstead & Co. and the Lard Company, as agreed upon in advance by the constituent companies. This agreement, it should be observed, was not a permanent one. Its only purpose or value was to set forth in black and white the understanding and agreement of the contracting parties, and hold them thereto until the plan of consolidation as therein outlined should be executed, the time for which, as thereby fixed, was May 1, 1907. As soon as that plan was carried out, the agreement became *functus officio*. Beyond the period of its consummation it had no inherent life; nor did it contain any saving clause by which life could longer be retained in it either by or for the benefit of Ware & Sons or other third party.

Turning to the agreement itself, an examination of the paragraphs referred to shows that if, upon inventory, the assets of the firm of Halstead & Co. aggregated \$525,000, then the total amount of the debts of the firm to be assumed by the new corporation was not to exceed the sum of \$100,000. If, however, the firm's assets exceeded the amount above named, then the firm, at its option, might add a like amount to the indebtedness which the purchasing corporation was to assume. It nowhere appears, however, but the contrary, that it was to assume all of the firm's indebtedness, or the indebtedness of any particular creditor or creditors of the firm. The purchaser was to assume, not the entire indebtedness of the firm, but its indebtedness to a limited amount only, which amount was to be deducted from the inventoried value of the property it was purchasing. Each of the constituent companies was treated in the same way, its assets were to be inventoried and valued, its debts to a prescribed amount deducted and assumed, and bonds and stocks issued to it for the difference or net value of its property, thereby completing the purchase and closing the entire transaction. The agreement in question was ultimately carried out, and the property of the firm of Halstead & Co., together with that of the other parties, acquired and paid for in accordance with its terms. To be more specific, indebtedness of the firm of Halstead & Co. to the amount of \$142,315.34, which did not include indebtedness to Ware & Sons, having first been deducted from the appraised value of its property of \$595,845.37, the corporation of Halstead & Co. paid the balance with its bonds and stocks, and by so doing paid all that it had by said agreement undertaken to pay. It has already been stated that this agreement was transitory, or, as styled by the Supreme Court of the United States in a somewhat similar case, "an executory contract *inter partes*." *National Bank v. Grand Lodge*, 98 U. S. 123, 25 L. Ed. 75. The similarity just referred to between that case and the one at bar is found in the fact that in both cases the assumption

of indebtedness was limited in amount and was conditional. In the reported case the promise to pay was contingent upon the promise to deliver certain stock, while in this it was contingent upon the indebtedness being turned in by the debtor that it might be deducted from the purchase price, and that it might be segregated from other indebtedness which was not assumed; the assumption being limited.

Ware & Sons had no knowledge of the existence of the agreement of consolidation until after it had been fully executed, and therefore had become nugatory. In *Joslin v. N. J. Car Spring Co.*, 36 N. J. Law, 141, upon which claimants' counsel place reliance, the plaintiff, whose debt had been assumed, knew of that fact, assented to it, and acted upon it, as appears in the opinion of the court, and in those respects the case is distinguishable from the one at bar. Again, because the agreement has been executed, the interpretation and effect given it at that time are binding, not only upon the parties themselves, but upon the claimants herein. But assuming that the agreement in question was not executory, that it remained unexecuted, and that there was a direct and specific assumption by name, which there was not, of the claimants' claim, still there can be no doubt that in law the purchaser's liability under such assumption could be released at any time before the claimants had accepted or in some way acted upon the assumption, when, for the first time, they would have had a vested right therein. *Crowell v. Currier*, 27 N. J. Eq. 152, affirmed by Court of Errors and Appeals 27 N. J. Eq. 650; *Jordan v. Laverty*, 53 N. J. Law, 15, 20 Atl. 832; *Keller v. Ashford*, 133 U. S. 610, 624, 625, 10 Sup. Ct. 494, 33 L. Ed. 667. Unquestionably, up to the time just mentioned, the parties to the agreement could have rescinded it in toto; unquestionably they could have released any liability thereby imposed upon the corporation of Halstead & Co. in favor of the claimants; and unquestionably, when the parties met to consummate the agreement, they could, by common consent and agreement, have waived the performance of any part or parts thereof, or could have modified, changed, or altered any of its terms; and this, as to such changes as were made, if any, is what in law, in the absence of fraud, they must be presumed to have done when the contract was carried out. The presumption, in the absence of evidence to the contrary, is that the agreement was executed as the parties desired and intended it should be, and if the facts show that its execution varied in any respect from its terms, then the extent of such variation must be taken as measuring the extent of a modification in the terms of the agreement, to which the parties must be taken to have assented.

The firm of Halstead & Co., when the agreement was executed and its property transferred, deducted from its inventoried value such of its debts as it chose and the agreement permitted, and received the balance as the purchase price of its property. In other words, it received the full amount coming to it for the value of its property according to the terms of the contract, and the purchaser, after assuming certain specified debts, paid the balance of the purchase price, and cannot be made to pay anything additional, either to the firm of

Halstead & Co. or to its creditors, whose debts were not included in and did not form a part of the purchase price. The contract, having been executed to the satisfaction of the parties, cannot be opened up because of the dissatisfaction of a third party. The case would manifestly be different if the claim of Ware & Sons had been deducted from the purchase price. In that case the corporation of Halstead & Co. would have in its possession moneys to which the claimants would be both legally and equitably entitled, moneys which, in fact, it held in trust for them.

As to any alleged recognition of or promise to pay the claim of Ware & Sons by letter of one of the officers of the corporation, written after the consolidation agreement was carried out, it is sufficient to say that it does not appear that such officer had any authority from the corporation to write it. Moreover, if it can be construed to contain any promise to pay, such promise was manifestly without consideration and void. *Hasbrouck v. Winkler et al.*, 48 N. J. Law, 431, 6 Atl. 22.

This whole proceeding may properly be regarded as a questionable attempt on the part of dilatory creditors after the lapse of eight or ten years, and after a considerable part of their claim from mere lapse of time has become open to question, to deplete the assets of the bankrupt and deprive its creditors of their just dividends. Such a result should only be contemplated in a plain case where no other conclusion could legally be reached. Certainly there would be no equity in making the bankrupt in this case pay again for property which it had already fully paid for, in order that Ware & Sons might be paid their claim at the expense of genuine creditors of the bankrupt.

The conclusion that has been reached upon this part of the case renders any consideration of the merits of the claim of Ware & Sons unnecessary.

The orders of the referee under review will be reversed and set aside.

ST. LOUIS INDEPENDENT PACKING CO. v. HOUSTON, Secretary
of Agriculture, et al.

(District Court, E. D. Missouri, E. D. April 12, 1913.)

No. 4,156.

FOOD (§ 7*)—MEAT PRODUCTS—SALE—DECEPTIVE NAME—SECRETARY OF AGRICULTURE—REGULATIONS—AUTHORITY—"SAUSAGE."

Act Cong. June 30, 1906, c. 3913, 34 Stat. 674, declares that no meat or meat product shall be sold or offered for sale by any person in interstate or foreign commerce under a false or deceptive name, and that the Secretary of Agriculture from time to time shall make such rules and regulations as are necessary for the efficient execution of the act. *Held*, that the term "sausage" being defined by lexicographers as an article of food composed of meat, salt, and spices, the Secretary of Agriculture had authority to prescribe that meat products sold under the name of "sausage" should not contain cereal in excess of 2 per cent.,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

nor water or ice in excess of 3 per cent., and if water and cereal are added the substance should be labeled "Sausage, water, and cereal."

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 7.*]

In Equity. Suit by the St. Louis Independent Packing Company against David F. Houston, Secretary of Agriculture, and others. Decree for defendants.

Franklin Ferriss, Joseph H. Zumbalen, Henry T. Ferriss, and Matt. G. Reynolds, all of St. Louis, Mo., for plaintiff.

Homer Hall, Asst. U. S. Atty., of St. Louis, Mo., for defendants.

DYER, District Judge. The defendants in this case are the Secretary of Agriculture, the Chief of the Bureau of Animal Industry, and the Chief Inspector of said Bureau. The latter is the only one of the defendants before the court. The other two are nonresidents, and therefore without the jurisdiction of the court.

The bill discloses the fact that the complainant is a corporation organized under the laws of Missouri, and as such owns and operates a slaughtering establishment, at which it conducts the business of slaughtering cattle, sheep, and hogs and manufacturing a meat product commonly styled and designated as "sausage."

The plaintiff alleges that the sausages so manufactured by it "are compounds and mixtures composed and manufactured from meat of hams, pork, spices and cereals"; that in the product thus manufactured there is contained from 1 to 10 per cent. of wholesome cereal and a varying amount of pure water, which, together with meat and spices, make a sound, healthful, and wholesome product, with which there is neither dyes, chemicals, preservatives, nor ingredients calculated to make the same unfit for human food.

The bill further alleges that the use of cereal and water in the manufacture of sausage is customary and necessary, and has been universally recognized for more than 50 years, and ever since sausages have been known as a commercial product.

It further appears by the allegations of the bill that after the approval by the President, on the 30th of June, 1906, of an act entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30th, 1907," the Secretary of Agriculture, claiming to act under the provisions of said act of Congress, established at the plant of the plaintiff, in the city of St. Louis, a system of inspection by which the operation of said plant was under the charge of an inspector assigned by the Bureau of Animal Industry to supervise its official work, etc.

It is not deemed necessary to recite the various provisions and allegations of the bill to get at the real point of controversy involved here. It may be briefly summarized as follows: The plaintiff is a manufacturer of a commodity called sausage, and in the manufacture thereof it uses as a part of the product from 1 to 10 per cent. of wholesome cereal and a varying amount of pure water; that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Secretary of Agriculture, on the 28th of February, 1913, promulgated the following regulation, to be effective on April 1st thereafter, to wit:

"United States Department of Agriculture, Office of the Secretary.

"Washington, D. C. Feb. 28, 1913.

"For the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name, under the authority conferred on the Secretary of Agriculture by the provisions of the act of Congress, approved June 30, 1906 (34 Stat. 674 [c. 3913]), regulation 18 is hereby amended by the addition of sections 15 and 16, to read as hereinafter set out.

"This amendment, which for purposes of identification is designated as amendment 4 to B. A. I. order 150, shall become effective on and after April 1, 1913.
James Wilson, Secretary of Agriculture.

"Section 16, paragraph 1. Sausage shall not contain cereal in excess of two per cent. When cereal is added its presence shall be stated on the label or on the product.

"Paragraph 2. Water or ice shall not be added to sausage except for the purpose of facilitating grinding, chopping and mixing, in which case the added water or ice shall not exceed three per cent., except as provided in the following paragraph:

"Paragraph 3. Sausages of the class which are smoked or cooked, such as Frankfort style, Vienna style, and Bologna style, may contain added water in excess of three per cent. but not in excess of an amount sufficient to make the product palatable. When water (in excess of three per cent.) and cereal are added to this class of sausages the statement 'Sausage, water and cereal' shall appear on the label or on the product, but when no cereal is added the addition of water need not be stated."

The bill claims that this regulation is null and void, on the ground that the Secretary was without authority to make the same, and that the act of Congress conferred upon him no such power. It will be seen, therefore, that the real point in controversy is as to whether the regulation is valid or invalid. If it is valid, the prayer of the bill for an injunction should be denied; otherwise granted.

So much of the act of Congress as is deemed applicable to the present inquiry is as follows:

"That when any meat or meat food product prepared for interstate or foreign commerce which has been inspected as hereinbefore provided and marked 'Inspected and Passed' shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this act is maintained, the person, firm or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under the supervision of an inspector, which label shall state that the contents thereof have been 'Inspected and Passed' under the provisions of this act; and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this act is maintained shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector, and no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted.

* * * * *

"That any person, firm or corporation, or any officer or agent of any such person, firm or corporation, who shall violate any of the provisions of this

act shall be deemed guilty of a misdemeanor, and shall be punished on conviction thereof by a fine of not exceeding ten thousand dollars or imprisonment for a period of not more than two years, or by both such fine and imprisonment, in the discretion of the court.

* * * * *

"The Secretary of Agriculture shall from time to time make such rules and regulations as are necessary for the efficient execution of the provisions of this act, and all inspections and examinations made under this act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this act."

It would seem from the act that no meat nor meat food products can be "sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce *under any false or deceptive name*; but established trade name or names which are usual to such products and which *are not false and deceptive* and which shall be *approved by the Secretary of Agriculture* are permitted."

If the meat product of the plaintiff, called "sausage," composed of meat and spices, and cereal in excess of 2 per cent. and water in excess of 3 per cent., is a false or deceptive name, then and in that case the plaintiff would not be authorized to sell or offer for sale such product, called sausage; nor would the inspector be authorized to put thereon the words "Inspected and Passed."

The act of Congress declares that no "meat or meat food product shall be sold or offered for sale by any person, firm or corporation in interstate or foreign commerce under any false or deceptive name."

The act further provides that the "Secretary of Agriculture shall from time to time make such rules and regulations as are necessary for the efficient execution of the provisions of this act."

The regulation complained of in the bill recites that "for the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name * * * sausage shall not contain cereal in excess of two per cent. * * * nor water or ice in excess of three per cent."

Had the Secretary power and authority to make and promulgate the regulation complained of? The court answers the question in the affirmative.

This court is no better informed than the judge of the Supreme Court of Michigan who wrote the opinion in *Armour & Co. v. State Dairy and Food Com'r*, 159 Mich. 1, 123 N. W. 580, 25 L. R. A. (N. S.) 616. He said:

"Sausage is defined by all the lexicographers as an article of food composed of meat, salt and spices. The people generally so understand it. The writer of this opinion would be compelled to admit that until very recently he had no knowledge that cereal was used in the manufacture of sausage."

This judge, although eating sausage for 70 years, never knew or even heard that cereals were used in this toothsome delicacy until the beginning of this hearing on last Tuesday.

The act of Congress under which the Secretary of Agriculture claims to have acted in promulgating the order of February 28, 1913, is so important in its character, and so far-reaching in its effect upon

the good of mankind, the court should be absolutely sure of its footing before it strips the officer (charged with the duty of making "such rules and regulations as are necessary for the efficient execution of the provisions of the act") of the right he claims to have exercised, in promulgating the order of February 28, 1913.

The prayer of the plaintiff for a temporary injunction will be denied; and it is so ordered.

UNITED STATES v. HERRIG.

(District Court, D. Montana. March 24, 1913.)

No. 1,995.

1. BANKS AND BANKING (§ 256*)—NATIONAL BANKS—OFFENSES—REPORTS TO COMPTROLLER—"FALSE ENTRIES."

The term "false entries," as used in Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), making it an offense for an officer of a national banking association to make false entries in reports to the Comptroller of the Currency, means untrue statements of items of account by written words, figures, or marks made therein, and was not satisfied by a mere unfilled blank in such report, viz., "Notes and bills rediscounted,, " when in fact the bank had rediscounted \$5,000 worth of its paper.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 966, 970-976; Dec. Dig. § 256.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2656, 2657; vol. 8, p. 7660.]

2. BANKS AND BANKING (§ 256*)—NATIONAL BANKS—OFFENSES—FALSE ENTRIES—REPORT TO COMPTROLLER.

Under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), making it an offense for a person knowingly to make false entries in reports of the condition of national banks to the Comptroller of the Currency, only those persons who knowingly make the false entries are chargeable, and not an officer of the bank, who verifies the bank's report containing a false entry for which he was not responsible.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 958-964, 967; Dec. Dig. § 256.*]

A. L. Herrigg was indicted for making alleged false entries in a report of a national banking association to the Comptroller. Demurrer to indictment sustained, and defendant discharged.

James W. Freeman, U. S. Atty., and S. C. Ford, Asst. U. S. Atty., both of Helena, Mont.

O. W. McConnell, of Helena, Mont., J. W. Speer, of Great Falls, Mont., and C. A. Rose, of Havre, Mont., for defendant.

BOURQUIN, District Judge. The defendant, on trial for alleged false entries made by him contrary to section 5209, R. S. (U. S. Comp. St. 1901, p. 3497), in a national banking association's reports to the Comptroller, objects to admission in evidence of the reports, in that the false entries relied on are not entries made by him or are true, though incomplete. The false entries alleged in the indictment are that defendant in reports verified by him, with the requisite evil intent, made entries thus, "Notes and bills rediscounted,, " that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

they were false, in that there were notes and bills rediscounted to the amount of \$5,000.

The reports disclose they are on forms furnished by the Comptroller, and contain many numbered items in print, with blank columns wherein to enter the several amounts thereof. "Notes and bills rediscounted" is one of the printed items therein, and defendant failed to enter the amount thereof, or to make any entry of any kind in connection therewith. The government contends that by adoption they are defendant's entries, and are false, in that the unfilled blank for the amount is equivalent to or implies an assertion by defendant that there were no notes and bills rediscounted. In disposing of the matter the court said:

The objection virtually challenges the sufficiency of the indictment to state an offense. The practice of refraining from demurring and of raising the issue by objections to evidence is to be discouraged, in that it is ill-timed, may find opposing counsel unprepared, and constrains the court "on circuit" to hasty determination of novel and grave law questions, with neither opportunity nor time for the research and consideration their importance merits. For that reason, and so that no technical advantage may accrue from the tactics employed, the objection is overruled pro forma (perhaps it might more properly be undetermined). In the court's opinion, however, the indictment does not charge an offense, and hence, as though demurred to and demurrer sustained, it is ordered dismissed. The defendant is discharged, and the jury excused.

The government's contention cannot be sustained. This is a statutory offense. The statute must be strictly construed, not to defeat the legislative will, but to effectuate it, to the end that no case not by Congress brought within the letter of the statute shall be included by construction. Though a case may appear of equal atrocity to those of the statute, or within the mischief thereof, if it be not clearly within the letter of the statute, it is clearly without it.

"Before a man can be punished, his case must be plainly and unmistakably within the statute." *U. S. v. Brewer*, 139 U. S. 278, 11 Sup. Ct. 538, 35 L. Ed. 190.

[1, 2] The statute prohibits making false entries. Neither false reports nor false verifications are within the statute. False entries in reports are untrue statements of items of account, by written words, figures, or marks made therein. Within the statute here involved they are the offense of him only who knowingly made them or caused them to be made. He who is not so responsible for a false entry is not guilty of making a false entry, though he verifies the association's report containing it. *Cochran v. U. S.*, 157 U. S. 287, 15 Sup. Ct. 628, 39 L. Ed. 704; *Richardson v. U. S.*, 104 C. C. A. 69, 181 Fed. 1; *U. S. v. Crecilius* (D. C.) 34 Fed. 30.

Here the entry as set out in the indictment is true, and not false, though it fails to set out the amount of the notes and bills rediscounted. To convert it into a false entry, it must be implied the negative "None" is intended to follow. If it were a necessary implication, doubtless it would be indulged. But it is not. An implied affirmative

is as reasonable—more reasonable, in view of the presumption of innocence. The most that can be said is that the entry is ambiguous.

If implications were permissible in cases like this at bar, whether the offense of making false entries was committed would depend on some subsequent mental process of the Comptroller. In this case one Comptroller might imply a negative, and so convert the entry into a false entry and the maker into an offender, and another Comptroller might imply an affirmative and so maintain the integrity of the entry and the innocence of its maker.

Men's guilt or innocence depends on their own acts and their aspect when performed; not on the alternative inferences of other persons thereafter. Doubtless the Comptroller could have rejected the reports as no reports in so far as the item involved is concerned, and could have imposed the penalty of \$100 per day, till reports made, provided for by section 5213, R. S. (U. S. Comp. St. 1901, p. 3499). But he could not accept them and by implication convert an incomplete, but literally true, entry therein into a false entry. And if we look beyond this indictment to the reports offered in evidence, it may be observed that a blank is not an entry. Instead of making a false entry, guilty action, defendant did not make any entry, mere inaction. Nor could the printed item in the form under any circumstances become a false entry by adoption made by defendant. If false, it might be a false statement by adoption; but, since defendant neither made nor caused it to be made, it could not be a false entry made by him. Hence, no offense within the statute involved.

The court is advised that the question here involved has been several times like decided in several districts, and that this indictment was sought by the Comptroller's office contrary to the advice of the government's counsel. It would seem that the Comptroller's office should either accept these decisions as law or seek a review thereof. Otherwise, prosecution is persecution.

IN RE HURLEY.

(District Court, D. Minnesota, Third Division. April 5, 1913.)

1. BANKRUPTCY (§ 67*)—PERSON SUBJECT TO ADJUDICATION—"WAGE-EARNERS."

Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), exempts wage-earners, and section 1, subsec. 27, provides that "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding \$1,500 a year. *Held*, that where an alleged bankrupt was employed as a traveling salesman at the rate of \$100 per month and board and lodging while traveling, and there was evidence that his employer's agreement to pay his traveling expenses was worth \$40 a month to him, his compensation exceeded \$1,500 a year, and he was therefore not exempt as a wage-earner.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 17, 18, 86, 87; Dec. Dig. § 67.*]

For other definitions, see Words and Phrases, vol. 8, p. 7365.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 14*)—JURISDICTION—DOMICILE—EVIDENCE.

An alleged bankrupt admitted that his residence was in St. Paul, Minn., until January 13, 1912, which lacked 13 days of being the greater part of six months preceding the filing of the bankruptcy petition in that district, but claimed he had changed his residence to Texas before January 26, 1912. He did not reach Texas until January 21st, and while he was actually within the state after that date, it appeared that the duration of his employment was uncertain, and that he was traveling with his wife in Texas in about the same manner he had previously traveled for the same employer through Kentucky and other states during the preceding year when he admitted that he retained his residence in St. Paul. *Held*, that his testimony that he intended to fix his residence in Texas as soon as he arrived there was not conclusive, and that the evidence did not show that he had changed his residence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 14.*]

3. WITNESSES (§ 400*)—ADVERSE WITNESS—CONCLUSIVENESS OF TESTIMONY.

The fact that petitioning creditors in involuntary bankruptcy proceedings called the alleged bankrupt as a witness as to his residence, and he testified that he intended to change his residence from Minnesota to Texas as soon as he arrived there, did not preclude such creditors from showing the contrary.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 400.*]

4. BANKRUPTCY (§ 67*)—PERSONS WHO MAY BE ADJUDGED—WAGE-EARNERS—CONTRACT OF EMPLOYMENT—TRAVELING EXPENSES.

A contract of employment by which the employé was to receive \$100 a month and traveling expenses would not entitle him to any allowance for expenses while he was at home.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 17, 18, 86, 87; Dec. Dig. § 67.*]

5. BANKRUPTCY (§ 481*)—INVOLUNTARY PROCEEDING—ADJUDICATION—CONTEST—HEARING—FEES.

Under local bankruptcy rule 10, providing for the fees of a referee, his fees as special master, on the hearing of an issue raised on an involuntary petition as to whether the court had jurisdiction and whether the alleged bankrupt was subject to adjudication, could not exceed \$10.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 886; Dec. Dig. § 481.*]

In Bankruptcy. In the matter of Joseph A. Hurley, alleged bankrupt. Adjudication granted.

Russell L. Moore, of St. Paul, Minn., for the bankrupt and another.

Walter L. Chapin and John M. Bradford, both of St. Paul, Minn., for the creditors.

WILLARD, District Judge. This case came on to be heard upon the report of the referee as special master upon the answer of the National Surety Company, the creditor sought to be preferred, and upon the special plea to the jurisdiction of the court by the bankrupt, Hurley. The National Surety Company answered that Hurley was a wage-earner at the time the petition was filed against him on April 25, 1912. The facts are stated in the report of the special master and need not be repeated. The salary which Hurley received was \$100 a month and his traveling expenses. His employer did not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

make him an allowance of a certain sum, but reimbursed him for such traveling expense as he incurred. This included his hotel bills or what he paid out for food and lodging.

[1] A "wage-earner" is defined by the Bankrupt Act, as follows:

"Section 1. (No. 27) 'Wage-earner' shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year."

Hurley was employed by a company located at St. Louis, Mo. If that employer had agreed to pay him \$100 a month, and to board and lodge him at St. Louis, and if it were proven that this board and lodging was worth to Hurley \$40 a month, it must be clear that the compensation which he received by reason of his employment would be \$140 a month. In the present instance he received this board and lodging while he was traveling. In a case where an employé maintained a household establishment at his place of residence, from which place of residence he traveled for his employer, it might be difficult to determine just what the board and lodging furnished him while he was so traveling would be worth to him, for the expenses of his household establishment would still go on during his absence. This difficulty is not presented here, for, in the first instance, Hurley maintained no household establishment in St. Paul; and, in the second place, both he and his wife testified from their experience that the agreement on the part of his employer to pay his traveling expenses was worth \$40 a month to him. It thus appears that he was in fact at the time the petition was filed against him receiving compensation at the rate of \$140 a month, or more than \$1,500 a year, and was therefore not a wage-earner.

This defense of the National Surety Company cannot be maintained.

[2] Hurley's plea alleged that he had not had his residence or place of business within the district of Minnesota the greater part of six months preceding the filing of the petition against him. The facts relating to this matter are stated in the report of the special master, and need not be repeated here. The petition was filed, as has been said, on April 25, 1912. Hurley admitted that his residence was in St. Paul until January 13, 1912, which lacked 13 days of being the greater part of the six months preceding the filing of the petition. The question is whether he changed his residence to Texas before January 26, 1912. He did not reach that state until January 21, 1912. While he was actually within the state after that date, I do not think that the evidence shows that he did not intend to return to St. Paul. The duration of his employment was uncertain. He apparently was traveling in Texas with his wife in about the same manner as he had traveled for the same employer through Kentucky and other states during the preceding year, when he admittedly retained his residence in St. Paul. Although he says that he intended to fix his residence in Texas as soon as he arrived there, yet this statement by him is not conclusive.

[3] The fact that the petitioning creditors called Hurley as a witness did not preclude them from showing that the facts material to the controversy were different from what Hurley stated that they were.

The matter of his intention was a fact material to this inquiry. Upon that question his acts while in Texas are more important than his testimony given after this controversy arose, as to what his intention then was. By the terms of his contract of employment he was entitled only to his traveling expenses.

[4] That, of course, would entitle him to no allowance for expenses while he was at home. At the time the petition was filed against him he said that he lived in Houston, Tex. The testimony shows, however, that he charged his employer with his expenses for board and lodging while he was at Houston, and that such expenses were paid. This fact is entirely inconsistent with the idea that Houston was his residence, or that he was anything more than a traveler while he was there. His plea to the jurisdiction cannot be sustained.

[5] Under rule 10 the fees of the referee as special master upon this hearing cannot exceed \$10.

It is therefore now here ordered that the answer of the National Surety Company and the plea of Hurley be overruled; that said Hurley be and hereby is adjudged a bankrupt; and that the case be referred to the proper referee for further proceedings in accordance with law.

In re BEARD.

(District Court, S. D. Georgia, N. E. D. March 28, 1913.)

1. CHATTEL MORTGAGES (§ 48*)—CROP MORTGAGE—DESCRIPTION.

A description in a crop mortgage of all the grantor's crop of cotton of 100 acres now up and growing on the lands of B. M. W., also 30 acres of corn on same place up and growing, and 20 acres of cotton on D. J. H.'s place up and growing, was not fatally defective; parol evidence being admissible to identify the same.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 93-95; Dec. Dig. § 48.*]

2. BANKRUPTCY (§ 184*)—CLAIMS—PRIORITY—CROP MORTGAGE—RECORD.

Under Civ. Code Ga. 1910, § 3349, providing that the lien of mortgages on crops given to secure debts for supplies to aid in making and gathering the crop shall be superior to judgments of older date than the mortgages, a crop mortgage, though not recorded until after an action was brought on a note against the mortgagor, was prior to the rights of the holder of the note; the mortgagor having become a bankrupt before judgment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

In Bankruptcy. In the matter of bankruptcy proceedings of J. E. Beard. On petition to review an order overruling objections of a trustee to priority of a crop mortgage held by J. O. and N. B. Chenault.

C. E. Sutton, of Washington, Ga., for trustee.

F. H. Colley, of Washington, Ga., for bankrupt.

Hardeman, Jones, Park & Johnston, of Macon, Ga., for J. O. and N. B. Chenault.

SPEER, District Judge. The parties to this case are all gentlemen mainly engaged in agricultural pursuits. In addition to these, the Chenaults conduct a country store at the "forks of the road" not far from Washington, in the county of Wilkes. Since before the American Revolution that historic county has proudly worn its name in honor of that John Wilkes, the famous editor of the North Briton, whose implacable hostility to King George III captivated the affection of Georgians in those early days. The county town, Washington, was given its famous name, not for the Father of his Country, but for Col. Washington, commanding those stark Virginian riflemen, ancestors of the "Stonewall Brigade" who covered Braddock's retreat and saved the remnants of his routed redcoats.

It is not unnatural that a people with such independent antecedents should have independent business methods. The case is illustrative of this. The Chenaults, in their business of "furnishing" the adjacent planters, took many crop mortgages. They, however, recorded none of them. Such record might have been an imputation on the Southern gentlemen with whom dealt these merchants of Huguenot strain. Now, a crop mortgage is a favored security in Georgia. It attaches, not only to the "growing crop," whether it has begun to grow, or actually grows, or ever grows. It secures payment for the guano or other fertilizer, natural or artificial, which stimulates and perfects the snowy fruitage of our royal staple, or the dark green of the Indian corn whose squares of tasselling plumes, swayed o'er broad acres by the soft breath of Southern winds, are glorious like an army with banners. The crop mortgage also supplies rations for Scipio Africanus and his patient mule, who, notwithstanding the obloquy they mutually wear, have no mean place in our economy. Such mortgage, indeed, is regarded in Georgia as superior in dignity to a court judgment, which in less favored states might have the priority of its date. This is made plain by section 3349 of our Code, and has been the law since the act of 1899:

"The lien of mortgages on crops, which mortgages are given to secure the payment of debts for money, supplies, and other articles of necessity, including live stock, to aid in making and gathering such crop, shall be superior to judgments of older date than such mortgages."

Now the Chenaults hold a mortgage of that superior sort. It covered the cotton to be grown on certain specified lands and certain mules. Some of the mules have departed this life, but the value of the cotton is in hand. Another creditor of Beard, the bankrupt, who executed this crop mortgage, is A. S. Anderson. He is the owner of a promissory note given long ago by Beard. In this the payee appears to be "Rasin Fert. Co.," which we construe to mean the "Rasin Fertilizer Company." Of this company, the record is silent. It has probably long been numbered with the things that once were and are not. The note was made at the remote period of May 4, 1894. A. S. Anderson is the transferee of this note, but with that neighborly spirit which pervades in the glorious county of Wilkes (which we may remember en passant was the home of the Mirabeau of the South, Robert Toombs, who is reputed to have said, long ago, that he would

read the roll of his slaves at Bunker Hill monument, but probably never said it), did not trouble his neighbor Beard about principal or interest, or any such base mechanical matter. The years rolled by. In each successive year, when the gentle springtime came and the Southern woods put on their vernal beauties, the orchards gave premonition of their lovely blooms, those good neighbors would repair to Augusta and Washington, and with the accommodating factors "arrange" for "guano," for "mules" and "supplies." Thousands of crop mortgages there were in all these years in Wilkes. All matured and most were paid, for in Wilkes the payment of honest debts was a sine qua non to distinction, indeed to social rank. What harvests of corn and cotton, of melons, of peaches, and all the other varied wealth which nature pours into Georgia's lap, was garnered in these prolific years by Beard, we do not know; but through all Anderson, like Gallo in Holy Writ, cared for none of these things. Not until Beard had done his best and failed were courts and sheriffs troubled with the long dormant claim.

[1] In 1911 the suit of the Rasin Fertilizer Company for the use of A. S. Anderson against J. H. Beard appears for the first time on the dockets of Wilkes superior court. In the meantime bankruptcy intervenes. The "uniform system" made possible by the "sages and patriots" who framed the Constitution takes effect, and so no judgment as yet has been entered on the records of said superior court. The trustee in bankruptcy is appointed. The crop mortgage is filed, and then that official of the bankruptcy court reaches the conclusion that the vital security by which the Georgia farmer is year after year kept "a going concern" must be held subordinate and inferior in rank to the uncomplete proceedings to enforce the chose in action Anderson so long ago bought from the Rasin Fertilizer Company. By the trustee the mortgage is attacked. Insufficient he contends is the description of the values pledged. Now the descriptive language is:

"All my crop of cotton of 100 acres now up and growing on lands of B. M. Walton; also 30 acres of corn on same place up and growing, 20 acres of cotton on Mrs. D. J. Hill's place up and growing."

It is true that this description leaves something to imagination; but it has seemed sufficient to the courts of the state, by whose rulings on such questions we are probably controlled. In *Read Phosphate Company v. Weichselbaum Company*, 1 Ga. App. 420, 58 S. E. 122, it is held that a mortgage which describes the property as "all my crops, corn, cotton, etc., now up and growing, on about 240 acres of land, all of the above property is in Jackson District, county and state aforesaid," may be explained by parol evidence, so as to point out and identify such property, and is good as between the parties to the mortgage. If it may be explained by parol evidence, surely it may be identified by admission in judicio; and the counsel for the trustee on this hearing admitted that the cotton figuratively before the court was the cotton raised on the lands therein mentioned.

[2] It is, moreover, insisted that this crop mortgage was not recorded until after Anderson's action on the fertilizer note was filed. This, however, does not affect the validity of the crop mortgage as

between Chenault and Beard, nor can it affect the ancient demand of Anderson. No fraud or intended fraud is charged. The credit given by Rasin Fertilizer Company to Beard and evidenced by the promissory note which Anderson holds could not have prevailed, as we have seen, against the crop mortgage, even had it been placed in judgment. A fortiori the crop mortgage must prevail, where the 18 years old chose in action has not been placed in judgment at all.

The referee in bankruptcy has sustained the validity of this crop mortgage which Beard gave to the Chenaults, in order to secure means to make the very cotton, the proceeds of which are now before the court. We think that the law of the state and the principles of equity as well uphold this decision; beside the leisurely methods adopted by Anderson for the enforcement of his 18 years old note, while enhancing the charm of life, where life is happiest in the county of Wilkes, are not favored by the law. Doubtless Anderson's long and langorous repose has made him a happier man. Doubtless it has added to his length of days. But is there not the maxim old, "*Vigilantibus et non dormientibus jura subveniunt*," which with liberal interpretation imports, "A Georgia crop mortgage is not conducive to safe repose."

In re E. A. WALKER & CO.

(District Court, N. D. Alabama, E. D. March 26, 1913.)

No. 529.

BANKRUPTCY (§ 122*)—CREDITORS' MEETING—ELECTION OF TRUSTEE—MAJORITY CREDITORS—RIGHT TO VOTE—IMPROPER REPRESENTATION.

Where at a creditors' meeting it appeared that the claims of the majority creditors both in number and amount were represented by disqualified attorneys, who had represented the bankrupt and had solicited part of the claims held by them and intended to vote for an inappropriate person, and, they being refused the right to vote, the attorneys asked leave to vote for another and suitable person, which was denied, it was error for the referee to deny their application for delay, to enable the creditors to obtain other proper representation and participate in the selection of a trustee, and to proceed to the election of a trustee nominated by minority creditors who was unsatisfactory to the majority; no improper conduct having been charged to the creditors, and it not appearing that they were in collusion with the bankrupt or his former attorneys.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 168, 169; Dec. Dig. § 122.*]

In Bankruptcy. In the matter of bankruptcy proceedings of E. A. Walker & Co., bankrupts. On petition of creditors to review a referee's order disallowing a right to vote on election of trustee. Granted, and remanded, with directions.

Blackmon, Merrill & Walker and C. H. Young, all of Anniston, Ala., for petitioners.

Rutherford Lapsley, of Anniston, Ala., for creditors.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GRUBB, District Judge. At a creditors' meeting it appeared to the referee that the claims of a large majority in number and amount were represented by the attorneys who had filed the voluntary petition for the bankrupt, but who had ceased to represent the bankrupt after the date of the filing of the petition, and that this firm of attorneys, during their representation of the bankrupt, had solicited a part of the claims held by them. It also appeared that they were going to vote them for a person as trustee who was put forward in the interest of or with the desire of the bankrupt. The referee determined that the claims were improperly represented, and that the person to be voted for by them was an inappropriate person to act as trustee. Thereupon the attorneys who represented such claims asked leave to vote them for another and suitable person, which was denied them upon the ground that they could not with propriety represent the claims by reason of their former connection with the bankrupt and the manner in which they had acquired the claims. The attorneys thereupon asked the referee to defer the creditors' meeting for a reasonable time to enable the creditors they represented to obtain other proper representation. No improper conduct was charged to the creditors, nor does it appear that they were in collusion with the bankrupt or his former attorneys, or had any improper motive in seeking the election of such person as trustee, nor did it appear that they knew of any conduct on the part of the bankrupt or his former attorneys that would preclude the former attorneys from representing them at the meeting. The referee held that the claims represented by the firm of attorneys, being improperly represented, could not be held as being present at the meeting at all, and declined to defer the meeting in order to enable them to obtain proper representation, but permitted a minority in number and amount of the proven claims to proceed with the election of a trustee, who was unsatisfactory to the majority. The creditors whose votes were disallowed filed a petition for review to the District Judge.

The conclusion of the referee is concurred in, so far as it determines that the attorneys holding the proxies of the majority in number and amount were not proper persons to vote their claims, and in so far as it determines that the candidate put in nomination by these attorneys was not a suitable person to act as trustee. In view of the fact that the majority creditors were not in fault in being improperly represented by such attorneys and in voting their claims for an ineligible trustee, it seems fair that they should have had a reasonable opportunity to acquire proper representation and to vote their claims for a suitable candidate; no injury to the estate being made to appear as a result of the delay to the meeting. In the case of *In re Nice & Schreiber* (D. C.) 123 Fed. 987, 988, the court said:

"Of course, if the creditors are content with this result (appointment by the referee upon failure of the majority in amount and the majority in number to agree on a trustee), and without objection permit the referee to appoint, no fault can be found with such appointment; but when, as in the present case, they unanimously ask for a reasonable postponement in order that they may have an opportunity to compose their differences, if that be possible, I think they are entitled to the delay. *And, in my opinion, the same consideration should be paid to a similar request by a majority in both number and*

amount. The creditors have the right to administer what is practically their own property by a proper trustee of their own choosing, and they should have such time as may be reasonable to see if they cannot get together upon so vital a subject."

For a like reason, it seems to me that the will of the majority in number and amount should not be set aside and the will of a minority substituted for it until a reasonable opportunity has been given the majority, when without fault, to properly present and vote their claims at the meeting. If after such opportunity was offered them they failed to do so, the votes of the minority should control, but not until then.

For these reasons I think the petition for review should be granted, and the referee directed to set aside the appointment of the trustee, and call another creditors' meeting for the election of a trustee, at which meeting the majority creditors in number and amount, who were excluded, shall be permitted to participate, if properly represented, and cast their votes for any suitable candidate; the present trustee to hold until his successor qualifies. No detriment to the estate can result, since the trustee has no duties left to perform except in reference to pending litigation.

COLLINS v. TWIN FALLS NORTH SIDE LAND & WATER CO.

(District Court, D. Idaho, S. D. April 1, 1913.)

No. 426.

1. REMOVAL OF CAUSES (§ 75*)—AMOUNT IN CONTROVERSY—PART OF RECOVERY—WAIVER.

In general, plaintiff in his prayer may waive a part of the recovery to which according to the averments of the complaint he is entitled, and thus avoid a removal of the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 132; Dec. Dig. § 75.*]

2. REMOVAL OF CAUSES (§ 75*)—AMOUNT IN CONTROVERSY—PART OF RECOVERY—WAIVER.

Plaintiff filed a complaint, containing two causes of action for breach of contract by which defendant agreed to furnish plaintiff water for irrigation; the first concluding with an allegation that there was due to plaintiff from defendant on account thereof \$4,234.50. The second count alleged that plaintiff suffered damages to the amount of \$1,425, and without more prayed judgment for \$2,999, without any allegation as to the cause of action on which he desired to credit the difference. *Held*, that since plaintiff did not waive any specific portion of either cause of action, but required defendant to contest the whole, the prayer for judgment was insufficient to prevent a removal of the cause on the ground that the controversy did not involve a dispute in excess of \$3,000 in value.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 132; Dec. Dig. § 75.*]

At Law. Action by Dolin Collins against the Twin Falls North Side Land & Water Company. On motion to remand. Denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Johnson & Haddock, of Shoshone, Idaho, for plaintiff.

S. H. Hays and P. B. Carter, both of Boise, Idaho, for defendant.

DIETRICH, District Judge. This cause was commenced in the state district court, and it having been removed here, the plaintiff now moves that it be remanded, upon the ground that the matter in dispute is not of a value in excess of \$3,000. Two causes of action are set forth in the complaint, in each of which damages are claimed for the violation of a contract by which the defendant agreed to furnish water to the plaintiff for irrigation purposes. The first cause concludes with this averment:

"That no part of said damages have ever been paid, and there is due to the plaintiff from the defendant on account thereof the sum of \$4,234.50."

Under the second count it is alleged that the plaintiff suffered damages to the amount of \$1,425. The prayer is for a judgment for \$2,999, together with interest and costs.

[1, 2] It may be conceded to be a general rule that plaintiff may in his prayer waive a part of the recovery to which, according to the averments of the complaint, he is entitled, and thus avoid removal. *Swann v. Mutual Reserve F. L. Ass'n* (C. C.) 116 Fed. 232; *Simmons v. Mutual Reserve F. L. Ass'n* (C. C.) 114 Fed. 785; *Barber v. Boston & Maine R. Co.* (C. C.) 145 Fed. 52. It is, however, thought that the case here made is an exception to this general rule. Each cause of action presents a distinct issue, and the judgment, when entered, will conclude the rights of the parties touching both claims. At the trial it will be necessary for the court to instruct the jury that, even though they find in favor of the defendant upon the second cause of action, they may still find the total amount prayed for upon the first. Defendant's jeopardy is upon both claims, the aggregate of which is not \$2,999, but \$5,659.50, and it must be prepared to meet two different sets of facts, and try out two separate controversies, one of which alone upon its face involves more than the jurisdictional amount.

The theory upon which the rule is based is that the plaintiff may credit his claim with the amount waived, and sue only for the balance. If the plaintiff here were required to give the necessary credit, would he be willing to do it; and, if so, which claim would he diminish, or to what precise amount would he reduce each claim? If he had given specific credit, or made a specific waiver in his complaint, the case would have presented an entirely different aspect; but that he is apparently unwilling to do. He wants the benefit of the whole of both claims as the basis of a judgment for \$3,000; he is unwilling to take the chance of applying the credit upon one or the other, or, in stated portions, upon both. In case of suit upon a single promissory note, the amount of which is over \$3,000, if the plaintiff waives the excess, he in effect makes a specific credit upon the note. So, in case of a claim for a single item of damages in a personal injury suit, the waiver is specific. But here the plaintiff waives no specific portion of either cause of action, but requires the defendant to contest the whole thereof.

For these reasons, the motion will be denied.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO.
et al. (and Two Other Causes).

(District Court, S. D. New York. April 4, 1913.)

STREET RAILROADS (§ 55*)—FORECLOSURE OF MORTGAGE—SALE—RECEIVERS'
CONTRACT—LIABILITY OF PURCHASER.

Where a foreclosure decree, under which property of certain street railroads was sold, provided that the purchaser or his assigns should assume all pending, uncompleted, and unexecuted contracts of the receivers, but should not be personally liable for any unpaid indebtedness of the receivers, the purchaser's assigns were not liable to petitioner under an alleged royalty contract with the receivers for the equipment of cars with the pay-as-you-enter plan; it appearing that the cars in controversy had been equipped by the receivers long prior to the entry of the decrees in the foreclosure proceedings, or a sale of the property.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 134; Dec. Dig. § 55.*]

In Equity. Suit by the Pennsylvania Steel Company and another against the New York City Railway Company and others, with two other causes. Application by the Pay-As-You-Enter Corporation for an order directing the New York Railways Company, to whom, through a purchasing committee, the property in the hands of the receivers of the New York Central Railway Company, etc., passed on foreclosure sale, to pay a claim for alleged unpaid royalties and license fees under an agreement between petitioner and the receiver. Dismissed.

See, also, 201 Fed. 418.

John C. Rowe and Joseph L. Levy, both of New York City, for petitioner.

James L. Quackenbush, of New York City, for New York City Ry. Co.

Arthur H. Masten, of New York City, for receivers.

LACOMBE, Circuit Judge. The petitioner is the owner of a United States patent covering, as is alleged, a certain system of constructing and equipping street cars of the type known as "pay-as-you-enter" cars. It made a contract with receivers while they were operating the old Metropolitan System, licensing them to manufacture and repair cars of that type covered by the patent on payment of a royalty of \$100 for each car. Under this contract the receivers, between November 5, 1907, and February 10, 1908, constructed and equipped 155 such cars, for which they paid the stipulated license fee. Thereafter, and prior to December 31, 1909, the receivers constructed and equipped 375 other cars. Petitioner contends that these are of the type covered by the patent, and that under the terms of the contract the license fees of \$100 per car should have been paid. Such license fees were not paid by the receivers, because they contend that the 375 cars were of a different type not covered by the claims of the patent, and therefore were not within the terms of the contract.

The petitioner relies on a clause in the decree of foreclosure which provides that the purchaser (or his assigns) shall assume all pending, uncompleted, and not fully executed contracts of the receivers. The same decree contains the further clause that no purchaser shall be held personally liable for any unpaid indebtedness of the receivers. The decrees of foreclosure and sale were not entered until April and May, 1910, and the property was sold December 29, 1911, long after the 375 cars had been built and the receivers had refused to pay for them on the ground that they did not contain the devices covered by the claims of the patent.

If petitioner is right in its contention that these cars are covered by the patent, the contract was broken, and the obligation to respond in damages for its breach was incurred by the receivers, long before the foreclosure sale. The petitioner has mistaken its remedy. It should proceed against the receivers, with whom it made the contract. It could do this by suit, possibly in a state court, since it is suing on a contract to pay license fees; certainly in a federal court, for the real controversy is whether certain cars are or are not covered by the claims of a patent. Or, if petitioner wishes a more expeditious disposition of the controversy, it could file a claim against receivers, which the court would send to a special master, experienced in patent law. The report of such master would be reviewable by this court, and, if desired, by the Circuit Court of Appeals. If the petitioner should prevail, there will be no difficulty about his collecting the amount of his judgment or decree. Ample provision has been made for supplying the receivers with cash to meet all the obligations they may have incurred while operating the road.

The petition is dismissed.

In re DIAMOND.

(District Court, E. D. Wisconsin. April 3, 1913.)

BANKRUPTCY (§ 408*)—DISCHARGE—SCHEDULE—CONCEALED ASSETS—FALSE OATH.

Where a bankrupt purchased the capital stock of a corporation for \$5,700, paying \$2,000 cash by drawing checks on funds to his own credit, and paid the entire balance of the debt thereafter, but in bankruptcy proceedings scheduled neither the capital stock of the corporation nor its assets, the bankrupt's mere assertion that he purchased stock as agent for and in the interest of his wife, she furnishing funds with the intention of acquiring the business for her sons, was no answer to objections to his discharge that he had concealed assets and made a false oath to his schedules.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

In Bankruptcy. In the matter of Max Diamond, bankrupt. On objections to the bankrupt's discharge. Denied.

Objections are made to the discharge of the bankrupt upon two specifications: First, that he concealed, secondly, that he made a false oath in his schedules respecting the ownership of, property.

The facts, in brief, are: The bankrupt came to Milwaukee in September.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1910. Prior thereto he had been in business at Pontiac, Ill., and Tama, Iowa. At the latter place he had conducted a shoe store, and claimed to have become financially embarrassed. His affairs were not administered through bankruptcy or other proceedings, but he claims to have sold out.

Upon coming to Milwaukee, he entered into negotiations for the purchase of the capital stock of a corporation conducting a shoe business in a department store. He entered into a written contract for the purchase of 50 shares—being all of such stock—of par value of \$100 per share, agreeing to pay therefor the sum of \$5,700; \$2,000 to be in cash, and the balance thereafter out of the earnings of the business. At that time he paid \$500 toward the purchase price, and shortly thereafter an additional \$1,500. The \$500 was paid by his personal draft on funds to his credit in a bank at Tama, Iowa, and the \$1,500 by a check on the First National Bank of Milwaukee, drawn on an account in his own name. The entire balance was subsequently paid. He claims that the purchase was made as agent for or in the interest of his wife, she having furnished the funds with the intention of acquiring the business for her sons. He has been in sole conduct and charge of the business.

The objector contends that either the capital stock or the assets of the corporation is the property of the bankrupt.

The issues having been referred to a master, the matter now comes before the court upon his report sustaining the objections and recommending denial of a discharge.

Bloodgood, Kemper & Bloodgood, of Milwaukee, Wis., for objecting creditor.

Harry M. Silber, of Milwaukee, Wis., for bankrupt.

GEIGER, District Judge (after stating the facts as above). The master, after an exhaustive hearing in which he was required to believe or disbelieve the bankrupt, has rejected his story and recommended denial of a discharge. The testimony has been examined, and no doubt is entertained respecting the correctness of the conclusion so reported.

Without considering the many discrediting features of the record as made by the bankrupt, he has failed utterly to meet the burden which was cast upon him when the objector showed the transaction relating to the purchase of the stock or assets of the shoe company at Milwaukee. When he was shown to have made payment of the \$500 through a draft upon funds to his own credit in a bank at Tama, a further payment of \$1,500 through a check on the First National Bank of Milwaukee, against an account in his own name, and to have executed the formal written contract between the shoe company and himself, in none of which transactions is there the slightest suggestion of a proprietary right, interest, or ownership in anybody other than the bankrupt, he could not, by mere assertion that these transactions were in the interest of his wife or his minor sons, meet the burden of giving exact and explicit proof requisite to overcome the contrary direct inference of his personal ownership.

The objector had made a good *prima facie* case; and the bankrupt's assertion that he acted as agent, that the transaction was in the interest of other members of the family, does not amount to proof. It is at best a statement of his side of the issue presented. To require that such a sweeping or general statement be met by fur-

ther proof on behalf of the objector, in the situation presented, would deny to the objector the benefit of his prima facie showing.

An order may be entered confirming the master's report and denying a discharge.

In re HASSLER.

(District Court, D. Minnesota, Third Division. April 4, 1913.)

BANKRUPTCY (§ 398*)—EXEMPTIONS—HOMESTEAD.

Where one, having furnished materials for the repair of a debtor's homestead, did not secure a mechanic's lien, and the debt, which had been reduced to judgment, after the petition in bankruptcy was filed, was duly scheduled in the debtor's bankruptcy proceedings, the bankrupt was entitled to a stay of execution on the judgment until one year after adjudication, notwithstanding Const. Minn. art. 1, § 12, provides that the homestead shall not be exempt from seizure and sale for debts incurred for materials furnished in the repair thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 676, 677; Dec. Dig. § 398.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Christian J. Hassler. Application for order staying execution sale of the bankrupt's homestead on judgments recovered against him for repairs. Granted.

T. J. Newman, of St. Paul, Minn., for bankrupt.

WILLARD, District Judge. This is an application for an order staying execution sales of the homestead of the bankrupt upon judgments docketed on December 9, 1912, and after the adjudication of the bankrupt was made on September 27, 1912. The motion is made by the trustee and the attorney for the bankrupt. The judgment creditors are the W. R. Shaw Lumber Company and the Anderson Hardware Company.

It appears that the judgments were based upon claims for materials sold by the judgment creditors to the bankrupt for the repair of his homestead, and that they were used in making such repairs. It does not appear that any proceedings were taken to secure a mechanic's lien upon the premises under the laws of Minnesota.

Section 12 of article 1 of the Constitution of the state of Minnesota, however, provides that the homestead shall not be exempt from seizure and sale for debts incurred for material furnished in the repair of the same. It has been decided by the Supreme Court of Minnesota (Nickerson v. Crawford, 74 Minn. 366, 77 N. W. 292, 73 Am. St. Rep. 354; Bagley v. Pennington, 76 Minn. 226, 78 N. W. 1113, 77 Am. St. Rep. 637) that this provision of the Constitution does not create any lien upon the homestead, and that such lien is only created by an attachment filed, or by the docketing of a judgment against the debtor. These debts were, therefore, at the time of the adjudication, not liens upon any property of the bankrupt.

They were scheduled by the bankrupt, were under the bankrupt law provable debts, and will therefore be discharged if the bankrupt

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

succeeds in obtaining a discharge. Under the circumstances, it seems that proceedings in the state court to enforce this judgment by a sale of the homestead should be stayed. A similar ruling was made by the Supreme Court of Georgia in *Graham v. Richerson*, 8 Am. Bankr. Rep. 700, 115 Ga. 1002, 42 S. E. 374.

It is therefore ordered that all proceedings upon the executions referred to, and all further proceedings in the actions referred to, be stayed until 12 months after the date of the said adjudication, or, if within that time the bankrupt applies for a discharge, then until the question of such discharge is determined.

NOTE.—Order vacated June 30, 1913, on the authority of *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061.

MISSOURI, K. & T. RY. CO. v. MEYER, State Auditor of Oklahoma.

(District Court, W. D. Oklahoma. January 25, 1913.)

No. 513.

1. TAXATION (§ 63*)—GROSS REVENUE TAX ON MINERALS—OKLAHOMA STATUTE—CONSTRUCTION.

Under Act Okl. May 26, 1908 (Laws 1907-08, c. 71, art. 2) §§ 2, 3, and section 6 as amended by Act March 27, 1909 (Laws 1909, c. 38, art. 2), Comp. Laws Okl. 1909, §§ 7702, 7703, 7706, which require every person or corporation engaged in the mining or production of coal, oil, gas, or ores to make quarterly reports of production and pay to the state a percentage tax on the "gross receipts from total production," a railroad company is not exempt from the tax on coal it mines because it does not sell the same but uses it in the operation of its road.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 147; Dec. Dig. § 63.*]

2. STATUTES (§ 121*)—TAXATION (§ 38*)—GROSS REVENUE TAX ON MINERALS—OKLAHOMA STATUTE—CONSTITUTIONALITY.

Act Okl. May 26, 1908 (Laws 1907-08, c. 71, art. 2) §§ 2, 3, and section 6 as amended by Act March 27, 1909 (Laws 1909, c. 38, art. 2), Comp. Laws Okl. 1909, §§ 7702, 7703, 7706, imposing a gross revenue tax on mineral production in the state, is not in violation of Const. Okl. art. 5, § 57, limiting acts to one subject expressed in the title, nor of article 10, § 19, requiring acts to specify the purpose of taxes thereby imposed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 146, 173, 174; Dec. Dig. § 121; * Taxation, Cent. Dig. § 67; Dec. Dig. § 38.*]

3. COMMERCE (§ 72*)—GROSS REVENUE TAX ON MINERALS—OKLAHOMA STATUTE—VALIDITY.

Nor is such statute invalid as imposing a burden on interstate commerce as applied to coal mined by a railroad company and used in the operation of interstate trains.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 123-136; Dec. Dig. § 72.*]

4. TAXATION (§ 6*)—PROPERTY SUBJECT TO TAXATION—RAILROADS OPERATED UNDER FEDERAL GRANT.

That the lines of a railroad company were built and are operated under grants by Congress does not affect the right of the state to tax its property, where the tax does not interfere with the performance of any service to the government which may have been made a condition of the grants.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 18; Dec. Dig. § 6.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. TAXATION (§ 6*)—POWER OF STATE—TAX ON FEDERAL INSTRUMENTALITY—OKLAHOMA STATUTE.

The tax imposed by Act Okl. May 26, 1908 (Laws 1907-08, pp. 640, 641, c. 71, art. 2) §§ 2, 3, and section 6 as amended by Act March 27, 1909 (Laws 1909, c. 38, art. 2), Comp. Laws Okl. 1909, §§ 7702, 7703, 7706, on the "gross receipts of total production" of coal and other minerals in the state, in addition to ad valorem taxes on the property of the producers, is in effect a tax on the business of mining, and, as applied to lessees of coal lands of the Indian tribes under direct authority and regulation of the United States, is invalid as a burden on a federal instrumentality.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 18; Dec. Dig. § 6.*]

In Equity. Suit by the Missouri, Kansas & Texas Railway Company against Leo Meyer, State Auditor of the State of Oklahoma. On demurrer to bill and exceptions to answer. Decree for complainant.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, Okl., and C. G. Hornor, of Guthrie, Okl., for plaintiff.

Charles West, Atty. Gen., of Guthrie, Okl., for defendant.

COTTERAL, District Judge. This suit was brought by the railway company to obtain a decree enjoining the collection by the State Auditor of gross revenue taxes imposed upon receipts derived from its railway operations under the laws of the state found in sections 2 and 3 of the act of May 26, 1908, Session Laws 1907-08, pp. 640, 641, forming sections 7702 and 7703 of Snyder's Compiled Laws of 1909, and upon receipts from coal mined and produced by the company in the state, under section 6 of the same act, and under that section as amended by act of March 27, 1909 (Laws 1909, c. 38, art. 2), forming section 7706 of Snyder's Compiled Laws.

A general demurrer to the bill was heretofore overruled. The taxes upon the gross railway receipts are conceded to be invalid under the decision of the Supreme Court, in Meyer, Auditor, v. Wells Fargo & Co., 223 U. S. 298, 32 Sup. Ct. 218, 56 L. Ed. 445, and must be enjoined in the final decree. The remaining controversy involves the taxes claimed on receipts from coal production. Upon leave given, the defendant has demurred to a portion of the bill, and filed an answer to the residue, relative to that subject. The answer admits that the coal is not taxable "in place," but alleges that it becomes so on severance, and justifies the law as "a fair and reasonable method of establishing the property rights of plaintiff both in the severance and mining of such coal, and in the property rights so acquired and thus subjected to taxation," and not otherwise taxed, and denies the averment of the bill that all of plaintiff's property was assessed at full cash value. The case is now submitted on said demurrer and exceptions to the answer.

Section 6 of the act of May 26, 1908, requires every person, firm, or corporation engaged in the mining, or production, within the state, of coal or asphalt, or of ores, to file quarterly reports with the State Auditor, showing the location of each mine, or oil or gas well, the kind of product, the gross amount produced, actual cash value, and other information, and at the same time to pay to the State Treasurer

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a gross revenue tax in addition to ad valorem taxes upon mining, oil, or gas property equal to 2 per centum of the gross receipts from the total production of coal therefrom, or one-half of 1 per centum for the total production of ores, etc.

The amended section, adopted March 27, 1909 (section 7706, Snyder's Compiled Laws), differs in changing the quarterly periods and fixing the tax on receipts from coal productions at one-half of 1 per centum. Further provisions of the section empower the Auditor to require additional information, examine books, etc., and compel the attendance of witnesses, and, in case of untrue or incorrect returns, ascertain the correct amount of gross receipts and compute the tax.

Section 7 of the former act (section 7707, Snyder's Compiled Laws) fixes the time of delinquency of the tax and penalties therefor, and, in case of failure of report, authorizes the Auditor to ascertain the amount and value of production, compute the tax, and add costs and penalties. Section 7a of the former act (section 7708, Snyder's Compiled Laws) authorizes a rebate of taxes when ores and minerals (not including coal) have been manufactured or refined in the state. Section 8 of the former act (section 7709, Snyder's Compiled Laws) provides for the collection of the tax by warrant. And section 7711 (Snyder's Compiled Laws), adopted March 27, 1909, provides that the funds be paid into the state treasury and credited to the general revenue fund of the state for the payment of the expenses of the state government.

The grounds of complaint mainly urged against these taxes are: (1) That the acts do not apply to coal production by the plaintiff, as it does not sell the coal, but uses it solely for its railway purposes. (2) That the acts are violative of section 57 of article 5, and section 19 of article 10, of the state Constitution. (3) That the tax is void as a burden upon interstate commerce. (4) That it is void because imposed upon rights and privileges conferred by the federal government.

[1] 1. With respect to the controversy as to the application of the law to coal mined and used by the railway company, no receipts being realized from sales, the rule of construction to be followed is that all the provisions relative to the matter should be harmonized and given effect if that may be done consistently with the evident legislative intent. The tax purports to be laid upon a per centum of the "gross receipts from the total production of coal," and from these words standing alone a meaning might be extracted that only taxation based upon sales was contemplated. But the tax is payable by all persons engaged in the mining or production of coal, etc., and not in selling it. A sworn return is exacted showing the location of the mine or well, the kind, the gross production, actual cash value, and other information, and while the Auditor is, under the same section, authorized to ascertain the gross receipts and compute the tax, the next section empowers him to ascertain the amount and value of production, compute the tax, etc. And section 7708, in providing for a rebate of taxes when asphalt, ores, or petroleum, or other mineral, have been manufactured or refined, contemplates a tax irrespective of sale of the natural product and not dependent on the sale after it has been manu-

factured or refined. The intent, from the several provisions taken together, seems therefore manifest to provide for the collection of a tax, whether the mineral is put on the market, or used by the producer, and by the expression "gross receipts from total production" to refer to equivalents in either case, and accomplish the object of obtaining revenues from all production of mineral, regardless of use. This conclusion appears to be necessary, notwithstanding the conceded principles that taxes must be imposed by law, and that the law should be construed favorably to the taxpayer and not extended by implication beyond its clear intent.

[2] 2. Section 57 of article 5 of the state Constitution limits legislative enactments to one subject expressed in the title, with certain exceptions, and requires amendments to be re-enacted and published at length, etc. In the case of *Binion v. Oklahoma Gas & Electric Co.*, 28 Okl. 356, 114 Pac. 1096, the Supreme Court of the state expressly decided that both the acts of 1908 and 1909 here involved were in accord with that section; and by uniform authority the construction of the Constitution of a state by the Supreme Court thereof is controlling in this court.

Section 19 of article 10 of the state Constitution requires legislative acts to specify distinctly the purpose of taxes thereby levied, etc. In the case of *Binion v. Oklahoma Gas & Electric Co.*, supra, it was said that, conceding the former act did not meet the requirements of section 19 of article 10, it seemed to have been permissible to cure the act by amendment. It was added, however, that it was not essential to determine whether the act in question was in violation of that section. But in the case of *McGannon v. State* (Okl.) 124 Pac. 1063, involving the act of May 26, 1908, imposing a tax upon inheritances, it was said by the state Supreme Court, of section 19 of article 10 of the Constitution, that "it is intended to apply only to annually recurring taxes imposed generally upon the entire property of the state and not the kind of tax we are dealing with, which is a special tax," and cases were quoted from applicable to the subject. The taxes here involved cannot be classified as "annually recurring" or "imposed generally upon the entire property of the state." They are dependent upon the discovery and production of mineral in particular localities, and for this reason the above section of the Constitution cannot be held to detract from the validity of the acts imposing them.

[3] 3. The contention that this tax constitutes a burden on interstate commerce thus invalidating it cannot be sustained. It is alleged that the plaintiff is an interstate carrier of goods, passengers, and the mails, and that the coal is used in the interstate railway operations of the company. But the tax does not purport to be a charge upon transportation, or the receipts therefrom, and it is not seen how it is open to objection on the ground of interference therewith. In the case of *Postal Cable Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 360, 39 L. Ed. 311, it was said:

"It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on

interstate commerce * * * and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchise within the state * * * (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not itself subject to restraint or impediment."

And in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, it was said:

"We are aware of no decision by this court holding that a state may, by any device or in any way, whether by a license tax, in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another state, although the state may tax the corporation's property regularly or permanently within its limits, where the ascertainment of the amount assessed is made dependent in fact on the value of its property situated within the state."

The coal produced from mines by the plaintiff first has its situs, and the production occurs, wholly within the state. If the tax should be regarded as levied upon property, it would not be objectionable on account of its use in interstate commerce. But if it was levied upon the production of the coal, it cannot be held invalid as a restraint or burden upon interstate commerce, because it attaches in advance of any use of the coal in such commerce, and it is too indirect in its effect thereon. *Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21, 24 Sup. Ct. 202, 48 L. Ed. 325; *Williams v. City of Talladega*, 226 U. S. 404, 33 Sup. Ct. 116, 57 L. Ed. —, decided December 23, 1912; *Thomas v. Gay*, 169 U. S. 264, 18 Sup. Ct. 340, 42 L. Ed. 740.

[4] 4. The objection that the tax is improperly laid upon rights and privileges conferred by the federal government is based on its effect upon grants of Congress to construct and operate railway lines, and upon certain leases for obtaining coal from the lands of Indian tribes. In addition to the averment that plaintiff is a carrier engaged in both intrastate and interstate commerce, with lines established under congressional acts before the adoption of the statehood Enabling Act, the bill alleges that the plaintiff has leases of coal mines upon segregated and unallotted lands owned by the Choctaw and Chickasaw Nations, executed by them and in their behalf and approved by the Secretary of the Interior under the act of June 28, 1898, c. 517, 30 Stat. 498, from which mines the plaintiff produces coal for its railway uses, and for which it pays royalties for the use and benefit of the tribes, and that the mining of the coal is conducted under acts of Congress and the supervision and direction of the Secretary of the Interior in accordance therewith.

Exemption from taxation of railway property or business within a state cannot be upheld on the ground that the lines have been constructed and are operated under grants contained in acts of Congress and accepted by the companies. The power of the state to tax is understood not to be affected in such cases, provided the tax be not

imposed upon or designed to terminate the service to be rendered the government in the way of transportation, etc., inserted as a condition or requirement in these grants. But this tax is not laid upon transportation service in any way, and its relation to such service to the government is so remote that the objections on that ground are without merit. *Williams v. City of Talladega*, *supra*; *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067.

[5] But the tax has a closer relation to the rights conferred by the leases of these coal mines, concededly a federal agency designed and put in execution by the government in pursuance of its constitutional power to deal with Indian tribes. The state's power of taxation is broad and complete and extends to all classes of property and occupations, and would not be open to objection because exerted upon this coal as property, or the right to mine it, unless it would thereby hinder or defeat the means employed by the government in carrying out its policy towards the Indians, in which case it would yield validity in favor of the superior power. *U. S. v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; *U. S. v. Thurston County*, 143 Fed. 287, 74 C. C. A. 425. If this tax were an ad valorem tax upon the coal produced from the mines, it would be valid because the exemption adhering to it in the mines would terminate on its removal, upon the general principle that taxation of property is valid after the status which exempts it no longer exists. But it is evidently not an ad valorem tax, as it is in terms imposed in addition to such taxes, and it is subject to the same comment in respect of its character as that upon gross railway receipts defined in the *Meyer-Fargo Case*, *supra*. If it is not a property tax, its classification would appear to fall within section 12 of article 10 of the state Constitution, authorizing the levy and collection of license, franchise, gross revenue, excise, and other special taxes. The following portion of the opinion of the state Supreme Court in the case of *Binion v. Oklahoma Gas & Electric Co.*, *supra*, with reference to the application of section 19 of article 10 of the Constitution, is strongly indicative of the view of that court as to the nature of the tax:

"The Court of Appeals of Kentucky, however, in construing a similar constitutional provision, held that it did not apply to franchise taxes. *Brown-Foreman Co. v. Com.*, 125 Ky. 402, 101 S. W. 321, 30 Ky. Law Rep. 793. As to whether the reasons that existed in Kentucky by which the Court of Appeals was induced to reach that conclusion would apply or have any persuasive force in this state, we do not now determine."

The language of the acts under consideration is that the tax is to be equal to a per centum of the "gross receipts from total production," and both ad valorem and franchise taxes are authorized by the Constitution. The construction therefore seems well fortified that the tax was intended to be laid upon the pursuit of mining. In that light it should be tested in its effect upon the federal agency embodied in the system of leasing the mines. If the tax be sustained, it seems clear it might be extended by legislation to the limit of depriving the leases of all value, and of frustrating the exercise of the federal pow-

er. The question is doubtless whether the tax is sufficiently direct in its bearing upon the leases to bring it into conflict with such agency.

In the case of *Thomas v. Gay*, 169 U. S. 264, 18 Sup. Ct. 340, 42 L. Ed. 740, taxes upon cattle grazed upon an Indian reservation in Oklahoma territory were upheld. It was argued that the taxes might impair or destroy the value of the lands for grazing purposes, but it was held to be obvious "that a tax upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians." It was also held that the tax was not an interference with the constitutional power of Congress to regulate commerce with the Indian tribes, but it was said:

"The taxes in question here were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees, and, as we have heretofore said that as such a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so it is too remote and indirect to be regarded as an interference with the legislative power of Congress."

This language is taken to indicate the view that a tax was not permissible upon the business of grazing. Here the tax based upon receipts from production of coal has been found to be virtually upon the business of producing it. A consideration of the character and effect of the tax in the case of the plaintiff leads to the conclusion that it so directly bears upon the leases and the rights conferred thereby that it should be declared invalid as a burden upon an instrumentality of the federal government.

The demurrer to the bill in part challenges the averments thereof which raise the question just decided, and the result is it must therefore be overruled. The answer does not raise any different question in asserting that the tax is laid on property rights. Nor does it contain relevant matter in alleging that plaintiff's other property is not fully taxed. If it be assumed that there was any failure of such assessment, it would not under the law aid or support the tax here involved. The exceptions to the answer are well taken, and will be sustained.

A final decree will be entered perpetually enjoining the collection or enforcement of the taxes involved in the suit, and the costs will be taxed to the defendant.

ROBERT H. INGERSOLL & BRO. v. McCOLL.

(District Court, D. Minnesota, Third Division. March 17, 1913.)

1. MONOPOLIES (§ 17*)—PATENTS—LICENSE—VALIDITY OF PRICE RESTRICTION.

If a license restriction imposed by the owner of a patent is not for the purpose of protecting the patent or for securing its benefits, but for the purpose of evading the Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), it is void.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.*]

2. MONOPOLIES (§ 17*)—PATENTS—LICENSE—VALIDITY OF PRICE RESTRICTIONS.

Complainants make and sell, under different trade-names, watches containing parts which are patented. Each watch is placed in a box, and on some of the boxes is printed a notice or so-called license, restriction by which complainants attempt to control the price at which the watch may be sold by jobbers and retailers under penalty of being charged with infringement of the patents. Others of the watches, sold under different trade-names, but having the same mechanism and containing the same patented parts, are sold without any restriction. *Held*, that such restrictions were clearly not intended to protect the use of the patents or the monopoly which the law confers upon them, but for the protection of certain of the trade-marks, and that a purchaser who had no contract relations with complainants was not bound thereby.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.*]

In Equity. Suit by Robert H. Ingersoll & Bro. against Henry McColl. On final hearing. Decree for defendant.

Edward S. Rogers, of Chicago, Ill., and E. S. Stringer, of St. Paul, Minn., for plaintiff.

C. D. O'Brien, of St. Paul, Minn., for defendant.

WILLARD, District Judge. This is a suit for the infringement of patent No. 787,041, granted April 11, 1905, for improvements in lantern pinions used in watches; patent No. 855,950, granted June 4, 1907, for improvements in lever escapements used in watches; patent No. 926,329, granted June 29, 1909, for improvements in watches relating to stem-winding and setting; and patent No. 958,987, granted May 24, 1910, for improvements in center frictions in watches. The infringement is said to consist in this:

The plaintiffs are owners of the patents. They cause to be manufactured for them a watch known under three names, "Ingersoll Dollar Watch," "Yankee Dollar Watch," and "Yankee." This they sell to jobbers, who sell to retail merchants. Each watch is packed in a box, on the outside cover of which is pasted the following notice:

"License.

"Robt. H. Ingersoll & Bro., Makers, New York, Chicago, London, San Francisco.

"Mechanism in this watch is covered by United States patents, and the watch is licensed and sold under and subject to the following conditions, assented to by purchase and controlling all sales and uses thereof, any viola-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of which license conditions revokes and terminates all rights and license as to this and all other watches of makers in violator's possession, and subjects the violator to suit for infringement of said letters patent:

"(1) Jobbers may sell only to retail dealers, may not sell to any one designated by makers as objectionable, may not detach or sell without this notice, and may sell only at rates specified in schedules furnished by makers.

"(2) Retailers may advertise and sell only to buyers for use at ONE DOLLAR.

"(3) No donation, discount, rebate, premium, or bonus may be allowed or given in connection with any sale at wholesale or retail.

"(4) Guarantee, with date of sale indorsed thereon, to accompany each watch."

The defendant, a retail druggist in St. Paul, never bought any watches from the plaintiffs, and never had any contractual relations with them. He did, however, buy from a jobber in Duluth several of the Yankee watches, advertised them for sale in his store at 83 cents each, and sold them at that price. He knew at the time of so advertising and selling them of the license restriction imposed by the plaintiffs in regard to the price. The prayer of the bill is that he be enjoined from selling a Yankee watch for less than \$1, and for damages and profits.

The real question in the case is whether this is a suit to protect a trade-mark, or one to protect a patent.

The Supreme Court of the United States has not yet directly decided that such a price restriction upon a patented article is binding upon a person who has entered into no contractual relation with the patentee. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 345, 28 Sup. Ct. 722, 52 L. Ed. 1086; *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 402, 31 Sup. Ct. 376, 55 L. Ed. 502. Nor has the Circuit Court of Appeals of this circuit so decided, but that court in the case of *National Phonograph Co. v. Schlegel*, 128 Fed. 733, 64 C. C. A. 594, did hold that such a price restriction could be enforced against a person who had entered into contractual relations with the owner of the patent.

But although the owner of a patent may control the price of the patented article, it does not follow that the owner of a trade-mark can do so. No such power is vested in the owner of a copyright. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086. The owner of an unpatented medicine cannot control the price in the hands of retail dealers with whom he has no contractual relations. An attempt to do so would be a violation of the Anti-Trust Law. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. It is very clear that the owner of a trade-mark is in no better position than the owner of a copyright. If this suit is really for the protection of a trade-mark, it cannot be maintained. Nor can it be maintained on the ground of any contractual relation between the plaintiffs and the defendant, because there was none.

Can it be maintained on the ground that the purpose is to protect a patent? In *E. Bement & Sons v. National Harrow Co.*, 186 U. S. 70, on page 92, 22 Sup. Ct. 747, on page 756 (46 L. Ed. 1058), the court said:

"But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act (Sherman Act) we have no doubt was never contemplated by its framers."

In *Henry v. Dick Co.*, 224 U. S. 1, on page 31, 32 Sup. Ct. 364, on page 372 (56 L. Ed. 645), the court said:

"If the stipulation in an agreement between patentees and dealers in patented articles, which, among other things, fixed a price below which the patented articles should not be sold, would be a reasonable and valid condition, it must follow that any other reasonable stipulation, not inherently violative of some substantive law, imposed by a patentee as part of a sale of a patented machine, would be equally valid and enforceable."

In *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. —, decided by the Supreme Court November 18, 1912, the court said:

"The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman Law. It had, therefore, a purpose and accomplished a result not shown in the Bement Case. There was a contention in that case that the contract of the National Harrow Company with Bement & Sons was a part of a contract and combination with many other companies, and constituted a violation of the Sherman Law; but the fact was not established, and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. And there is nothing in *Henry v. A. B. Dick Co.*, 224 U. S. 1 [32 Sup. Ct. 364, 56 L. Ed. 645], which contravenes the views herein expressed."

[1] From these authorities the rule to be deduced is this: If the license restriction is imposed, not for the purpose of protecting the patent or for securing its benefits, but for the purpose of evading the provisions of the Anti-Trust Act, then it is void, because such restriction is not "a reasonable condition imposed upon the licensee of a patent by the owner thereof," nor is it "a condition suitable to protect the use of a patent and secure its benefits."

It is necessary, therefore, to examine the evidence to see what the real purpose of the license restriction is in this case. Putnam, a witness for the plaintiffs, has been connected with their business for 15 or 16 years, and is, and for more than 10 years has been, their general sales manager. He testified, among other things, as follows:

"Q. Please state what the fact has been, and is, in reference to the use of the complainant during this period of trade-marks and brand names in connection with the manufacture and sale of its products, and if trade-marks or brand names have been used thereon, please give some of the principal names employed. A. The general name under which its principal watch products have been sold is 'Ingersoll.' Different classes or grades of watches have been given identifying names, each of which has been largely advertised and has become a trade-mark for such particular watch. These names as now and recently used are 'Yankee,' 'Eclipse,' 'Midget,' and 'Junior.' There are and have been other names, but they are not in such common or large use.

"Q. Please state whether these names 'Ingersoll,' or the universal general trade-mark name for the product, and the names 'Yankee,' 'Eclipse,' 'Junior,' 'Midget,' and other names, have been in any way advertised as trade-mark

or brand names of the product? A. Each of such names has been largely advertised; the name 'Yankee' has been very largely advertised.

"Q. Of these different trade-mark names, 'Yankee,' 'Eclipse,' 'Junior,' 'Mid-get,' which has been the most extensively advertised? A. 'Yankee,' or, as it has been commonly known and advertised, the 'Dollar Watch.'

"Q. About when was the name 'Yankee' adopted by the complainant as a trade-mark name for a part of its product? A. Some time prior to 1897.

"Q. At the time of its adoption, and since, has this name 'Yankee' been applied to a watch of particular construction? By that I mean distinctive construction, although it may have varied at different times? A. Yes.

"Q. At the time that the word 'Yankee' was adopted as a trade-mark name, and during the period that it was so adopted by the complainant, has there been a retail selling price for such Yankee watch, designated and requested to be employed and used by retailers? If so, please state what this retail selling price was. A. Since 1897 or thereabouts, there has been such retail selling price, and it was at that time and ever since one dollar.

"Q. How has this fact of one dollar being indicated and requested as the retail selling price been employed in connection with the Yankee watch in advertising it to the trade and public? By that I mean has this term 'Dollar Watch' come to be associated with the Ingersoll Yankee watch as a trade-mark name or phrase? A. It has.

"Q. Please explain to what extent, if any, the term 'Dollar Watch' has become associated with and is now used, if at all, as a trade-mark name or phrase for the Ingersoll Yankee watch in advertising by the plaintiff, by the trade, and by the public. A. It is my opinion, based upon observations and knowledge, that the term 'Dollar Watch,' as applied to the Yankee watch, has lost, if it ever had, a monetary significance to the trade or to the public, and it is my belief that the two terms interchangeably used—'Dollar Watch' and 'Yankee Watch'—as trade-marks are associated definitely in the public mind with the same watch, the principal Ingersoll product in watches.

"Q. Please state to what extent, if any, the term 'Dollar Watch' has been employed since 1897 in advertising the Ingersoll Dollar watch. A. In almost every advertisement and show card the term 'Dollar Watch' has been used, and usually in such advertising and show cards the picture of a watch has been shown, on which watch has appeared the trade-mark 'Yankee.' During the period referred to in the question, much more than a million dollars has been expended in the various ways referred to in my answer to question 17, and the largest part of such sum has been directed to the advertising of the Yankee or Dollar watch.

"Q. During this period, has the newspaper or magazine advertising of the Ingersoll Watch contained the term 'Dollar Watch,' and, if so, in a general way to what extent? A. Almost always.

* * * * *

"Q. Referring to the license shown upon the box marked 'Exhibit F,' containing the watch marked 'Exhibit G,' referred to Saturday in the testimony of Arthur H. Brown, please state, if you know, the date at which this license system was adopted, connected with the manufacture or sale of the Ingersoll Yankee or Dollar watch. A. In this particular form, this license system was adopted about six years ago.

* * * * *

"Q. Please state the fact as to whether, prior to the adoption of this license system some six years since, in connection with the Yankee or Dollar watch, this watch, under the name 'Ingersoll Yankee,' 'Yankee,' 'Ingersoll Dollar Watch,' or 'Dollar Watch,' had obtained any reputation, either in the trade or with the public. A. I can perhaps best answer this question by stating that in the year 1899 about one-half million Ingersoll Yankee watches were sold, and that the sale thereof increased yearly until in 1905 or thereabouts the sale had reached at least a million of these Ingersoll Yankee or Ingersoll Dollar watches. They were handled by many thousands of merchants throughout the United States and foreign countries.

"Q. About what is the annual output of the Ingersoll Yankee or Dollar watch at present? A. About 2,000,000 per year."

He further testified that the Yankee or Dollar watch, since it was put upon the market in about 1897, contained mechanism covered by letters patent of the United States. In that connection he also said:

"Q. Have any notices of the dates or numbers of the patents covering the mechanism embodied therein been placed upon the watches? If so, please state where. A. For a great many years past, and I believe always, each Yankee watch has had stamped upon it the word 'patented' and the dates of such patents as from time to time they existed in such watch. Such notice has usually been stamped upon that part of watch known as the barrel bridge, which is, commonly speaking, a part of the rear movement plate or rear of the watch movement."

He further said:

"Q. What was the occasion or reason, if any, for the adoption by the complainant of this license system for the Ingersoll Yankee or Dollar watch, if you know? A. About 1899, or possibly 1900, when the sale of this Ingersoll Yankee watch or Ingersoll Dollar watch had reached into many hundreds of thousands, a few merchants, both retailers and jobbers, sought to take advantage of the reputation of this watch, established by large advertising and large sale, by offering it to the public or to the trade, as the case might be, at less than the prices which the complainant had fixed upon for such watches. This caused protests from merchants, both retailers and jobbers, throughout the country, who threatened, if such cut prices were allowed to continue, that they would cease handling and dealing in and buying from the complainant this Ingersoll Yankee watch. Thereupon complainant, knowing that its continuance as a business organization for the manufacture and sale of watches depended upon the good will of these merchants, both jobbers and retailers, and the continued and continuous buying, handling, and selling by them of this watch, cast about for a plan by which it could properly and lawfully fix, determine, and control the price at which this Yankee watch might be sold by the merchants, both retailers and wholesalers, and, having found what, in their opinion was a proper means, determined upon and did adopt such means, out of which this present license system later grew.

"Q. Prior to the adoption of the license system in its present or original form, did the complainant have a means of controlling the prices of the Ingersoll Yankee or Dollar watch in the hand of dealers, or did it simply indicate the prices at which it desired the dealers to sell, without any means of enforcing such prices? A. While always indicating the price, it knew of no means, and believed it had no means, of controlling such prices.

"Q. And until the license system was adopted, it was simply optional with the dealers to observe these prices, I understand? A. If you mean by 'license system' any system which the complainant had adopted, including the system adopted about 1899 or 1900, the answer is 'Yes.'

"Q. I understand that a license system was adopted about 1899 or 1900, which after various modifications about six years since took the present form? A. That is correct."

This testimony strongly indicates that the purpose of the plaintiffs was to protect the trade-mark, and that the patented improvements placed in the watch were of little or no consequence. There were always in the watch such patented improvements, but they were not always the same. The dates of patents placed upon the interior mechanism of the watch varied from time to time. The license system was adopted in 1900, but the earliest one of the patents in suit was not granted until 1905. The case of these same plaintiffs against Snellenberg (C. C.) 147 Fed. 522, indicates that further evidence in support of the inference drawn from the testimony already in the case might

have been obtained. The purpose of that suit was the same as the purpose of this suit. One of the patents there involved was for an improvement in escapement mechanism, and was issued in December, 1890; that patent expired in 1907. The escapement patent here in suit was granted on June 4, 1907. The other patent in that suit was for an improved clock pinion, and was granted in January, 1891. That patent expired in 1908. The lantern pinion patent in this suit was granted on April 11, 1905. The plaintiffs make a high-grade watch, which contains none of the mechanism covered by the patents in suit.

There has been no judicial determination of the validity of any one of them. There has been no litigation concerning any one of them. No testimony was presented by the plaintiffs to show that any one of the patents was of any value. The defendant produced as a witness a watchmaker of 30 years' experience, who testified that there was nothing new in any of them. The plaintiffs presented no evidence in rebuttal. There is nothing in the case to show what patents relating to the subject-matter of these improvements were granted prior to the patents in suit. While the defendant's watchmaker testified that he understood the scope of the claims of two of the patents, yet it appeared that one at least of the other two he had never read. His evidence probably is not sufficient to overcome the presumption of novelty and utility created by the issuance of the patents.

The most important evidence, however, remains to be stated. In addition to the Yankee, Eclipse, Midget, and Junior, the plaintiffs sell other watches, one of which is called the Defiance. These watches, according to Putnam, have probably hundreds of special names. One of the watches offered in evidence was called the McColl, and was so named at the request of the defendant. He bought 27 dozen Yankee watches and 18 dozen of the other kind. He paid 65 cents each for the Yankee and 55 cents each for the McColl watches. The Defiance and the McColl contain the same mechanism as the Yankee. The parts of the Yankee and the parts of the McColl and the Defiance are interchangeable. In fact, it is the same watch under three different names. The barrel plates of the Defiance and the McColl contain the dates of all the patents in suit. There is nothing on either of these watches to indicate that the plaintiffs are in any way connected with them. They are sold without any license restriction, such as it attached to the sale of the Yankee. While the purchaser of the Yankee is required to sell it for not less than \$1, a purchaser of identically the same watch, if it is called the Defiance or the McColl, can sell it for any price he chooses.

If the purpose of the license restriction were to secure the benefits of the patents, no sound reason can be given why it should not have been applied to the watch when it is called the Defiance, as well as when it is called the Yankee. It is very evident that the plaintiffs care nothing for the patents. They say in one of their briefs:

"A point was made at the argument that complainant makes three watches under different names and embodies in them the same patents, and that only one of them, the Yankee watch, is sold under the license restriction. What inference it is sought to draw from this fact is not apparent. Complainant, having a complete monopoly under the statute, is not bound to

exercise all of it. It may release any part of it that it sees fit and reserve the rest. If it wishes to release the 'Defiance' and the 'McColl' watches entirely from the patent monopoly by unrestricted sale, and retain a portion of its monopoly of sale with respect to the Yankee watch, it may do so."

The right of a patentee to do what he may please to do with the patented article is not unrestricted. It is limited in the manner indicated by the cases hereinbefore cited. He cannot impose upon a purchaser a condition which is unreasonable. He cannot impose an unreasonable condition, for the purpose of enabling him to violate the Anti-Trust Act. It appears from the evidence in this case that the license restriction so imposed on the sale of the Yankee watch is not for the purpose of securing the benefits of the patented improvements therein, but in order that the plaintiffs may protect the trade-mark or trade-name under which they sell the watch. Such a condition was not imposed "to protect the use of the patent or the monopoly which the law conferred upon it." It is an unreasonable one, is beyond the power of the plaintiffs to impose upon the defendant, and is void as to him. Whether or not it would be valid if the defendant had made a contract directly with the plaintiffs, and thereby bound himself not to sell the Yankee watch for less than \$1, it is not necessary to decide.

Let the bill be dismissed, with costs.

UNITED STATES v. MILITARY CONST. CO.

(District Court, W. D. Missouri. April 3, 1913.)

No. 3,831.

INTERNAL REVENUE (§ 25*)—CORPORATION TAX ACT—RETURN—DUTY TO MAKE.

Act Cong. Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), imposes an excise tax on all corporations with certain exceptions, earning an annual net profit in excess of \$5,000, and requires the officers of every such corporation to file a return on or before the first day of March in each year. *Held*, that all corporations of the kinds specified in the act as subject to the tax were bound to file returns, though their net profits were not sufficient to render them liable to the tax.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 72, 73; Dec. Dig. § 25.*]

Action by the United States against the Military Construction Company. Judgment for plaintiff.

Hugh C. Smith, of Kansas City, Mo., Asst. U. S. Atty.

Ben R. Estill and George H. English, Jr., both of Kansas City, Mo., for defendant.

VAN VALKENBURGH, District Judge. The United States, through the district attorney at the instance of the commissioner of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

internal revenue brought suit against the defendant to recover penalty for failure to make return under paragraph 3 of section 38 of the act of Congress approved August 5, 1909, providing for a special excise tax on the business of corporations. The defendant answered that its entire net annual income is less than \$5,000, and in consequence thereof that it is not subject to such corporation tax, and was not required to make a return to the collector of internal revenue. To this answer the government demurred.

My attention has been called to an opinion of the honorable Solicitor General rendered August 7, 1911, in which he reached the conclusion that all corporations, joint-stock companies, or associations organized for profit and having a capital stock represented by shares, as defined in the act, are subject to this excise tax, and therefore required to make the return provided in the third paragraph of the section. I think his reasoning convincing and his conclusion sound.

By section 38, 36 Stat. p. 112 (U. S. Comp. St. Supp. 1911, p. 946), it is provided:

"That every corporation, joint-stock company, or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any state or territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any state or territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year," exclusive of certain receipts then specified.

The same section in a proviso then excepts certain other classes of corporations and organizations from the operation of that section; that is to say, expressly provides that such excepted classes shall not be subject to the tax.

The income tax law of 1894 (Act Aug. 27, 1894, c. 349, § 27, 28 Stat. 553 [U. S. Comp. St. 1901, p. 2260]) explicitly requires returns from all business corporations, whether or not they had any net incomes during the year. Manifestly corporations which had no net incomes could not be required to pay an income tax. Nevertheless, the law expressly required a return. This is instructive and pertinent only in so far as it indicates the policy and practice of requiring returns from all corporations of a class subject to the tax, whether or not for any particular year they were bound for any amount of tax. Section 27 of the War Revenue Law of June 13, 1898 (chapter 448, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2306]), provided:

"That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, *whose gross annual receipts exceed two hundred and fifty thousand dollars*, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars.

"And a true and accurate return of the amount of gross receipts as aforesaid shall be made and rendered monthly by each of such associations, corporations, companies, or persons to the collector of the district in which any such association, corporation, or company may be located, or in which such person has his place of business."

Here it will be seen that the limitation that the gross annual receipts should exceed \$250,000 is expressly made a part of the description of the corporation made subject to the tax. It would seem, therefore, that under that law corporations whose gross annual receipts did not exceed \$250,000 were specifically excluded, and were not required to make the return provided for. Nevertheless the Treasury Department construed that law to require returns from all who were engaged in the designated business. In its circular of July 7, 1899, directing when and by whom returns should be made, it said:

"The foregoing instructions will also apply to all such persons, firms, corporations, and companies where the gross receipts, during the period for which the return required by law is made, do not exceed the \$250,000 specially exempted from tax."

Of this the Solicitor General says:

"This usage of the government requiring all those engaged in the designated business as being subject to the tax, to make returns, even though the volume of business was not large enough to make them liable for any amount of tax, was no doubt in the mind of Congress when enacting the law of 1909, and should be considered in construing that law."

The Treasury Department has construed the present law to mean that all corporations organized for profit, and having a capital stock represented by shares, must make this return, irrespective of whether or not their entire net annual income is over and above \$5,000. So that for a period of 18 years legislation of this nature has been thus construed by the department charged with its administration. If this interpretation by the department is not obviously or clearly wrong, but is fairly supported by the language employed, the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. *United States v. Finnell*, 185 U. S. 236, 22 Sup. Ct. 633, 46 L. Ed. 890. Furthermore, as has been said, it may well be that this construction was in the mind of Congress when this legislation was enacted.

It will be observed that in the present act the amount of the net annual income is not made an integral part of the description of the class of corporations, joint-stock companies, or associations made subject to the tax. Their essential characteristics are that they shall be organized for profit, and have a capital stock represented by shares, and that they shall be actually engaged in carrying on or doing business. The classification does not include those specifically exempted in the proviso, nor corporations generally not organized for profit, and not doing business in that sense. This interpretation, that it is its inherent nature and not its income that stamps the cor-

poration designated as subject to the tax, is supported by the decision of the Supreme Court in *Flint v. Stone Tracy Company*, 220 U. S. 107-144 et seq., 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, and is further suggested by other provisions of the act. The return required is a somewhat complicated one. It consists of eight sections, the proper interpretation of which controls the determination of what the net income may be. This is a matter for the exercise of the official judgment and discretion of the Revenue Department; in order that it may exercise such judgment and discretion, it must have the facts before it. The officers of the corporation and those of the Revenue Department may differ as to the ultimate effect of such facts. The Solicitor General in his opinion well said:

"As well permit the corporation to determine for itself how much tax it is liable for as permit it to so determine whether it is liable for any amount. The law in every respect is to be administered by the officers of the law, and not by those who are subject to it. Efficiency of administration would be difficult, and even impossible, if the corporations could determine, each for itself, whether or not they were liable for any amount of tax, and make or withhold returns accordingly."

Furthermore, if the obligation to make a return depends upon the amount of net annual income, and lies within the discretion of the corporation itself, then by reason of fluctuation in business affairs the same corporation might deem itself charged with the duty of making a return in one year and absolved from that duty in another year according to conditions. This would lead to endless confusion. Nor can it be successfully urged that corporations whose incomes are consistently small should be excused. The law, to be effective, must be uniform.

It must not be forgotten that the revenues of the government are its life blood; without them it cannot exist. Taxes are imposed in large measure with reference to estimated needs; and the collection of such taxes must be effective and thorough, in order that the estimated revenue may not fall short of known requirements. For these reasons, such statutes are construed with greater strictness in favor of the revenues.

The duty of making these returns is one comparatively light to each corporation subject to the tax, and may easily and readily be provided for as a regular part of its business system. In the aggregate the burden thrown upon the collecting department of the government is a heavy one, and should not be increased by imposing upon it the added necessity of initiative in the discovery of delinquents. Its labors in that regard will be great enough if those subject to the tax are held to the full measure of duty contemplated by the law. If it were left to each corporation to determine whether it need make the return provided for, there can be little doubt that the number of delinquents would be largely increased. It would follow, either that an added burden of investigation would be cast upon the Revenue Department, or that the revenues would be greatly diminished. The court should not lean to a construction which would contribute to either result. If the present law is deficient, or unduly harsh in its

terms, it should be so amended as to enable its administration to meet the requirements of justice and the necessities of particular cases.

For the foregoing reasons, the demurrer to the answer will be sustained.

UNITED STATES v. ACORN ROOFING CO. SAME v. BROADWAY BOWLING ACADEMY. SAME v. J. DESSNER & CO. SAME v. FEIN-BALL REALTY & CONSTRUCTION CO. SAME v. M. A. FINKEL & CO.

(District Court, E. D. New York. June 22, 1912.)

1. INTERNAL REVENUE (§ 25*)—CORPORATION TAX ACT—CONSTRUCTION—DUTY TO FILE RETURNS.

Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112,[†] provides that every corporation, joint-stock company, or association organized for profit and having capital stock represented by shares, etc., shall be subject to pay annually an excise tax of 1 per cent. on its entire net income over \$5,000, and that on or before the 1st day of March in each year a true and accurate return under oath or affirmation shall be made by each of the corporations, etc., subject to the tax imposed, to the collector of internal revenue, etc., and declares that for a willful neglect to make return 50 per cent. of the amount of the tax may be added, and for a false return 100 per cent. may be added, but in either case the corporation is also liable to a penalty of not less than \$1,000 nor more than \$10,000. *Held*, that the duty to make returns extended to all corporations of the sort described in the act, and was not limited to those the net profits of which were sufficient to render them liable to the payment of the tax.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 72, 73; Dec. Dig. § 25.*]

2. INTERNAL REVENUE (§ 45*)—CORPORATION TAX—ACTION FOR PENALTY—VERDICT.

Act Cong. Aug. 5, 1909, c. 6, § 38, 36 Stat. 112, imposes a tax on corporations not specifically exempted, and requires all such corporations to make a return, declaring that, if any shall refuse or neglect to make return within the time specified in each year or shall render a false or fraudulent return, it shall be liable to a penalty of not less than \$1,000 nor more than \$10,000. *Held* that, where a civil action is brought to recover a penalty against delinquent corporations, the jury's verdict must fix the amount of such penalty not less than the minimum, after which the only remedy of the corporations (other than appeal) is an application to the commissioner of internal revenue or the Secretary of the Treasury for a compromise authorized by Rev. St. §§ 3229, 3469 (U. S. Comp. St. 1901, pp. 2089, 2317).

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 109-113; Dec. Dig. § 45.*]

Actions by the United States against the Acorn Roofing Company, against the Broadway Bowling Academy, against J. Dessner & Co., against the Fein-Ball Realty & Construction Company, and against M. A. Finkel & Co. to recover penalties for defendants' failure to file returns under the Corporation Tax Act (Act Cong. Aug. 4, 1909, c. 6, § 38, 36 Stat. 112). A verdict having been returned in favor of the government for \$1,000 in each case, defendants moved to set the same aside. Denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† U. S. Comp. St. Supp. 1911, p. 946.

Wm. J. Youngs, U. S. Atty., and Louis R. Bick and William P. Allen, Asst. U. S. Attys., all of Brooklyn, N. Y.

Bloomberg & Bloomberg, of New York City, for defendant Acorn Roofing Co.

Paul Hellinger, of New York City, for defendant Broadway Bowling Academy.

Philip S. Glickman, of New York City, for defendant J. Dessner & Co.

Altkrug & Kahn, of Brooklyn (M. V. Lovins, of New York City, of counsel), for defendant Fein-Ball Realty & Construction Co.

CHATFIELD, District Judge. In the cases before the court actions have been brought against five corporations to recover in suits at law the penalty provided by Act Cong. Aug. 5, 1909, c. 6, § 38, 36 Stat. 112, for failure to file returns. By direction of the court the jury in each case has found a verdict, and has fixed the amount of penalty at the minimum, viz., \$1,000.

[1] The facts shown by the record in the five cases do not differ so far as the present question is concerned. Each of the five corporations was organized under the laws of the state of New York, and either was doing or was authorized to do business during the year 1910. None of them made the return required by statute by March 1, 1911, nor did any one obtain any extension during the 30-day period, or apply to the Secretary of the Treasury to compromise their obligation for failure to comply with the statute. In each of the cases, however, the defendant has ultimately filed a report showing that the net income received by it during the calendar year 1910 did not amount to the sum of \$5,000, and in one instance, at least, the evidence shows that the defendant did no business whatever beyond keeping itself in existence during that year.

The statute provides that each corporation "now or hereafter organized" shall be subject to pay, etc. This clearly makes every corporation not actually dissolved or legally out of existence subject to the provisions of law.

The next question presented is whether every organization admittedly within the classes defined, viz., a corporation, joint-stock company, or association organized for profit, and having capital stock represented by shares, and every insurance company, except the particular ones exempted, is liable to the duty of making the annual return specified by the statute, or whether only those who enjoyed a sufficient net income to make them liable to the payment of the annual tax are under obligations to make the return.

This question was first passed upon for the guidance of the Treasury Department in administering the law by an opinion of the Solicitor General, issued upon the 7th day of August, 1911, and approved by the Attorney General. In this opinion the Solicitor General refers to the income tax law of 1894, by which all persons having an income in excess of \$3,500 were required to make returns, while all business corporations were expressly required to make returns whether having a net income or not. The Solicitor General also refers to the war tax law of 1898 (Act June 13, 1898, c. 448, § 27, 30

Stat. 464 [U. S. Comp. St. 1901, p. 2306]), which provided that all corporations, firms, persons, and companies engaged in the business of refining, etc., whose "gross annual receipts exceed \$250,000, shall be subject to pay an annual tax." The law further on provides that each of "such corporations," etc., shall make a return of the amount of its gross receipts monthly. Under that statute the Treasury Department naturally required a monthly return from every corporation of the kinds enumerated, whether or not at the end of the year the amount of business might be such as to make the corporation liable to a tax. To hold otherwise would have been to render the law ridiculous. The present statute has not followed the language of the war tax law, however, but has provided that from the amount of the net income of each of "such corporations," etc., "ascertained as provided in the foregoing paragraphs" of the law, \$5,000 shall be subtracted and that the remainder shall be taxed. It is apparent that "such corporations" in this sentence in practice must mean corporations having a net income of more than \$5,000. The law then provides that on the 1st of March in each year "a true and accurate return under oath shall be made by each of the corporations," etc., *subject* to the tax imposed by this section. The Solicitor General draws an analogy between the two laws by saying that "in each case only those subject to the tax are required to make returns."

But it will be seen that the war tax law did not require a return from those only who were subject to tax, but, on the contrary, required a return from every such corporation, while in the present statute the tax is to be collected from every "such corporation" as is taxable; that is, such as have a certain amount of income, while the return is to be made by every "such corporation," *subject* to the tax.

In the case of *U. S. v. Military Construction Co.*, 204 Fed. 153, decided by the United States District Court for the Western District of Missouri, and published as Treasury Decision No. 1,774, the same question as is presented in the present case was considered by the court, and the conclusions of the honorable Solicitor General were followed, for the reason that the application of the war tax law was considered to have been in the mind of the Congress when passing the present statute. But it would seem that the changes in the language of the statute might as well be held to show that Congress intended to change the application, if they were justified by the plain reading of the law. Nor does it seem that any greater confusion would result to the government if certain corporations in certain years did not make returns, and hence should be assumed to consider themselves not subject to tax, than if they did make returns, and upon the face of the figures as presented by them they did not appear to be taxable. The difference in trouble and necessary investigation to the government would be slight.

But it does appear by the reading of the law itself that the present statute makes every corporation of a certain kind subject to pay a tax upon income over and above a certain amount, and every such corporation—i. e., of the sort required to pay if their income be great enough—must make a return and must pay if taxable. There would be no difficulty about this interpretation if it were not that the Con-

gress did not specify a different penalty than is provided for a willful neglect to make return, or for a false or fraudulent return, if such be handed in. The minimum penalty for the wrongful act is \$1,000, and the maximum penalty is \$10,000. A willful act of this sort is also made a misdemeanor, and the law provides that the tax shall be increased by one-half, and shall bear interest if a return is not made by a certain time. It also provides that the Commissioner of Internal Revenue may prepare the return after investigation and fix the tax. The language of this section, giving authority to investigate upon report that a corporation "has failed to make return as required by law," is pertinently pointed out by the solicitor as indicating that every corporation is bound to make such return, even if not showing business enough to make it liable for the tax. If the provision for an addition of 100 per cent. for false return, or 50 per cent. for neglect, with added interest, were not based upon the amount of the tax, instead of the minimum amount of income taxable, it would be possible to treat this as the penalty for neglect, or honest belief that a return was not necessary, and the difficulties of the present situation could be avoided.

[2] But such is not the case. The law has provided but the one penalty; and in the present instances, where jury trials have been had in civil actions, the verdict must provide the amount of the penalty, and nothing less than the minimum amount, \$1,000, can be found.

The present motions, therefore, which have been considered to set aside the verdict of \$1,000 in each case, must be denied and the various corporations can have no remedy (other than appeal) except to apply, as is indicated in the opinion of the Solicitor General above quoted, to the commissioner of internal revenue, or to the Secretary of the Treasury, for a compromise of the government's claim under sections 3229 and 3469 of the Revised Statutes (U. S. Comp. St. 1901, pp. 2089, 2317).

MARIAN COAL CO. v. PEALE.

(Circuit Court of Appeals, Third Circuit. April 19, 1913.)

No. 1,690.

1. COURTS (§ 314*)—FEDERAL COURTS—ACTIONS—PROPER DISTRICT.

Where plaintiff was a citizen of New York, and defendant was a Delaware corporation operating a coal washery in Pennsylvania, the federal forum, where jurisdiction depended solely on diversity of citizenship, was either in New York or Delaware, as provided by Act March 3, 1875, c. 137, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 508).

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 860; Dec. Dig. § 314.*

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. COURTS (§ 325*)—FEDERAL COURTS—SUIT IN WRONG DISTRICT—WAIVER.

Where federal jurisdiction existed by reason of diversity of citizenship of the parties, but plaintiff sued in the wrong district, the error was waived by a demurrer filed by defendant, raising not only the question of venue, but also denying that plaintiff had a cause of action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 884; Dec. Dig. § 325.*

Waiver of right as to district in which suit may be brought, see notes to *Memphis Savings Bank v. Houcheffs*, 52 C. C. A. 192; *McGinnity Co. v. Union Pac. R. Co.*, 87 C. C. A. 634.]

3. APPEAL AND ERROR (§ 80*)—JUDGMENTS APPEALABLE—FINAL OR INTERLOCUTORY JUDGMENT.

Where a decree appealed from determined the rights of the parties, the fact that it referred the cause to a master to perform certain ministerial duties with reference to ascertaining the amount of damages recoverable, no further judicial proceedings being contemplated, did not render it interlocutory, so as to preclude an appeal therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 429, 432, 433, 450, 456, 457, 494-509; Dec. Dig. § 80.*]

4. SPECIFIC PERFORMANCE (§ 4*)—RIGHT TO RELIEF—CONTRACT REMEDIES.

Defendant coal company, engaged in washing coal from the culm bank of a large colliery, in consideration of advances made to it by the plaintiff, agreed to deliver to him for sale all the output of its colliery until the bank was exhausted, the plaintiff to sell the coal and remit the proceeds, less a commission and a certain sum per ton, to be reserved and applied on his advances until repaid. The contract also provided that, in case of the default of the coal company, plaintiff should be entitled to a writ of estrepement, or to the appointment of a receiver by any court of competent jurisdiction in foreclosure, or any other proper proceeding, and that a writ of scire facias might issue, and an execution sale of the property be had for the collection of the whole amount of the debt and interest remaining unpaid, etc. *Held*, that the contract itself provided the remedies to be invoked in case of the coal company's default, which were more adequate than those which equity could afford, and that plaintiff, on the coal company's default, was not entitled to maintain a suit for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 4; Dec. Dig. § 4.*]

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
204 F.—11

Suit in equity by John W. Peale against the Marian Coal Company. From a decree for complainant (190 Fed. 376), defendant appeals. Affirmed in part, and reversed in part.

John H. Dando, William P. Brewster, and John T. Lenahan, all of Wilkes-Barre, Pa., for appellant.

Franklin D. Peale, of New York City, Robert Snodgrass, of Harrisburg, Pa., and Joseph O'Brien, John P. Kelly, and William J. Fitzgerald, all of Scranton, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. [1, 2] The plaintiff is a citizen of New York, and in 1909 filed a bill in equity against the Marian Coal Company, a corporation of Delaware, operating a coal washery in Lackawanna county, Pa. The federal jurisdiction depended solely on diversity of citizenship, and under Act March 3, 1875, c. 137, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. Stat. 1901, p. 508) the federal forum was either in New York or in Delaware. But the suit was actually brought in the Middle district of Pennsylvania, and therefore, as the plaintiff was in the wrong court, the Coal Company was entitled to have the bill dismissed, without submitting to any inquiry into the merits of the dispute. Nevertheless, as the right to be sued in a particular court, and not elsewhere, is merely a personal privilege, a defendant may waive it, expressly or impliedly; and the company did waive it impliedly, no doubt through a natural desire not to omit any ground of objection. For, instead of confining its demurrer to the single ground that the plaintiff had sued in the wrong district, the company set up also the ground that the plaintiff had no case on the merits, and thus required the Circuit Court to pass on the substance of the controversy. To do this is to waive the privilege just referred to, as the Supreme Court has often held; and the Circuit Court was right, therefore, in so deciding. Its opinion, citing the authorities, will be found in 172 Fed. at page 639.

The controversy thereupon took the usual course. The company answered the bill, an examiner was appointed, much testimony was taken, argument was had, and the Circuit Court considered and decided all the questions in controversy. An extended opinion was filed on August 24, 1911, which is reported in 190 Fed. 376, and on the same date the following decree was entered:

"First. That the defendant be ordered and directed to specifically perform its contract with the plaintiff, by delivering to the plaintiff from the date of this decree the output of its washery.

"Second. That the defendant be enjoined by perpetual injunction from delivering any of the output of the washery and the Holden dump to any one other than the plaintiff.

"Third. That the defendant be and it is hereby required to account to the plaintiff for all moneys advanced by the plaintiff to it under the contract, which has not already been repaid, together with interest thereon, and that the defendant be required to account to the plaintiff for all dam-

ages sustained by the plaintiff by reason of the defendant's breach of contract.

"Fourth. That J. Fred Schaffer, Esq., be appointed a special examiner to state an account between the parties and report the same to the court."

[3] As a whole, the form of this decree is rather interlocutory than final; for, as will be observed, the third and fourth paragraphs direct the company to account, and appoint a special examiner (or master) for this purpose. But the true character of the decree appears upon further examination. The master reported, making some arithmetical calculations, and recommending a money decree in favor of the plaintiff. The court confirmed the report, and in March, 1912, entered a second decree, whose first three paragraphs are identical with the first three in the decree of August 24th. But the fourth paragraph now reads as follows:

"Fourth. That the defendant, the Marian Coal Company, pay to the plaintiff, John W. Peale, within six months from the date hereof, the sum of thirty-four thousand five hundred thirty-three and 94/100 dollars (\$34,533.94), with interest from the 1st day of January, 1912, in full payment and satisfaction of the sum due to the plaintiff, John W. Peale, by the defendant, the Marian Coal Company, on the loan or advancement account, and the damages due by reason of the defendant's violation of the contract in suit."

And a final paragraph disposes of the costs. The appeal before us was taken in February, 1912, and, of course, is from the decree of August, 1911, as the decree of March, 1912, had not yet been entered. The motion to dismiss is put upon the ground that, as the August decree was interlocutory, the appeal should have been taken within 30 days; and the company resists the motion on the ground that the August decree was really final, since the master had nothing judicial to do, but was merely required to perform the ministerial labor of computation—the facts and the rules of decision having previously been ascertained by the court, with one or two unimportant exceptions. We think the company's contention must be sustained. The two lines of authorities on this subject—one stating the general rule, and the other stating the exception—are referred to in *Latta v. Kilbourn*, 150 U. S. 539, 540, 14 Sup. Ct. 207, 37 L. Ed. 1169:

"It is well settled by the decisions of this court that where the purpose of the suit is to obtain an account, such as that prayed for by the bill in this case and directed by the order of October 27, 1886, the decree is of such an interlocutory character that no appeal will lie therefrom. *Beebe v. Russell*, 60 U. S. (19 How.) 283, 285, 15 L. Ed. 668; *Green v. Fisk*, 103 U. S. 518, 26 L. Ed. 486; *Keystone Manganese & I. Co. v. Martin*, 132 U. S. 91 [10 Sup. Ct. 32] 33 L. Ed. 275; *Lodge v. Twell*, 135 U. S. 232 [10 Sup. Ct. 745] 34 L. Ed. 153; *McGourkey v. Toledo & O. C. R. Co.*, 146 U. S. 544, 550 [13 Sup. Ct. 170] 36 L. Ed. 1083, 1085. In this last case the authorities are thoroughly reviewed as to what constitutes a final decree, and it was laid down as the general rule that if the court made the decree fixing the rights and liabilities of the parties, and thereupon referred the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final, but if it referred the case to him for a judicial purpose, as to state an account between the parties, upon which a further decree is to be entered, the decree is not final."

Among the early cases that support the exception is *Forgay v. Conrad*, 47 U. S. (6 How.) 201, 12 L. Ed. 404; but a brief extract

from *Beebe v. Russell*, 60 U. S. (19 How.) 286, 15 L. Ed. 668, will sufficiently state the ground on which the exception rests:

"The object of the law and the interpretation of it by this court is to prevent a case from coming to it from the courts below, in which the whole controversy has not been determined finally, and that the same may be done in this court. We say: 'In which the whole controversy has not been determined.' Wherever it has been, and ministerial duties are only to be performed, though that be to ascertain an amount due, the decree is final."

See, also, *Thomson v. Dean*, 74 U. S. (7 Wall.) 342, 19 L. Ed. 94; *Winthrop Iron Co. v. Meeker*, 109 U. S. 180, 3 Sup. Ct. 111, 27 L. Ed. 898.

An examination of the master's report shows that his duties were ministerial and not judicial. No doubt he took a little "additional testimony, * * * covering shipments of coal from the defendant's washery from December 1, 1910, to September 30, 1911"; but this was the mere presentation of a supplementary statement, and was only intended to bring the account up to the date when the washery ceased operation after the suit was begun. The master's report leaves no doubt concerning the character of his duties:

"It appears, by an inspection of the opinion of the learned judge already filed in this case, that all the disputed facts, with the exception of two items (\$145 and \$125), have been determined in favor of the plaintiff, and that the books of account of the treasurer of the defendant, by which the plaintiff proved his case, were correctly kept. (Opinion, pages 18-20.) The two items above mentioned have been practically abandoned by the plaintiff. The defendant did not offer any books of account in evidence. The only accounts offered in evidence were the books of the defendant's treasurer, supervised by an expert accountant, and the books of the plaintiff, both offered by the plaintiff, and which correspond to the cent. The plaintiff also offered the tonnage figures of the Delaware, Lackawanna & Western Railroad Company, showing shipments by the defendant. These were not disputed. The plaintiff alone offered evidence on the loan account. In view of the opinion of the learned judge, it would be supererogation for the examiner and master to enter into a discussion of the facts, the law applicable thereto, or to report conclusions of law."

In our opinion the August decree was final for the purpose of appeal, and the motion to dismiss must be refused.

[4] But we discover no reason to disagree with the conclusions of the District Judge on the disputed questions, except in one particular. We are not disposed to set aside on technical grounds a settlement of conflicting claims that has only been reached after a long and bitter controversy. We content ourselves with saying that upon other matters covered by the assignments of error we accept the opinion of the District Judge, both for the facts and for his conclusions thereon, merely adding that we do not find it necessary to decide whether the plaintiff was a buyer of the company's coal, or an agent selling on a *del credere* commission. But we cannot agree to the first two paragraphs of the August decree, for the reason, briefly stated, that the agreement of April 11, 1907, has provided adequate remedies for its own enforcement. The agreement is a very careful and elaborate instrument. The District Judge quotes it in part (190 Fed. 378-380), and we shall refer to one more paragraph only. One who reads the whole agreement can hardly doubt that the par-

ties intended to meet every contingency that they were able to foresee, and in our opinion they did make ample provision for the present situation. The fourth paragraph is as follows:

"Fourth. In case the maturity of the amounts secured by said mortgage is accelerated as herein above provided, because of the default of the party of the second part, or in case of the failure of the party of the second part to repay the amount of said loans as hereinbefore provided, or any part thereof, or interest thereon, when due, the party of the first part shall be entitled to a writ of estrepement, or to the appointment of a receiver by any court of competent jurisdiction in foreclosure or any other proper proceeding; and a writ of scire facias may be issued forthwith on said mortgage and prosecuted to judgment, execution, and sale for the collection of the whole amount of said debt and interest remaining unpaid, together with all fees, costs, and expenses of such proceeding, including an attorney's commission of three (3) per cent. and all errors in said proceedings, together with all stay of, or exemption from, execution, or extension of time of payment, which may be given by any act or acts of assembly now in force or which may be enacted hereafter, are hereby forever waived and released."

Abundant care has therefore been taken here and elsewhere in the agreement to secure "repayment of the moneys to be advanced hereunder, with interest thereon, and due performance of the terms and stipulations of this agreement and of the leases aforesaid, * * * due performance of each being expressly understood to be of the essence of this contract and a material part of the security of the party of the first part" (the plaintiff in this suit). The mortgage contains an express stipulation making the whole sum secured thereby due and payable at once whenever the company shall make default in keeping "each and every of the stipulations of said agreement," and provides that in such event (and in other contingencies also) a writ of estrepement may issue, or a receiver may be appointed, or a writ of scire facias may issue forthwith, etc. In a word, the agreement takes up four distinct remedies, and makes them more effective in certain directions for the plaintiff's benefit, or it forestalls controversy by declaring expressly that they shall be applicable. The writ of scire facias may issue forthwith upon the mortgage, this being the usual Pennsylvania procedure upon such an instrument; and, as the company may impair the security, the plaintiff may apply for a writ of estrepement to stay waste, this also being a well-known remedy in Pennsylvania; or he may ask a court of equity to put a receiver into possession of the property; and, still further, if default continue for 30 days, he may enter an amicable action of ejectment in the state court, and proceed immediately to judgment and execution, thus taking summary possession of the premises. These remedies are certainly more complete than the decree now in question, which does not even make the attempt (futile as such an attempt would be) to compel the company to operate the washery. It simply requires the company to deliver the product of the washery to the plaintiff, and forbids delivery to any one else. If there should be no product, of course, the decree can do no more than maintain an expectant attitude. No doubt this is an effort to do indirectly what could not be done directly, namely, to compel the company to operate the washery; and perhaps we need not be sur-

prised that the effort has not succeeded. The only result has been to keep the washery idle, thus depriving both litigants of whatever ultimate advantage might have been gained by its operation. But, by using the remedies to which he is already entitled, the plaintiff may not only take possession, but may acquire title to the property in dispute, and may thereafter dispose of it as he sees fit, either by operating the washery himself, or by sale or lease to another person.

The present situation cannot be approved. We affirm so much of the decree as is contained in the third and fourth paragraphs, but we reverse the rest, with instructions also to set aside the first two paragraphs of the March decree. Each party to pay one-half the costs of this appeal.

This order is, of course, without prejudice to the plaintiff's right to use such remedies as he may be entitled to employ in any court of competent jurisdiction.

SILVER KING COALITION MINES CO. OF NEVADA v. SILVER KING
CONSOL. MINING CO. OF UTAH.

SILVER KING CONSOL. MINING CO. OF UTAH v. SILVER KING COALI-
TION MINES CO. OF NEVADA.

(Circuit Court of Appeals, Eighth Circuit. April 5, 1913.)

Nos. 3,646, 3,687.

(Syllabus by the Court.)

1. CONTRACTS (§ 330*)—MINES—PROMISE TO PAY DEBT OF ANOTHER—SUIT IN EQUITY BY CREDITOR—FACTS—CONCLUSION.

The K. Co. and the C. Co. were equal owners and tenants in common of a mining right. The K. Co. secretly extracted ore therefrom, failed to account therefor, and conveyed its property to the M. Co., which, in consideration of that conveyance, assumed and agreed to pay all the debts and obligations of its grantor.

Held, a suit in equity can be maintained by the C. Co., or its assignee, against the M. Co., without the presence of the K. Co. to enforce the contract of the M. Co. to pay the obligation of its grantor to account to the C. Co. for the latter's share of the value of the ore the K. Co. extracted from the common property.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1589, 1591–1594, 1596, 1597, 1602–1604; Dec. Dig. § 330.*]

2. CONTRACTS (§ 187*)—MINES—CREDITORS' SUIT IN EQUITY ON PROMISE OF THIRD PERSON TO PAY HIS CLAIM.

When a grantee contracts with his grantor to pay the latter's debt or obligation in payment, or in part payment, for the conveyance, the creditor may accept and appropriate that contract to himself, and maintain a suit in equity upon it. In equity, the grantee then becomes the principal debtor, the grantor the surety, and the creditor is substituted for the promisee or grantor.

It is immaterial in equity whether or not the contract was made or intended for the benefit of the creditor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798–807; Dec. Dig. § 187.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. EQUITY (§§ 94, 96*)—"INDISPENSABLE PARTY"—PROPER PARTY—ORIGINAL DEBTOR NOT INDISPENSABLE PARTY.

In the federal courts, a suit in equity may proceed without any necessary or proper party, who is not an indispensable party, if his presence would oust the jurisdiction of the court.

An "indispensable party" is one who has such an interest in the subject-matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.

The original debtor is not an indispensable party to a suit in equity by his creditor on the promise of the grantee of the debtor to pay the creditor's claim.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 246-252, 253-256; Dec. Dig. §§ 94, 96.*]

For other definitions, see Words and Phrases, vol. 4, p. 3559.]

4. CONTRACTS (§ 187*)—WORDS AND PHRASES—"DEBTS AND OBLIGATIONS"—LIABILITY FOR THE APPROPRIATION OF ANOTHER'S ORE.

A promise to pay all the "debts and obligations" of another includes the promise to pay its obligation to account and pay to a cotenant the latter's share of the proceeds of ore which the grantor has extracted from the common property and sold.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798-807; Dec. Dig. § 187.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

5. APPEAL AND ERROR (§ 1011*)—REVIEW—QUESTIONS OF FACT—FINDINGS—PRESUMPTION.

Where a court has considered conflicting evidence, and made a finding or decree, it is presumptively correct, and unless some obvious error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

6. MINES AND MINERALS (§ 51*)—DAMAGES—MEASURE OF—WILLFUL TRESPASS.

The measure of damages for the reckless, willful, or intentional taking of ore or timber from the land of another without right is the enhanced value of the ore or timber when it is finally converted to the use of the trespasser, without allowance to him for the labor bestowed or expense incurred in removing it and preparing it for market.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 137-141; Dec. Dig. § 51.*]

7. TRUSTS (§ 322*)—TENANCY IN COMMON (§ 22*)—ACCOUNTING BY TRUSTEE—BASIC PRINCIPLE IN EQUITY—ALLOWANCE OF EXPENSE OF MINING.

The basic principle of an accounting by a trustee in equity is that the account should be so stated that the trustee shall make no profit by his use of the property of the cestui que trust and the latter shall receive the value of his property and its income.

A cotenant has the right to extract ore from the common property and sell it, accounting for the proceeds, less the reasonable expense of mining and marketing.

Where the fundamental rule of an accounting can be complied with by allowing to the cotenant, who is a trustee for his fellow, the expenses of mining and marketing the ore, the measure of damages for a willful trespass is not necessarily applicable to the case, although the cotenant who extracted the ore intended to appropriate all of it to himself, con-

cealed his acts, kept no accounts, caved the stope, and made it difficult and expensive to ascertain the volume and value of the ore taken.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 480; Dec. Dig. § 322; * Tenancy in Common, Cent. Dig. § 63; Dec. Dig. § 22.*]

8. TRUSTS (§ 309*)—ACCOUNTING BY TRUSTEE—COMPOUND INTEREST.

Where the basic principle of an accounting by a trustee can be given effect without charging him with compound interest on the amount which he has held for his cestui que trust, it is not error to refuse to make such a charge.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 429; Dec. Dig. § 309.*]

Appeals from the Circuit Court of the United States for the District of Utah; John A. Marshall, Judge.

Bill by the Silver King Consolidated Mining Company of Utah against the Silver King Coalition Mines Company of Nevada. Decree for complainant, and both parties appeal. Modified and affirmed.

W. H. Dickson, of Salt Lake City, Utah (A. C. Ellis, Jr., and Russell G. Schulder, all of Salt Lake City, Utah, on the briefs), for appellant in No. 3,646 and for appellee in No. 3,687.

Andrew Howat and Edward B. Critchlow, both of Salt Lake City, Utah (Herbert R. Macmillan and William J. Barrette, both of Salt Lake City, Utah, on the briefs), for appellee in No. 3,646 and for appellant in No. 3,687.

Before SANBORN and CARLAND, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. The Silver King Mining Company, a corporation of the state of Utah, and the Silver King Consolidated Mining Company, a corporation of the state of Wyoming, were equal owners and tenants in common of the Vesuvius mining claim, which was situated in the state of Utah, from 1901 until June 19, 1907. During that time the King Company secretly extracted from that claim and sold a large amount of valuable ore without accounting to its cotenant for any of it, and on June 19, 1907, it sold and conveyed all its property to the Silver Coalition Mines Company, a corporation of the state of Nevada and the defendant below, and in part payment for that conveyance the Coalition Company agreed to pay all the outstanding debts and obligations of its grantor, the King Company. The Coalition Company then secretly extracted ore from the Vesuvius claim and sold it, without accounting to its cotenant for this ore or its proceeds. On February 24, 1908, the Consolidated Company of Wyoming conveyed all its title and interest in the Vesuvius mining claim, and in its cause of action against the Coalition Company on account of the extraction of the ores by the King Company and by it, to the Silver King Consolidated Mining Company of Utah, a corporation of that state and the complainant in this suit. On May 26, 1908, the latter company exhibited its bill in equity in the court below against the Coalition Mines Company of Nevada, and prayed, among other things, for an accounting and recovery of one-half of the value of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ores extracted by it and by its grantor, the King Company. The defendant demurred, it subsequently answered, issues were joined, evidence was taken, and upon final hearing a decree was rendered that the defendant was indebted and should pay to the complainant \$735,-045.87 on account of the ores taken from the Vesuvius claim by the defendant and by its grantor. Both parties have appealed from that decree and specified many alleged errors.

(A) The defendant insisted by demurrer and motion in the court below, and still insists, that the King Company was an indispensable party to the cause of action to recover the value of the ore which its grantor, prior to the latter's conveyance on June 19, 1907, extracted and sold; but the Circuit Court overruled that contention, and its ruling is specified as error.

[1] When a grantee contracts with his grantor to pay the latter's debt or obligation in payment, or in part payment, for the conveyance, the creditor or obligee may accept and appropriate that contract to himself and maintain a suit in equity to enforce it. In that event the grantee becomes the principal debtor and the grantor the surety, and the creditor's suit stands on the equitable doctrines that the creditor may have the benefit of any security or obligation given by the principal debtor to the surety, and that to avoid circuity of action—that is to say, an action by the creditor against the original debtor and a subsequent action by the latter against his grantee—the creditor may be, and is in equity, substituted for the promisee, the grantor. *Keller v. Ashford*, 133 U. S. 610, 623, 625, 626, 10 Sup. Ct. 494, 33 L. Ed. 667; *Johns v. Wilson*, 180 U. S. 440, 447, 21 Sup. Ct. 445, 45 L. Ed. 613; *Thompson v. Cheesman*, 15 Utah 43, 48, 49, 48 Pac. 477; *Blackmore v. Parkes*, 81 Fed. 899, 900, 26 C. C. A. 670, 671.

[2] In this case the complainant, the creditor, has accepted the promise of the defendant, the grantee, to pay the obligations of the King Company, the grantor, and standing by substitution in the shoes of the King Company, the grantor, has brought this suit to enforce the covenant of the grantee.

[3] It is contended that this suit cannot be maintained for the value of the ore extracted by the King Company, because it was a necessary party to the suit for the value of the ore which it extracted, and it has not been made a party to this suit. But necessary parties, who are not indispensable parties, may be dispensed with in suits in equity in the national courts. An indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or subject-matter which is separable from the interest of the other parties before the court, so that it will not necessarily be directly or injuriously affected by a decree which does complete justice between them, is a proper party to a suit. But he is not an indispensable party, and if his presence would oust the jurisdiction of the court the suit may proceed without

him. *Rogers v. Penobscot Min. Co.*, 154 Fed. 606, 610, 83 C. C. A. 380, 384; *Sioux City Terminal R. & W. Co. v. Trust Company*, 27 C. C. A. 73, 75, 82 Fed. 124, 126. The King Company, the grantor, is a corporation of the same state as the complainant, and its presence in this suit would oust the jurisdiction of the federal courts.

Why is that corporation an indispensable party to this suit? Counsel for the defendant answer: Because the amount of the claim for the extraction of the ore taken by the grantor, the King Company, was unliquidated. But how can its liquidation in a suit between the creditor and the grantee alone radically and injuriously affect the interest of the grantor? Because, say counsel, in separate actions against a grantor and grantee, founded on the obligation of the former, different juries or courts might find different amounts recoverable, and because the grantor could not maintain an action against the grantee alone to enforce the latter's promise. Let the propositions that different courts and juries might find different amounts recoverable, and that the grantor could not maintain an action against the grantee alone to enforce the latter's promise, be conceded. Nevertheless the grantor cannot be injuriously affected by the creditor's suit and recovery against the grantee. The grantor was liable to a suit by the creditor on its obligation before the creditor's suit against the grantee was instituted, and if it is still subject to such a suit its liability is no greater since the suit and the decree against the grantee than it was before that suit was commenced. Counsel argue that if the creditor first recover a judgment of \$100,000 against the grantor on its obligation, and subsequently recover a judgment of \$200,000 against the grantee in an action on the grantee's promise to pay the grantor's obligation, the grantee would be subject to two judgments on the same promise—one for \$100,000 in favor of the grantor on a suit which it might bring against the grantee, and one in favor of the creditor for \$200,000. But the grantee could suffer no legal injury from the judgment for \$100,000, because its payment of the judgment of \$200,000 against it in favor of the creditor would discharge it from all liability on the judgment for \$100,000 on the same obligation, on the ground that a party is required to make but one satisfaction of the same claim.

Counsel say that if the plaintiff, the creditor, should subsequently bring an action against the King Company, the grantor, and recover one-half the amount awarded by the final decree herein, the grantor could not recover of the grantee more than one-half the amount which the grantee is adjudged to pay to the creditor, and yet the creditor could recover of the grantee twice as much as it could from the grantor. But the creditor would not recover, nor would the grantee be required to pay, more than the just amount of its liability, and no one would be injuriously affected; for, against the mere supposition of counsel that a subsequent judgment for one-half the amount fixed by the decree in this case may be recovered by the creditor against the grantor, the amount adjudged by the decree of the court below in this suit, after full hearing, must be presumed to be right and just. Counsel contend that if the creditor should subsequently recover a judgment against the grantor on its obligation for double the amount fixed by

the decree herein, the grantor would be entitled to a judgment for that amount against the grantee. The supposition is too improbable for serious consideration. If the creditor subsequently sues the grantor, it is probable that it will be met by the answer that by the present suit the creditor elected to substitute itself for the grantor and in the latter's right to litigate with the grantee, whom it thereby made the principal debtor, while the grantor became the surety in this suit to determine the amount of the grantor's original obligation, that the grantee has obeyed the decree of the court and paid the amount thus adjudged due to the creditor, for the presumption is that it will promptly obey the decree, and that, as the creditor can have but one satisfaction of the same claim, it is estopped by these facts from recovering any judgment or decree whatever against the grantor. And the probability that the creditor will overcome such an answer and recover such a judgment or decree is so remote as to be negligible. Moreover, these hypotheses of counsel present nothing but moot questions. It is improbable that they will ever rise to the dignity of living issues, and the argument based upon them is neither convincing nor persuasive.

On the other hand, the facts disclosed by the record satisfy that the grantor, the King Company, has no such interest in the subject-matter of the controversy in this suit that a final decree cannot be rendered between the creditor, the plaintiff, and the grantee, the defendant, without radically and injuriously affecting the interest of the grantor, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. They convince that a decree between the creditor and the grantee, just and equitable to the latter, can be made and ought to be made in this suit, which will not in any way injuriously affect the interest of the grantor, the King Company, and that the latter is not an indispensable party to this suit. There was no error in the ruling of the court below to this effect. *Keller v. Ashford*, 133 U. S. 610, 626, 10 Sup. Ct. 494, 33 L. Ed. 667; *Barker v. Pullman's Palace Car Co.* (C. C.) 124 Fed. 555, 559, 570; *Dancel v. Goodyear Shoe Machinery Co.* (C. C.) 137 Fed. 157, 158, 159, 160, 161; s. c., 144 Fed. 679, 680, 75 C. C. A. 481, 482.

(B) It is specified as error that the court below held that the defendant grantee was liable to account to the creditor, the plaintiff, for the one-half of the value of the ore extracted by the grantor from the common property of the grantor and the Consolidated Company of Wyoming prior to June 19, 1907. The promise of the defendant, evidenced by the deed of all the property of the grantor which the grantee accepted, was to pay therefor, among other things, \$3,750,000, and "all the outstanding debts and obligations of the grantor." The grantor owed its cotenant and creditor one-half of the value of the ore it had extracted from their common property. It was under a legal obligation to account for and pay to its cotenant one-half of that value, and without the aid of the ingenious arguments of counsel it would be difficult to perceive any reason why this obligation did not fall within the terms of the grantee's contract.

Counsel contend, however, that it does not do so because the word "debt" is without definite meaning in the law, and in this contract it

means a debt for a sum certain, and does not include one for an unliquidated amount, and because the word "obligation" is of the same character, and in this contract has the same meaning. In support of this position definitions of these words are quoted from text-books and opinions of courts; but after a thoughtful consideration of the authorities cited, and many others, an abiding conviction still remains that in this contract these words are so plain and their meaning is so clear and certain that there is no doubt that they include, and must be held to have been intended to include every liability of the grantor of such a nature as that here in suit. The use of the words "debts" and "obligations" is so common that an exhaustive review of opinions concerning their meaning is impossible within the limits of the opinion of a court, and a partial review might be confusing or misleading. The conclusion which has been reached, however, is readily deducible from the terms of the contract and from familiar rules of construction.

[4] Words and phrases should be given their popular sense and meaning, unless there is a clear indication that they were used in a different sense. The popular sense of a word or phrase is that sense which people conversant with the subject-matter with which the contract is dealing would attribute to it. When a word which has a known legal meaning is used in a contract, it must be assumed that it was used in its legal sense, in the absence of a clear indication of a contrary intent. The legal presumption is that words in a contract are used in their usual sense, unless it clearly appears that the parties intended to use them in a different or more restricted sense. Apply these indisputable canons of interpretation to the words and terms of this contract. The popular, the customary, and the legal sense of the word "debt" in a contract to pay all the debts of a party is not, in our opinion, limited to obligations to pay certain sums of money; and, if it is so limited, the popular, the customary and the legal sense of the broader word "obligation" includes every duty "which has a binding operation in law and which gives to the obligee the right of enforcing it in a court of justice." 2 Bouvier's Law Dictionary, page 534. The contract of the defendant is to pay all the debts and obligations of the grantor. The word "obligations" may not be ignored, nor may it be restricted to the more limited meaning of the word "debts"; for in the construction of the agreement tautology must be avoided, and all the words of the contract must be given meaning and legal effect (*Keith v. Haggart*, 4 Dak. 438, 33 N. W. 465, 468; *Ullman v. Chicago & N. W. Ry. Co.*, 112 Wis. 150, 88 N. W. 41, 47, 88 Am. St. Rep. 949; *Fitzgerald v. First National Bank*, 114 Fed. 474, 52 C. C. A. 276), and the grantor was certainly bound, by operation of law, to account for and to pay to its cotenant one-half of the value of the ore it had extracted from their common property, and the cotenant had the right to enforce that obligation in a court of justice.

The grantee was a new corporation, formed apparently to succeed to the rights of the grantor, to take all its property, and to acquire other interests. Most, if not all, of the stockholders of the grantor received stock of the grantee in payment of their respective shares of the \$3,750,000 paid by the grantee for the grantor's prop-

erty and surrendered their stock in the grantor. Keith was the president, and Kearns was the vice president and manager of the grantor, and they were also stockholders and directors of the grantee, when the conveyance to it was accepted, and they voted for the resolution which authorized the grantee's contract to pay all the debts and obligations of the grantor. There were seven other directors in the board of the grantee. Keith and Kearns had conducted the grantor's extraction of the ore from the common property, and necessarily knew all about it; but they claim that they thought that the grantor was not indebted to its cotenant, because they believed that the expense of finding and taking the ore out of the ground exceeded the proceeds obtained from it. The other seven directors testified substantially that they were aware of three or four other obligations contracted by the grantor, but that they were ignorant of the extraction of this ore and of the grantee's liability therefor, and that they never intended to authorize a contract by the grantee to pay for it. The foregoing facts were proved by counsel for the grantee, and they rely upon them to reach the conclusion that the parties to the contract never intended that the grantee should agree by its promise to pay the grantor's obligation to account for the ore thus extracted. They contend that their evidence proves that the grantee was ignorant of the obligation arising out of the taking of the ore, and, while this is not admitted, it is conceded for the purpose of the discussion and determination of the question here at issue.

Counsel invoke the general rule that the purpose of all interpretation of the words and terms of a contract is to ascertain the sense or meaning in which the parties to it used them when their minds met upon the stipulations of the agreement, and they then argue that inasmuch as the grantee was aware of three or four other obligations contracted by the grantor, and was ignorant of this one, the parties to the contract intended to exclude it from the meaning of the words "all the debts and obligations of the grantor." But the words and terms of this agreement are clear, and their meaning is not doubtful. It is ambiguous words and terms of doubtful meaning in a contract only that are susceptible to interpretation by the situation of the parties and the circumstances surrounding them when they made them. The secret intentions of parties to a contract, the words and terms of which are clear, free from ambiguity, and inexpressive of the intention, may not be imported into it by construction. *Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 80, 52 C. C. A. 25, 28 (57 L. R. A. 696). And:

"Where, without fraud, accident, or mutual mistake (and none of these has been pleaded or proved in this case), the written contract purports to be a memorial of the transaction, it supersedes all prior representations, proposals, and negotiations, and is conclusive evidence that it embodies such of these as were ultimately intended to become parts of the agreement, and that all others were rejected as not expressing the final intention of the parties. * * * The law controlling the operation of a contract is deemed to be, and usually is actually, within the contemplation and intention of the parties, as much as the words in which it is expressed, and becomes equally an

essential part of it. * * * For this reason the rule that a written contract cannot be varied by parol extends to the legal import or intendment of the contract, as well as to the terms or words in which it is written." *Union Selling Co. v. Jones*, 128 Fed. 672, 676, 63 C. C. A. 224, 228; *Elliott on Evidence*, pp. 646, 647.

By the plain terms of the contract the grantee agreed to pay all the debts and obligations of the grantor. It was not a contract to pay all the debts and obligations of the grantor listed or named in the agreement, for none was listed or named, nor all except those unknown to the grantee, nor all the debts and obligations of the grantor except the obligation to pay for one-half of the ore which the grantor extracted from the Vesuvius claim; and because the grantee, at the time it made the contract with the grantor, had the opportunity to require the insertion of any of these limitations and exceptions it desired in its contract, and it did not do so, but permitted and induced the grantor to join in and perform it in reliance upon the grantee's promise to pay all its debts and obligations without exception, it is now estopped from importing into its promise by construction any of these limitations or exceptions. *Insurance Company v. Mowry*, 96 U. S. 544, 547, 24 L. Ed. 674. This is a natural, reasonable, and righteous conclusion. This agreement by the grantee to pay all the debts and obligations of the grantor was a natural and reasonable requirement of the grantor, which was parting with all its property, with all its means to pay its debts and obligations; and the evidence of the situation, knowledge, intention, and circumstances of the parties which counsel for the grantee have produced, if admissible and carefully considered, as it has been, would fail to convince that these parties ever intended that the conveyance should be made without such a contract. The obligation of the grantor to account for and pay to the predecessor of the complainant the value of one-half of the ore extracted by the grantor from the Vesuvius claim fell far within the terms and meaning of the agreement of the grantee to pay all the debts and obligations of the grantor.

The next contention is that the creditor, the complainant, cannot maintain this suit on the contract of the grantee, because the grantor itself could not have maintained it. But for the reasons already stated the grantor could have maintained a suit upon the contract of the grantee, in the absence of fraud, mutual mistake, accident, or rescission, and none of these has been pleaded or proved in this case. Moreover, while the general rule is that the suit of a creditor against the grantee, founded on the latter's promise to the grantor, is subject to the same defenses as the suit of the grantor would have been, the exceptional facts of this case place the creditor in a much stronger position than the grantor itself would have had. The assignor of the complainant was a creditor of the grantor when the conveyance of all its property to the grantee was made, and the complainant has succeeded to all the rights of its assignor. A "transfer of property by a debtor with the reservation of an interest therein to himself" is always fraudulent and voidable by his creditors as

against a debtor and all claiming under him with notice of his act, and a transfer by stockholders of a corporation of all its property to another corporation, in consideration that they receive stock or bonds of the grantee in exchange for their stock in the grantor, is equally fraudulent in law as to the unpaid creditors of the grantor, and renders the grantee liable for their claims. *Northern Pacific Ry. Co. v. Boyd*, 177 Fed. 804, 101 C. C. A. 18; *Luedecke v. Des Moines Cabinet Co.*, 140 Iowa, 223, 118 N. W. 456, 32 L. R. A. (N. S.) 616; *Hurd v. New York & Commercial Steam Laundry*, 167 N. Y. 89, 60 N. E. 327; *Montgomery Web Co. v. Dienelt*, 133 Pa. 585, 596, 19 Atl. 428, 19 Am. St. Rep. 663; *Railroad Co. v. Howard*, 74 U. S. (7 Wall.) 392, 409, 19 L. Ed. 117; *Central of Georgia Railway Co. v. Paul*, 93 Fed. 878, 884, 35 C. C. A. 639.

In the case at bar, most, if not all, of the stockholders of the grantor took stock of the grantee in exchange for their stock in the grantor, and in consideration of this exchange caused all the property of their corporation to be conveyed to the grantee. If, therefore, as counsel for the grantee argue, the grantee did not make a valid agreement with the grantor to pay its obligation to the assignor of the complainant, the conveyance of the grantor's property to the grantee was fraudulent as to the assignor and is fraudulent as to the complainant, and on that ground the grantee is liable to pay the claim of the complainant, for the property of the grantor which the grantee received was worth much more than the amount of this claim. The contention that the grantor may escape liability here, either because the grantor could not maintain an action upon its promise, or because the obligation of the grantor to account and pay for the ore was not within the terms of the promise, cannot be sustained.

Finally, it is insisted that the creditor has no right of action on the grantee's promise to the grantor to pay the creditor's claim because it does not appear that this contract was made for the creditor's benefit, and that it was the party intended to be benefited thereby. The following language of Judge Folger is quoted from *Simson v. Brown*, 68 N. Y. 355:

"It is not every promise made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person; he being neither privy to the contract, nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited."

Many authorities are cited that have repeated or approved this statement of the law. *Austin v. Seligman* (C. C.) 18 Fed. 519, 522; *Sayward v. Dexter, Horton & Co.*, 72 Fed. 758, 764, 765, 19 C. C. A. 176; *Constable v. National Steamship Co.*, 154 U. S. 51, 74, 14 Sup. Ct. 1062, 38 L. Ed. 903; *American Exchange National Bank v. Northern Pacific Ry. Co.* (C. C.) 76 Fed. 130; *Central Trust Co. v. Berwind-White Coal Co.* (C. C.) 95 Fed. 391; *Electric Appliance Co. v. United States Fidelity & Guaranty Co.*, 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609, 613; *Parker v. Jeffery*, 26 Or. 186, 37 Pac. 712; *Burton v. Larkin*, 36 Kan. 246, 250, 13 Pac. 398, 59

Am. Rep. 541; *Howson v. Trenton Water Co.*, 119 Mo. 304, 308, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; *Wright v. Terry*, 23 Fla. 160, 2 South. 6. But none of these cases was a suit in equity and in none of them were the equitable doctrines that a creditor may have the benefit of any security or obligation given by the principal debtor to the surety, and that, to avoid circuity of action, the creditor may be, and is, when he sues upon the contract of the grantee to pay the latter's indebtedness to the creditor, in equity substituted for the grantee and promisee, upon which this suit stands, either invoked or available. Authorities are conflicting upon the proposition that it is essential to the maintenance of an action at law by the creditor of a grantor upon the contract of his grantee to pay the grantor's debts that the contract should be made for the creditor's benefit as its object and that he should be the party intended to be benefited. *Coster v. Mayor*, 43 N. Y. 399, 411, and cases there cited; *Arnold v. Nichols*, 64 N. Y. 117, 119.

That, however, is a moot question in this case. It is unnecessary to consider or discuss it, and it is here dismissed, because this is a suit in equity, and not an action at law. In such a suit it is sufficient that the grantee has agreed with the grantor to be primarily liable for the latter's obligation to the creditor, so that, as between the parties to the agreement, the first is the principal and the second the surety. The creditor of the surety is then entitled in equity to be substituted in his place, and to maintain his suit against the grantee to the same extent as the grantor could have maintained it, and it is immaterial whether the contract was made and intended for the benefit of the creditor or of the grantor, for the creditor has all the rights of both to enforce the obligation of the grantee. *Keller v. Ashford*, 133 U. S. 610, 623, 10 Sup. Ct. 494, 33 L. Ed. 667, and the authorities there cited; *Barker v. Pullman's Palace Car Co.* (C. C.) 124 Fed. 555, 568, 569; *Willard v. Wood*, 164 U. S. 502, 519, 520, 17 Sup. Ct. 176, 41 L. Ed. 531; *Johns v. Wilson*, 180 U. S. 440, 447, 448, 21 Sup. Ct. 445, 45 L. Ed. 613. There was no error in the decision of the court below that the grantee, the defendant, was liable to account and pay to the creditor, the complainant, for the half of the value of the ore extracted by the grantor from the *Vesuvius* claim prior to June 19, 1907, and that the complainant could maintain this suit in equity to enforce that accounting and payment on the promise of the grantee to the grantor to pay all the latter's debts and obligations.

(C) The court below found that the value of one-half of the ore extracted from the *Vesuvius* claim by the defendant and its grantor was \$516,264.47, and that the complainant was entitled to recover from the defendant this sum and interest thereon at 8 per cent. per annum from January 1, 1906, which amounted in the aggregate to \$735,045.87 on April 17, 1911, when the decree for that amount was rendered. The complainant and defendant complain of this amount, the former that it is too small, the latter that it is too large, and by numerous specifications of error challenge the controlling facts which the court found and used to ascertain it. As the defendant

stands in the shoes of the grantor in this accounting, the acts, omissions, and intent of the latter will henceforth be treated as those of the former, and the grantor will be ignored. The defendant secretly entered the Vesuvius claim beneath its surface by means of a deep shaft, which it sunk from adjoining claims, which it owned in severalty, and, working by means of levels running from this shaft, extracted the ore, mixed it with the ores it took from the claims it owned in severalty, sold the combined product, and kept all the proceeds. It kept no account of the ore which it took from the Vesuvius claim, and gave no notice to the complainant's grantor that it was extracting it, and that grantor was in ignorance of that fact until the ore was gone.

The court below was compelled to ascertain the amount and value of this ore from more than 4,000 printed pages of evidence. It found from this evidence these facts: The extent of the excavation in the Vesuvius claim was 573,937 cubic feet. After the excavation was made there remained in the cavity 435,350 cubic feet of caved and waste material, and 31,551 cubic feet of like material had been removed, so that the entire amount of this material was 466,901 cubic feet. This material, when it was in place in the cavity, occupied only one-half of the space which it filled after it was extracted, or only 233,450 cubic feet. Deducting this amount from the 573,937 cubic feet in the excavation, there remained 340,487 cubic feet of the cavity which must have been originally occupied by the ore which the defendant removed. This ore was of two classes: There were 18,916 tons of ore of the first class, from which the defendant realized \$60.07 per ton, in all \$1,136,284.12. The cost of mining, tramping, and smelting this ore was \$6.33 per ton, or \$119,738.28, which left the net proceeds from it \$1,016,545.84. There were 14,187 tons of second-class ore, whose net value was \$3.53 per ton, in all \$50,080.11. The sum of \$1,016,545.84 and \$50,080.11 is \$1,066,625.95. The cost of the work done by the defendant within the Vesuvius claim in developing the ore was \$34,097. Deducting this amount from \$1,066,625.95, there remains \$1,032,528.95, the total net value of the ore taken from the Vesuvius claim by the defendant. One-half of this amount, or \$516,264.47, and the interest thereon, is the amount which the court found from these facts the defendant owed the complainant for its share of this ore.

[5] Each of the findings of fact from which the court deduced this conclusion is vigorously assailed by each of the parties to this suit in oral argument and in briefs which contain many hundreds of printed pages. Each of them has been carefully examined, with the aid of these arguments and briefs, and in the light of the evidence to which they refer, and has been found to have been deduced from conflicting testimony, and many of them from evidence very evenly balanced. These findings, therefore, fall far within the familiar rule that, where a court has considered conflicting evidence, and made a finding or decree, it is presumptively correct, and unless some obvious error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand. *Coder v.*

Arts, 152 Fed. 943, 946, 82 C. C. A. 91, 94, 15 L. R. A. (N. S.) 372; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649.

An exhaustive consideration of the record and the briefs relating to the defendant's specifications of error in regard to these findings has failed to convince that through any mistake of fact or error of law the court below has made any finding or reached any conclusion too favorable to the complainant. Turning to the specifications of the complainant, there is convincing evidence that there was a space in the openings out of and directly connected with the excavated slope in the Vesuvius claim which contained 22,168 cubic feet that was not included in the 573,937 cubic feet of excavation on which the finding of the court below is based, and one of complainant's specifications is the exclusion of these 22,168 cubic feet. But because there is persuasive evidence that there was only a small percentage of the material taken from these openings which contained any ore, that these openings were made in the course of the work of developing the ore body and determining its extent, and not in the work of stoping for ore, and that the larger part of the material taken from them was never placed in the stoped cavity, but was taken to the surface and thrown away before the cavity was made, the record fails to prove that the court below made any mistake in this exclusion.

The complainant specifies as error the addition by the court of 31,551 cubic feet of waste material removed from the cavity in 1909 to the 435,350 cubic feet of filled material which the court found in the cavity, on the ground that this added material was removed after the measurement of the filled material on which the court relied had been made, so that this addition gave the defendant credit for it twice. This specification is well founded. The evidence convinces that the court fell into the mistake here charged, and on account of it the amount which the court found the defendant owed the complainant should be increased \$23,908.07.

[6] The complainant specifies as error: (1) The allowance by the court to the defendant below of one-half the cost of mining, tramping, and sampling the first-class or shipping ore, and one-half the cost of mining, milling, tramping, and sampling the second-class or milling ore, which amounted in the aggregate to about \$117,000.00; and (2) that it failed to charge the defendant with compound interest upon the amount found due. In support of the first specification, its counsel invoke the rule that the measure of damages for the reckless, willful, or intentional taking of ore or timber from the land of another without right is the enhanced value of the ore or timber when it is finally converted to the use of the trespasser, without allowance to him for the labor bestowed or expense incurred in removing and preparing it for market. *Wooden-Ware Co. v. United States*, 106 U. S. 432, 434, 1 Sup. Ct. 398, 27 L. Ed. 230; *United States v. Homestake Min. Co.*, 117 Fed. 481, 482, 54 C. C. A. 303, 304; *Durant Min. Co. v. Percy Consolidated Min. Co.*, 93 Fed. 166, 167, 35 C. C. A. 252, 254; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, 129 Fed. 668, 679, 64 C. C. A. 180, 191. They argue that this rule is applicable to the

case at bar, and cite in support of their contention *Sweeney v. Hanley*, 126 Fed. 97, 103, 61 C. C. A. 153, 159; *Foster v. Weaver*, 118 Pa. 42, 12 Atl. 313, 4 Am. St. Rep. 573; *Walker v. Walker*, 9 Wall. 743, 757, 19 L. Ed. 814; *Railroad Co. v. Soutter*, 13 Wall. 517, 519, 520, 523, 524, 20 L. Ed. 543; *Blank v. Aronson*, 187 Fed. 241, 246, 109 C. C. A. 327, 332; *Guckenheimer v. Angevine*, 81 N. Y. 394, 396, 397; *Goble v. O'Connor*, 43 Neb. 49, 61 N. W. 131, 133, 134; *Lynch v. Burt*, 132 Fed. 417, 67 C. C. A. 305.

These and other authorities have been examined, but they fail to disclose any settled rule of law to the effect that a cotenant, who lawfully extracts the ore from the common property and sells it, is deprived, in his accounting with his cotenant, by his preconceived intent to appropriate all the proceeds thereof to himself, of any allowance for the necessary and reasonable expense of extracting, preparing, and marketing the ore. In *Sweeney v. Hanley*, 126 Fed. 97, 103, 61 C. C. A. 153, 159, and *Foster v. Weaver*, 118 Pa. 42, 12 Atl. 313, 4 Am. St. Rep. 573, cotenants who had first fraudulently obtained from their fellows conveyances of their shares of the common property, and thereafter had extracted the mineral from it, were denied an allowance for their labor and expense. The courts held that the complainants were entitled to the enhanced value of their shares of the mineral extracted and sold by the defendants while the complainants were fraudulently dispossessed by them, without any deduction or allowance for the labor and expense of mining or marketing. In those cases the intentional and fraudulent dispossession of the defendants was first effected, and it characterized and rendered unlawful the subsequent acts of the defendants. In the case in hand, however, the intent of the defendant to appropriate all the proceeds of the ore to its own use did not render its entry upon the common property, or its extraction and preparation of the ore for market, unlawful. In this extraction, preparation, and sale it was not a trespasser. It was not acting without right. It was the owner of one half of every particle of the ore in its own right, and of the other half when extracted as trustee for its cotenant. It had the right to extract and sell the ore, in order that it might obtain its share of its value; and if it had accounted for and paid over to its cotenant in due time its part of the proceeds of the sales, no one would be so bold as to claim that it was not entitled to a just allowance for the reasonable expense of mining it, preparing it for the market, and selling it.

[7] In an accounting by a trustee in equity, the basic principle is that the account should be so stated that the trustee shall make no profit from his use of the property of the cestui que trust, and that the latter shall receive the just value of his property and its income. Other equitable rules and principles inform and guide the conscience of the chancellor; but their application to the particular facts of each case is necessarily and wisely left largely to his discretion, to use them in such a manner as to work out the fundamental principle that governs the accounting.

It is conceded that there is convincing evidence in this record that the defendant had the intent, before it extracted any of this ore, to appropriate it all to itself; that it entered secretly, and carefully con-

ceased its extraction and sale of the ore for many years; that it mixed the ore with its own taken from other mines, which it owned in severalty; that it kept no separate account of this ore, or of its proceeds; and that it caved the stope from which it extracted it, so that it was difficult and expensive to ascertain the amount or value of the ore it took. But an evil intent does not make a rightful act wrongful, or an owner of property in its lawful possession a trespasser thereon (*Stevenson v. Newman*, 13 C. B. 285, 297; *Allen v. Flood* [1898] App. Cas. 114, 123), or necessarily subject a cotenant who extracts ore from the common property to the measure of damages for a willful trespass. It was a trustee for the complainant of its share of the ore it took, and of the proceeds thereof. As such trustee it violated its duty to notify its cotenant of its entry and taking of the ore, its duty to keep the ore separate, its duty to keep an account of it and of its proceeds, and its duty promptly to account for and pay to its cotenant its just share of the proceeds of the ore. Nevertheless, when this matter came to an accounting in the court below, the duty still rested upon the chancellor so to apply the rules and principles of equity jurisprudence to this accounting that the complainant should receive its just share of the value of the ore, or of its proceeds, and the defendant should make no profit by its breaches of trust.

The general and just rule is that a cotenant, in exclusive possession of mining property, who extracts and sells the ore, may charge against its proceeds the reasonable and necessary expense of its extraction and marketing. *Lindley on Mines*, § 790, p. 990; *Appeal of Fulmer*, 128 Pa. 24, 18 Atl. 493, 15 Am. St. Rep. 662. The chancellor below was of the opinion that the application of this rule to the accounting in this case would yield a just and equitable result, and our review of the evidence and the arguments has led to the same conclusion. There was neither error nor mistake in allowing to the defendant the reasonable expense of mining, tramming, milling, and sampling the ore.

[8] Did the court err by its refusal to allow compound interest? Compound interest is generally allowed to give effect to the equitable rule that a trustee may not derive profit from the property of the cestui que trust, and that the latter should receive the full value of his property and its income. *Walker v. Walker*, 9 Wall. 743, 757, 19 L. Ed. 814; *Heath v. Waters*, 40 Mich. 457, 472; *Schieffelin v. Stewart*, 1 Johns. Ch. 620, 627, 7 Am. Dec. 507. The defendant stood in a fiduciary relation to its cotenant. It held the complainant's share of the ore and its proceeds in trust for it. It violated its duty to keep an account of the ore and its proceeds, to keep the ore separate from other ores it mined, to account for and promptly pay over to the defendant its share of the proceeds of the ore, and to inform the defendant of its acts and omissions. But if the payment of the amount adjudged will deprive the defendant of all profit from the complainant's share of the ore, and will yield to the complainant the full value of its share and of the interest or income therefrom that it would probably have derived if the defendant had not extracted the ore, the reason for the allowance of compound interest does not exist.

The defendant took this ore from the mine between 1902 and May, 1908. It extracted the larger part of it between 1904 and 1908. The

testimony fails to disclose the amount taken each month, or each year, and the court below fixed January 1, 1906, as the mean time when the entire debt of the defendant for the complainant's share of the proceeds of all the ore should be deemed due, and charged it with interest thereon from that date at 8 per cent. per annum. The evidence left the value of the ore uncertain. For the first-class ore the court charged the defendant with the highest monthly price it had received for ore of that class during the extraction of this ore, and it stated its account by the rule that the defendant should be made to bear the burden of any uncertainty in the proof due to its fault. This was the state of the case when the request for compound interest was considered, and the chancellor said that the lawful rate of interest to be allowed by the decree, 8 per cent. per annum, was above the current rate, that the method of calculation of the amount adjudged due had been sufficiently unfavorable to the defendant, and refused to grant the request. The evidence in this case is so persuasive in support of many of the findings of the court on the material issues of fact, and so conflicting and uncertain upon the others, that the record fails to convince that the amount adjudged due, with interest at 8 per cent. per annum, will not yield to the complainant the full value of its share of the ore extracted, and of the income that it probably would have derived from it, if the extraction had not been made, or that it will not deprive the defendant of all profit therefrom. There is no rule of law which requires the allowance of compound interest under such circumstances, and no mistake of fact or error of law is discovered in the refusal to charge it.

There are many specifications of error of each of the parties to this suit which have not been discussed in this opinion, but there is none which has not received examination and reflection. This is a suit in equity, and the consideration and decision of the questions this appeal presents is a trial of this case *de novo*. Upon a review of the entire case, the conclusion of this court is that the decree below, modified by the correction of the slight mistake which has been noted, is well sustained by the evidence, reasonable, and just.

Let the case, therefore, be remanded to the court below, with directions to modify the decree by increasing the amount of the adjudged recovery by \$34,034.46, which is the sum of \$23,908.07 and interest thereon from January 1, 1906, to April 17, 1911, and let the decree, so modified, be affirmed.

CONN v. RICE et al.

(Circuit Court of Appeals, Fifth Circuit. March 18, 1913.)

No. 2,341.

1. TRESPASS (§ 19*)—TITLE OF PLAINTIFF—ASSIGNMENT AS SECURITY.

Where a landowner, pending suit to recover certain land and in addition to convey half of the land to plaintiff, made a subsequent assignment to him of timber rights on the land, including a cause of action for damages for trespass already committed, such assignment conferred on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff the right to sue for and recover all damages resulting from the taking of the timber from the whole tract, though the conveyance and assignment, absolute in terms, were mere securities for the repayment of moneys advanced by plaintiff.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 18-31; Dec. Dig. § 19.*]

2. **TRESPASS (§§ 23, 56*)—CUTTING TIMBER—DAMAGES—MITIGATION—ADVICE OF COUNSEL.**

Where, in an action against receivers to recover timber land, plaintiff appealed from an adverse judgment, and pending appeal the receivers sold the timber on the land, which was removed by their vendees, the fact that the receivers, in so doing, acted on the advice of eminent counsel, did not constitute a defense, and was available only, as indicating good faith, to relieve them from liability for exemplary damages, on its being subsequently determined that they had no interest in the timber.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 48-51, 64, 65; Dec. Dig. §§ 23, 56.*]

3. **TRESPASS (§ 27*)—RECEIVERS—EXTENT OF LIABILITY.**

Where, pending appeal in a suit against receivers to recover timber land, they wrongfully sold and permitted the removal of the timber which they were subsequently held not to own, they were guilty of trespass and conversion, and could not be permitted in equity to derive any profit therefrom.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 53, 59-63; Dec. Dig. § 27.*]

4. **TRESPASS (§ 46*)—CUTTING TIMBER—STUMPAGE VALUE.**

In an action for the wrongful cutting of timber from land which the defendants did not own, evidence of the stumpage or market value of like timber at the time of the trespass was not conclusive as to the amount to be recovered for the wrongful taking against the will and protest of the owner, as he was not bound to sell, but was entitled to hold the timber according to his own judgment and necessities.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 123-127; Dec. Dig. § 46.*]

5. **TRESPASS (§ 52*)—CUTTING TIMBER—SALE—DAMAGES—CONTRACT PRICE.**

Where, pending suit against the receivers of an oil company to recover certain timber land, the receivers, who were subsequently held not to own the land, sold the timber to the receivers of a lumber company, who removed the timber, the measure of recovery against the receivers of the oil company for the conversion of the timber could not be less than the contract price which they received for the sale thereof.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 137, 138; Dec. Dig. § 52.*]

6. **TRESPASS (§ 52*)—STANDING TIMBER—DAMAGES TO VENDEE.**

An owner of certain timber land contracted to sell the same to C. for \$200 cash and \$2.25 per 1,000 feet as the timber was thereafter scaled when cut and removed. C. paid the \$200, but took no further steps to assert any right to the timber until after it had been cut and removed by trespassers, and the landowner had sued to recover for the trespass and conversion. *Held*, that C.'s rights in the recovery were limited to a return of the \$200 advance payment, with interest, and to the difference between the rate per 1,000 which he had agreed to pay for the standing timber and its value regarded as standing timber at the time it was cut.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 137, 138; Dec. Dig. § 52.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. ATTORNEY AND CLIENT (§ 144*)—COMPENSATION—CONTRACTS—ASSIGNMENTS—EFFECT.

An owner of timber land, having contracted to sell the timber to C., pending suit to recover the land from an adverse claimant, assigned one-half of all moneys to accrue under the transfer of the timber to C. to H., one of his attorneys, in consideration of services rendered in the suit. The timber was wrongfully cut and removed by the vendee of the adverse claimant, and suit was thereafter brought by the landowner's assignee to recover damages for the trespass. At the time of the assignment to H., C. owed the landowner nothing under his timber contract, and, the timber having been subsequently removed, there was no possibility that the contract could be further executed, so as to give the landowner any enforceable claim against C. *Held*, that H. was entitled to no part of the trespass recovery by virtue of such assignment, but was in equity only entitled to such an allowance as his services were reasonably worth.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 332, 333; Dec. Dig. § 144.*]

8. MORTGAGES (§ 217*)—ABSOLUTE CONVEYANCE—ACTION AGAINST THIRD PERSON—RIGHT TO PROCEEDS.

An owner of certain timber land, having sued an adverse claimant to recover the same and being unable to appeal from an adverse decree, conveyed one-half of the land to plaintiff to induce him to advance the funds necessary for an appeal, pending which the timber was sold by the adverse claimant and wrongfully removed, after which the landowner assigned to plaintiff his right to recover damages for the trespass. *Held* that, such deed and assignment, though absolute in form, being in the nature of collateral security for advances made and to be made, plaintiff, after reimbursing himself for such advances and interest, together with his proper expenditures and disbursements, was bound to account to the landowner for the balance as trustee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 559-562; Dec. Dig. § 217.*]

Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Action by R. C. Conn against Joe S. Rice and others, as receivers, etc. Judgment for plaintiff for less than relief demanded, and he appeals. Reversed and remanded, with directions.

On the 24th day of April, 1905, Charles Dillingham, receiver of the Houston Oil Company of Texas, instituted an ancillary suit in the United States Circuit Court, Southern District of Texas, against G. W. Lewis, for the title and possession of 160 acres of land out of the southwest corner of the W. C. Armstrong survey in Newton county. The said Lewis answered, claiming title to the said 160 acres of land by the statute of limitation of 10 years under the laws of Texas, and after issue joined the case was referred to a special master for hearing and to report his findings therein. On August 8, 1907, the master made his report, in which he found that the record title to the said 160 acres of land was in the Houston Oil Company of Texas, or its receiver, and found against the said George W. Lewis on his limitation claim. Exceptions were duly filed to the report of the master, which exceptions were overruled by the court, and a decree was entered in favor of Charles Dillingham, receiver of the Houston Oil Company of Texas, for title and possession of said 160 acres of land, including all timber thereon, save and except about 11 acres surrounding the improvements of the said Lewis. Lewis filed a petition for an appeal to this court, which was granted by the judge a quo on his giving a bond in the sum of \$1,000, the same to act as a bond for costs and damages on appeal. Lewis gave a bond, with appellant herein as security,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for \$1,000, conditioned to prosecute his appeal to effect and answer all costs. On February 9, 1909, this court reversed and rendered said cause in favor of said Lewis. The decree against Lewis in the Circuit Court was rendered on March 16, 1908.

Prior thereto, on the 16th day of January, 1908, the said Lewis, by a warranty deed, conveyed the north one-half of the 160 acres of land for which he was being sued, to R. C. Conn. Lewis' deed was duly recorded in the Deed Records of Newton county, Tex., on the 16th day of March, 1908. The consideration for the deed mentioned from Lewis to Conn was \$50 in cash and an agreement upon the part of R. C. Conn to look after the appeal of the said case of *Dillingham v. Lewis*, make the appeal bond, and advance such moneys as were necessary to pay cost, in order that the case might be brought to and decided by this court. Mr. Conn performed his part of the contract, made the appeal bond for G. W. Lewis, and advanced in cost about \$250 in cash. Pending the appeal, and after R. C. Conn had recorded his deed, the receivers of the Kirby Lumber Company, while the appeal was pending in this court, cut and carried away the pine timber on said 160 acres of land. Before the timber was cut by the receivers of the Kirby Lumber Company, George W. Lewis gave them written notice and forbade them doing so. At the time of the cutting of the said timber by the receivers of the Kirby Lumber Company there was a contract existing between the said Kirby Lumber Company and the Houston Oil Company of Texas, the terms of which were being carried out. The receiver of the Houston Oil Company of Texas, upon application by the receivers of the Kirby Lumber Company, gave permission to cut the said timber, and, acting together, the said timber was cut. The receivers of the Kirby Lumber Company, in accordance with the contract existing between the Kirby Lumber Company and the Houston Oil Company of Texas at and before the cutting of the said timber, paid to the receivers of the Houston Oil Company of Texas, for the timber cut off of the land of R. C. Conn and G. W. Lewis the sum of \$5 per 1,000 feet of timber, aggregating 1,198,500 feet, or \$5,992.50.

The case of *Lewis v. Dillingham*, Receiver, 167 Fed. 779, 93 C. C. A. 267, in this court was decided in favor of said Lewis on February 9, 1909. At that time all of the merchantable pine on the land of the said G. W. Lewis and R. C. Conn had been cut by the receivers of the Kirby Lumber Company and the receiver of the Houston Oil Company of Texas, acting together. R. C. Conn and G. W. Lewis, having learned of the fact that the said case was reversed and rendered in favor of G. W. Lewis, entered into an agreement on the 14th day of April, 1909, by which R. C. Conn agreed to reconvey to G. W. Lewis the north one-half of the 160 acres of land, and to give him a horse and buggy and \$50 in merchandise; and in consideration of the said land, horse and buggy, and merchandise the said G. W. Lewis, by an instrument in writing, assigned to R. C. Conn "all of my interest in a certain debt that is due me by Geo. W. Cavin, of Nacogdoches, Texas, and the Kirby Lumber Company and the Houston Oil Company and their receivers, of Houston, Texas; the said debt that I this day sold to the said R. C. Conn is for timber cut and removed by the Kirby Lumber Company off my land," etc. The agreement between the said Conn and Lewis was that out of the recovery had for the timber on the south one-half of the land the said Conn should be paid for his land, horse and buggy, and merchandise the sum of \$550, the balance to be paid out of the recovery to G. W. Lewis.

R. C. Conn brought this suit as an ancillary one on May 12, 1909, claiming that, at the time of the cutting of the timber by the receivers of the Kirby Lumber Company and the Houston Oil Company, he owned in fee simple the north one-half of the said 160 acres of land by virtue of a warranty deed from the said G. W. Lewis, dated January 16, 1908, and recorded in the Deed Records of Newton county, Tex., on March 16, 1908; further, that G. W. Lewis, for good and valuable consideration, prior to the institution of the said suit, and on, to wit, April 14, 1909, by an instrument in writing had assigned and conveyed to him the cause of action accruing to the said Lewis for the cutting of the said timber on said land, and by said deed and assignment all of the debts and causes of action in favor of the said Lewis

had become vested in him, the said R. C. Conn. He also alleged that George W. Cavin, of Nacogdoches county, Tex., was setting up some pretended claim in and to the said timber and lumber as against the plaintiff and the said receivers, and prayed that the said Cavin be made a party. Plaintiff's suit was against Joe S. Rice and Cecil A. Lyon, receivers of the Kirby Lumber Company, a corporation, and the Kirby Lumber Company, Charles Dillingham, receiver of the Houston Oil Company of Texas, and Geo. W. Cavin, to recover of the defendants the Kirby Lumber Company, the Houston Oil Company of Texas, and their receivers, as joint tort-feasors, damages for cutting the timber off of the said land pending the appeal—plaintiff alleging that he was the owner in fee simple title of 80 acres of the land at the time of the trespass, and that since the trespass G. W. Lewis had assigned to him, by an instrument in writing, all of his rights and causes of action in reference to the cutting of said timber; that the defendants conspired and confederated together to willfully cut and remove the said timber from the said land and appropriate said timber to the use of themselves pending the appeal of the case of G. W. Lewis v. Charles Dillingham, Receiver, and by bringing the same within the terms of the said timber contract between the Kirby Lumber Company and the Houston Oil Company of Texas, the Kirby Lumber Company, or its receivers, would pay to the Houston Oil Company of Texas and its receiver \$5 per 1,000 feet, thereby enabling the Houston Oil Company of Texas and its receiver to make a profit from the said timber largely in excess of its actual market value; that the defendant had cut and removed from said land, pending the appeal, 7,000 logs, aggregating 1,700,000 feet of lumber, and did convert the said logs into lumber willfully and without right or excuse, and with full knowledge of the rights and possession of the said Lewis and plaintiff, and had mixed and mingled the said lumber with other stocks of lumber, and had sold the same on the market, so that now the same could not be identified, by reason of which the defendants have become liable and obligated to pay plaintiff the value of the said lumber, to wit, the sum of \$15 per 1,000 feet, aggregating the sum of \$25,500, together with 6 per cent. interest thereon from the date of said conversion. Plaintiff also prayed in the alternative that, if it should be decided that he was not entitled to judgment for the market value of timber taken from the said land, then plaintiff prayed for judgment against the defendants for the value of said timber as lumber, less reasonable cost for converting the timber into lumber, and for the value of the said timber according to the contract existing between the said defendants and under which the said timber was cut, to wit, the sum of \$5 per thousand feet, aggregating \$8,500, together with 6 per cent. interest thereon from the date of the conversion, and, if that could not be had, plaintiff prayed for the market value of said timber, to wit, \$3 per 1,000 feet.

The Houston Oil Company of Texas and its receiver answered plaintiff's suit on October 3, 1910, wherein they alleged that on or about the 24th day of April, 1905, Charles Dillingham and F. A. Reichardt, then receivers of said Houston Oil Company of Texas, filed in the Circuit Court of the United States for the Southern District of Texas, and in the cause of Maryland Trust Company, Trustee, v. Kirby Lumber Company et al., known as the main receivership cause, in which cause said Dillingham and Reichardt were appointed receivers, their supplemental and ancillary bill, which is docketed as "Intervention No. 294, Chas. Dillingham and F. A. Reichardt, Receivers of the Houston Oil Company of Texas, v. Geo. W. Lewis, wherein they sought to recover title and possession of 160 acres of land, part of the W. C. Armstrong survey, in Newton county, Tex.; that the said Lewis had answered said suit, and the same had been referred to the special master, who, on or about the 12th day of July, 1907, had filed in said Circuit Court his report, recommending judgment in favor of the Houston Oil Company of Texas and its receiver; that said Geo. W. Lewis duly excepted to the master's report, which exceptions were overruled by the court, and judgment rendered in favor of the Houston Oil Company of Texas and its receiver for said land, less, however, the tract of 11 acres actually inclosed by the said Lewis, and said decree was entered by said court on March 16, 1908; that on the 29th

day of July, 1908, the said Geo. W. Lewis, in said Intervention No. 294, filed his assignments of error, petition for appeal, and appeal bond, and that the said Circuit Court thereupon entered an order allowing said appeal, and the said case was carried to the United States Circuit Court of Appeals, this circuit, for a review of the said judgment. The said defendants denied that Cecil A. Lyon and Joe S. Rice, receivers of the Kirby Lumber Company, and Charles Dillingham, as receiver of the Houston Oil Company of Texas, did with force of arms, wrongfully, willfully, and oppressively enter upon said land. They denied that they were engaged in selling said lumber and said logs upon the market, and denied that they ever sold any logs at any time, and denied that they had committed trespass upon the said 160 acres of land. The said answer admitted the making and the existence of the contract between the Kirby Lumber Company and the Houston Oil Company of Texas, whereby the said Houston Oil Company of Texas, or its receiver, obtained \$5 per 1,000 feet for the timber cut off of said land; that under the decree of March 17, 1904, appointing receivers for the said Kirby Lumber Company and the said Houston Oil Company of Texas, the said receivers were vested with title to and with full power of said receivers, and instructed to take immediate possession and charge of, and to manage and control, under the orders of the court, all of the property, real, personal, and mixed, belonging to the two defendant corporations, and the said receivers were authorized and directed to continue the business operations of said corporations and carry out said timber contract; that on the 24th day of July, 1908, the receivers of the Kirby Lumber Company, in due course of the carrying out and continuing of the business of the Kirby Lumber Company, and in the due and usual and ordinary performance of the said timber contract, asked the receiver of the Houston Oil Company of Texas for permission to cut the timber from the 1,130 acres of land owned by the Houston Oil Company of Texas on the W. C. Armstrong survey in Newton county, of which the 160-acre tract involved in said Intervention No. 294 was and is a part; that upon advice of their general counsel, Denman, Franklin & McGowen, they gave permission to the receivers of the Kirby Lumber Company to cut said timber under the said timber contract; that said advice of their general counsel was given after being apprised of the existing condition of said litigation in Intervention No. 294; that, acting upon the said advice of general counsel, they had given permission to the receivers of the Kirby Lumber Company to enter upon the said 160 acres and cut the timber therefrom under the timber contract between the said two companies; that about the 19th of August, 1908, the receiver of the Houston Oil Company of Texas gave permission in writing to the receivers of the Kirby Lumber Company to cut the timber from the 160 acres of land involved in said suit (except the 11 acres awarded to Geo. W. Lewis by decree of said Circuit Court) under the timber contract between the Kirby Lumber Company and the Houston Oil Company of Texas, and alleged that the said receivers of the Kirby Lumber Company, in accordance with said permission and under and by virtue of said timber contract, entered upon said land and cut and removed therefrom 1,198,577 feet of pine timber, and that the same was cut and removed during the months of October, November, and December, 1908, and January, 1909; that, in cutting and removing said timber, same was scaled by the timber scalers provided for in said timber contract, and that the quantity of timber given above is the quantity cut and removed from the said 160 acres of land and scaled and reported by the said timber scalers; that at the time of the giving of permission to cut said timber the Houston Oil Company of Texas owned and held said land under fee simple title and perfect record title, and in addition to that the Circuit Court had entered a decree in favor of the said defendant and against the said Lewis for said land, and having the report of the special master on said cause and the decree of the Circuit Court confirming same, and having submitted said question of law to his counsel, the said receiver of said Oil Company owned said land, and in entire good faith and without any desire to injure the said George W. Lewis gave permission to the receivers of the Kirby Lumber Company to cut said timber. The said defendant alleged that Geo. W. Cavin, of Nacogdoches county, Tex., Geo. W.

Lewis, of Newton county, Tex., and John Hamman, of Harris county, Tex., were asserting some character of claim or right in and to said timber or its value, as against the claimant and the Kirby Lumber Company, and its receivers, and the Houston Oil Company of Texas, and its receiver, and asked the said parties be made parties litigant to this suit, so that the parties might be protected, etc.

Cecil A. Lyon and J. S. Rice, receivers of the Kirby Lumber Company, filed their answer on March 16, 1911. They admitted that they were the receivers of the Kirby Lumber Company, acting under and by virtue of the appointment of the Circuit Court at the dates and trespasses complained of by intervenor R. C. Conn, and admitted that as such receivers they had possession of and control of all of the properties of the said corporation, and were operating the same under orders of the court at those dates, and that the defendant Chas. Dillingham, receiver of the Houston Oil Company of Texas, had like authority and power. The said answer then proceeds to admit the matters of fact in reference to Intervention No. 294, Chas. Dillingham, Receiver, v. Geo. W. Lewis, practically as set out and admitted by their co-defendants, Chas. Dillingham and Houston Oil Company of Texas. The said defendants denied that they did with force of arms, wrongfully, willfully, and oppressively enter upon said land and cut and carry away all of the merchantable pine timber thereon. The said defendants admitted the existence and the terms of the timber contract between the Houston Oil Company of Texas and the Kirby Lumber Company at the time of the alleged trespass; that the said defendants requested permission of the receiver of the Houston Oil Company to cut the timber on the 160 acres of land involved in said Intervention No. 294, and that said permission was given, and under the terms of the said contract existing between the said two companies, after having taken the advice of their own general counsel, with knowledge of the circumstances then existing relative to the disposition of said Intervention No. 294, they proceeded to cut and did cut the timber from said land, and in doing so acted in good faith, believing that the Houston Oil Company of Texas had a good title to said land; that during the months of October, November, and December, 1908, and January 1909, they cut and removed from said land 1,171,665 feet of timber, believing that they were rightfully entitled to commit the acts done by them, and with no intention to injure or oppress the intervenor or deprive him of any rights which he may have had; that the logs, after being transported to the mills, are so mingled and mixed with other logs that accurate information in reference to the same cannot be obtained. The said defendants admitted the existence of the timber contract as alleged in plaintiff's pleadings, and admitted, further, that the said contract was in force at the time of the cutting of said timber, and alleged that they were at said time engaged in due performance of said contract under the orders of the court in the receivership cause. The said defendants admitted the price of \$5 per thousand feet referred to in plaintiff's pleadings as the price fixed by said contract to have been paid by said Kirby Lumber Company was largely in excess of the market value of the timber at the time of the alleged trespass. The said defendants also impleaded Geo. W. Cavin, Nacogdoches, Tex., John Hamman, Harris county, Tex., and G. W. Lewis, of Newton county, Tex., and prayed the court that the intervenor take nothing, and that they go hence without day, etc.

On October 21, 1910, John Hamman filed a cross-bill, complaining of all of the parties to the said suit, and alleging in said cross-bill that he referred to and adopted as his own the allegations of the cross-bill of his codefendant Geo. W. Cavin, filed on the same date. The said John Hamman further alleged that under and by virtue of that certain written contract and transfer made, executed, and delivered to him by Geo. W. Lewis, dated March 20, 1909, the said Lewis, for valuable consideration, did transfer and assign to him in full one-half interest in and to all sums of money and other rights, interests, and properties which inured or might accrue to said Lewis under and by virtue of his timber contract theretofore entered into by and between him, the said Lewis, and Geo. W. Cavin, dated October 2, 1906, and by virtue of said instrument that he became and was the owner of an undivided

one-half of all sums of money which the said Lewis was or is entitled to receive from the said Geo. W. Cavin for the timber cut or to be cut by the said Cavin on said land; that the Kirby Lumber Company, and its receivers, and the Houston Oil Company of Texas, and its receiver, knowingly, willfully, and recklessly, and in disregard of the rights of complainants, trespassed upon the said lands, and cut and appropriated the timbers therefrom, and converted the same into lumber, and disposed of the same, and put it beyond the reach of said Cavin and of this complainant, thereby becoming liable to the said Cavin, and to the said Lewis, and to complainant, according to the respective interest as measured and fixed by the said contracts between Cavin and Lewis, on the one hand, and complainant and Lewis, on the other; that the said defendants cut and carried away timber from said land aggregating 1,700,000 feet of lumber, and that by virtue of said contract between Lewis and Cavin the said Lewis would have been entitled to receive as compensation for said timber \$3,825, and would have received the same from the said Geo. W. Cavin if the latter had not been interrupted by the unlawful conduct of said companies and their said receivers in cutting and appropriating the said timber; that the complainant John Hamman, under and by virtue of his said contract with said Lewis, was entitled to and would have received one-half of the said Lewis' portion, which would have been \$1,912.50. Wherefore the said complainant prayed for judgment against the Kirby Lumber Company and the Houston Oil Company of Texas and their receivers, in the sum of \$1,912.50, with interest at the rate of 6 per cent. per annum from the dates of the conversion of said timber, and that the same be declared and fixed as a lien on the funds in the hands of the Houston Oil Company of Texas, placed by the Kirby Lumber Company as the purchase price thereof, etc.

Geo. W. Cavin filed a cross-bill on October 21, 1910. He alleged that on or about the 2d day of October, 1906, G. W. Lewis, being the owner of 160 acres of land, by written deed and transfer of that date sold, transferred, and conveyed, for a valuable consideration, to him all the merchantable pine timber then standing on said land (it being the tract of land involved in Intervention No. 294); that the consideration of said conveyance was the payment by said Cavin to said Lewis of the sum of \$200 in cash and the further payment of \$2.25 per 1,000 of the timber to be cut, and to be paid as scaled, payments to be made on the 15th day of each month after the scales should be turned in on the 1st of said month, and it was stipulated as part of said contract that said Cavin should cut and remove said timber from said land within a period of 10 years from the date thereof, and, failing to do so, that the title thereto should revert to and vest in the grantor, G. W. Lewis; that said deed was duly acknowledged and recorded October 2, 1906, in the deed records of Newton county, Tex.; that he purchased and acquired and became the owner of said timber in good faith and for a valuable consideration; that at the date of the execution of said deed he paid the said Lewis \$200 in cash, and for which he was entitled to receive a credit on the total purchase price, and subsequently he had paid said Lewis the sum of \$250, for which he is entitled to a credit on the total purchase price of said timber; that after his purchase of the said timber, and before he was able, with the utmost diligence, to perform and consummate his undertaking thereunder, so as to remove the said timbers, suit was instituted in this court by Charles Dillingham, receiver of the Houston Oil Company of Texas, against G. W. Lewis for the title and possession of said land. The said cross-bill sets out the proceedings in the said Intervention No. 294, and alleges the trespasses of the receivers of the companies as alleged by the complainant, R. C. Conn; that the said Cavin was entitled to a judgment by reason of his conveyance aforesaid against the Kirby Lumber Company and the Houston Oil Company of Texas, and their respective receivers, for the market value of the lumber taken from said land, to wit, \$25,500, together with 6 per cent. interest thereon per annum from the date of said conversion, and in the alternative for the value of said timber according to the contract between the Kirby Lumber Company and the Houston Oil Company of Texas, under which the timber was cut, to wit, the sum of \$5 per 1,000 feet, aggregating \$8,500,

together with 6 per cent. interest thereon; and further, in the alternative, for the market value of said timber, with 6 per cent. interest, etc.

The plaintiff, R. C. Conn, answering the cross-bill of G. W. Cavin, alleged that some time prior to the rendition of the judgment in the lower court in the case of Dillingham v. Lewis, Intervention No. 294, G. W. Cavin pretended to purchase from the said G. W. Lewis all of the merchantable pine timber of the land involved in said suit, and took from the said Lewis a pretended transfer or timber deed to all of the merchantable pine timber upon the said land, for a consideration of \$2.25 per 1,000 feet; that at the time of the trial of said case in the lower court, and at the time of the rendition of the judgment therein, the said Cavin had taken no steps to remove the timber from said land, but had merely placed his timber deed on record in Newton county. Plaintiff alleged that on the rendition of the decree in the case of Dillingham v. Lewis it became apparent to the said Geo. W. Cavin that whatever right he had in and to the timber upon the said land was lost, in that the said G. W. Lewis had been cast in said suit, and a judgment had been rendered for the said Dillingham for the said land; that thereupon the said Cavin sent for the said G. W. Lewis and represented to the said Lewis that he had lost his land, and therefore the timber deed from the said Lewis to the said Cavin was of no value, and set about to induce the said Lewis to appeal the said case to the Circuit Court of Appeals at New Orleans; that the said Lewis told the said Cavin that he had no money with which to appeal the case, and had no way of getting the case to the higher courts, so that it might be reversed, as he was poor and not able to make a bond on appeal, and not able to raise the money necessary to pay the cost of appeal; that thereupon the said Cavin told the said Lewis that he might get Parker & Hefner, at Beaumont, Tex., to appeal the said case and advance the necessary money therefor, if he would give the said attorneys one-half of the pine timber upon the said land, and asked the said Lewis if he would be willing to join him in making the said deed to Parker & Hefner for one-half of the timber upon the said land in order to get the case appealed; that the said Lewis agreed to the proposition made to him by said Cavin, and asked the said Cavin to write to Parker & Hefner, but the said Cavin refused to write or take up the matter with them, but insisted on the said Lewis doing so. Plaintiff alleged that the said Lewis suggested at said time to Cavin that probably he could get Mr. R. C. Conn, a banker at Kirbyville, Tex., to advance all necessary moneys to appeal the said case and make a bond therein, if the said Cavin and Lewis would give to him (R. C. Conn) one-half of the timber and land; that said Cavin consented thereto, and requested the said Lewis to go and see the said Conn, and if he would agree to advance the money necessary to appeal said case, and, if he would, to make a deed to the said Conn for one-half of the land, and that he, the said Cavin, would give up or waive his rights to the timber upon the said land. Plaintiff alleged that the said Lewis, acting upon the representations made by said Cavin, upon plaintiff agreeing to make a bond in said case and advance the necessary moneys for appealing the same, executed and delivered to the plaintiff, R. C. Conn, his general warranty deed for the north one-half of the said land; that the said deed was taken by plaintiff on January 16, 1908, and that at the time the said timber deed to Geo. W. Cavin was on record in Newton county, but he, the plaintiff, had no knowledge thereof, and, further, the plaintiff had no knowledge of the sale of the said timber to said Cavin, and did not know that Cavin was interested in said land or timber in any manner; that plaintiff, R. C. Conn, complied with his agreement with G. W. Lewis and caused the said case to be appealed; that a short while after the taking of the said deed from G. W. Lewis, and before the case had been appealed or passed on by the higher court, the said Cavin informed the plaintiff that he had a deed to the timber upon the said land; that the plaintiff then refused to proceed further with the matter of appealing the said case, and so informed the said Cavin, but the said Cavin at said time told the plaintiff that he was willing to give up to the said Conn the timber on the north one-half, if he would proceed with the said appeal, and appeal the said case for Lewis, and also informed the said Conn that he had authorized

G. W. Lewis to make the deed to him for the north one-half of the land in order to get the said Conn to appeal the said case. Plaintiff alleged that by the representations and inducement of the said Cavin he proceeded with the appeal of the said case and advanced the sum of \$300 or \$350 for appealing the same; that he paid all the cost in the lower court, and the necessary cost of preparing the record and making briefs in the higher court, and paid the expenses of an attorney to New Orleans to make an oral argument in the case, and by virtue thereof the said case was reversed and rendered for G. W. Lewis; that if it had not been for the representations made by the said Cavin he would not have appealed the said case or advanced his money therefor, and that he took the deed to the north one-half of the land in ignorance of the right, if any, of the said Cavin to the timber thereon, and it was only by the assurance made by the said Cavin to him, and because he learned that the said Cavin had authorized the said Lewis to make the said deed that he was induced to proceed with the appeal and advance his money therefor; that in equity and good conscience the said Cavin was estopped from asserting any claim or right to the timber upon the said land. Plaintiff also alleged that in any event he is entitled to recover the sum of \$2.25 per 1,000 feet for all timber cut off of the said land by reason of the contract between the said Lewis and Cavin and an assignment thereof by the said Lewis to the plaintiff, and by reason of plaintiff's deed from Lewis. Plaintiff further alleged that by the terms of said pretended contract of sale no completed sale was made of the standing timber of said land by said Lewis to the said Cavin, but the said sale was to be complete only upon the cutting and removal of said timber by the said Cavin and the measuring or scaling of same and the payment therefor by said Cavin; that the said pretended sale was executory in character, and the said instrument in writing under which the said Cavin claims was and is only an executory contract of sale, and the same was never executed by the said Cavin cutting, removing, and measuring the same at his mill, or paying therefor as provided for in said contract; that none of the said timber was ever cut or removed or scaled at the mill of the said Cavin, or elsewhere, as the said Cavin was never in possession of the same; that no title to the said timber passed from the said Lewis to said Cavin, but remained in the said Lewis at the time he executed and delivered the several conveyances to the plaintiff; that by the said conveyance to plaintiff the said Lewis revoked and annulled the said pretended executory contract of sale to said Cavin and the license granted therein to the said Cavin; that it was the intention of Lewis and Cavin that the title to the said timber should remain in Lewis until the said Cavin should avail himself of the terms of the contract, and cut and remove the said timber, measure the same, and pay therefor at the price stipulated, and to give to the said Cavin merely a license to cut and remove the said timber; that the said instrument did not convey any interest in the land of the said Lewis, and was not entitled to record under the laws of this state, and, if recorded, did not operate as notice to this plaintiff. Plaintiff further alleged that at the time of the making of the said contract by said Lewis the suit of Charles Dillingham, Receiver, v. G. W. Lewis was pending, and had been for more than one year, which was known to said Cavin; that after the execution of said contract the said Cavin took no steps to defend the said contract, or to assert his claim, if he had any, but shortly thereafter the said Cavin sold his mill near the said land and moved therefrom, with the intention of abandoning all claims to the said timber, and with no intention of ever removing or cutting the said timber. Plaintiff alleged that the said Lewis was very old and poor, and had no means with which to defend the said suit or employ legal counsel, and because of his necessitous condition it was necessary for him to give a part of said land and timber to obtain funds to prosecute the said case, all of which was well known to the said Cavin, and the said Cavin permitted the said Lewis to deal with the subject-matter of said suit as if it were his own, and the said Cavin is and should be held bound by the acts of the said Lewis done in furtherance of the defense of said suit.

G. W. Lewis answered in this case in the lower court, and referred to and adopted as his own the pleadings of the plaintiff, R. C. Conn. He admitted

all of the allegations in the pleadings of the plaintiff, and alleged that the matters and things therein alleged were true. He prayed that judgment be rendered herein for the said plaintiff as prayed for by him, and that the said Hamman and Cavin be adjudged to recover nothing.

Upon the issues as made by the pleadings, evidence was taken by the respective parties, and final judgment was rendered by the lower court November 3, 1911. By the terms of this judgment the court found against the Houston Oil Company of Texas and the Kirby Lumber Company in the sum of \$3,595.50, the same being the value of 1,198,500 feet of timber at \$3 per 1,000 feet. The decree does not provide for interest, and the court made no allowance for interest in entering the said decree. By the terms of the decree the defendants, the Houston Oil Company of Texas and the Kirby Lumber Company, were required to pay into court the said sum of money in full satisfaction of the claims of all parties to the record, and ordered the fund distributed as follows: To R. C. Conn, \$550; to G. W. Cavin, \$961.40; to John Hamman, the sum of \$1,042.05; to Geo. W. Lewis, the sum of \$1,042.05. The plaintiff, R. C. Conn, being dissatisfied with the said decree, in due time, on December 27, 1911, appealed to this court.

John B. Warren, of Houston, Tex., for appellant.

T. M. Kennerly, John G. Logue, John Hamman, and B. F. Louis, all of Houston, Tex., for appellees.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). Under the decision of this court (*Lewis v. Dillingham*, 167 Fed. 779, 93 C. C. A. 267) Lewis, at the institution of the proceedings against him, was the owner of the land in contest. Lewis' deed to Conn, duly recorded, conveyed the north one-half, so that at the time the trespass was committed, and the timber cut and removed, by the receivers of the Houston Oil Company of Texas and the receivers of the Kirby Lumber Company acting in conjunction, Lewis and Conn were the parties damaged.

[1] The subsequent assignment by Lewis to Conn of his timber rights, including his cause of action for damages for the trespass already committed, gave to Conn the right to sue for and recover for all the damages resulting from the taking of the timber from the whole tract; and this right, not specifically denied in the pleadings, is reinforced by the undisputed evidence that the deed for the north one-half of the land and the assignment of timber rights, though absolute in terms, were mere securities for the repayment of moneys advanced by Conn. The decision appealed from ignored this right of Conn, and therefore this appeal must be maintained, as none of the defenses presented are sufficient.

[2, 3] That the receivers, in cutting and removing the timber pendente lite, acted under the advice of eminent counsel, and as they may have supposed within their legal rights, may mitigate the character of the trespass, so far as good faith is to be considered; and this may relieve them from exemplary damages, still the fact remains that without right and pending an appeal wherein the order of the court—if not the bond—operated a supersedeas, they invaded the possession of Lewis, and over his protest cut and removed and converted to their own use 1,198,500 feet of timber belonging to Lewis and Conn, and

they should fully compensate for and restore the same, or its full value, and not be permitted in a court of equity to escape with any profit resulting from their wrongful trespass and conversion.

[4] There is much evidence in the record of "stumpage" value and market value of like timber at the time of the trespass, and while this may be admissible and useful in determining the value when an owner is compelled or is willing to sell, it is not at all conclusive as to the amount to be recovered when property is wrongfully taken over the will and protest of the owner, who has a right to sell or to hold according to his own judgment and necessities. In cases of conversion of personal property of fluctuating value, a rule of damages frequently applied is that the recovery may be at the highest value the property may have had at any time between the conversion and settlement day (38 Cyc. 2096, and cases cited), for we take it that where an owner is not bound to sell he may avail himself of the highest market.

[5] In this case, however, we are somewhat relieved; for in the case we find a contract between the Houston Oil Company of Texas and the Kirby Lumber Company, whose receivers committed the trespass, and who benefited by the same, which stipulates the price to be paid as timber was cut on the lands supposed to belong to the Houston Oil Company of Texas, and therein \$5 per 1,000 feet is fixed as the price to be paid for over three-fourths of the timber therein contracted for, and so far as we can find from the record that is the price at which the trespassers in this case and the companies they represented settled for the timber taken from the lands of Lewis and Conn, and under all the circumstances we think that is the price they ought to account for in this case. At less than that they would make a profit out of the trespass.

Conn is the only appellant now before this court, but in order to grant him the relief to which we think he is entitled, and yet do justice, it is necessary to pass upon the claims of the interveners and cross-complainants, appellees, whose rights are involved.

[6] George W. Cavin intervened in a cross-bill, in which he claimed he was the owner of all the pine timber on the Lewis tract, and he exhibited a contract in the form of a warranty deed executed by Lewis October 2, 1906, and thereafter duly recorded, which purports, for a consideration of \$200 in cash and the payment of \$2.25 per 1,000 feet as scaled thereafter when cut and removed, to convey to Cavin all the merchantable pine timber then standing on the Lewis tract, and ends with this provision:

"It is expressly understood that the said George W. Cavin agrees, by acceptance hereof, to cut and remove said timber above conveyed from the above-described land, within a period of 10 years from date hereof, failing so to do, title thereto shall revert to and vest in grantor herein."

Cavin paid the \$200, but thereafter cut and removed no timber from the Lewis tract, nor took any steps to assert any right thereto until after Conn filed his intervention in October, 1909. The contract as shown by the deed is admitted; but the contention below and here is that it was, and is, only a license to Cavin to enter and cut and remove the timber within the limited period, and until the timber should be cut and removed, and paid for, it belonged to Lewis, and it is pointed

out that Cavin was not obligated to take and pay for the timber at any time specifically or otherwise, and that until cut and paid for the timber belonged to Lewis and was solely at his risk, and that this was Cavin's construction of the contract, as he never removed any timber, has not shown that he ever prepared to or contemplated any removal, stood by and allowed the removal by other parties without protest, and, without aiding Lewis to defend his title, now comes in to reap where he has not sown. We have been referred to cases in Texas construing such contracts, in which it has been held they are contracts affecting the realty and must be in writing, and some other cases where a sale was executed by payment of the price, in which it was held that the contract conveyed an interest in the land. We may accept the rulings in these cases, but they do not control in the instant case.

The agreement between Lewis and Cavin is an executory contract of sale of standing timber, on which there was a price fixed and a small advance paid, but delivery was postponed; and, pending the time given to Cavin to remove the timber agreed to be sold, the same has been, and without the fault of the owner, wrongfully carried away and converted, and the question here is what are Cavin's damages recoverable in this suit. He is entitled to recover the \$200 paid to Lewis in advance, with legal interest thereon from the date of payment. If he had ever paid Lewis for the timber, and been diligent in the protection of his rights, he might be entitled to the full value of the standing timber at the time it was cut and removed; but he did not pay Lewis, nor did he defend. The decree below allows him the \$200 advance payment, and further allows him 75 cents per 1,000, the difference between the \$2.25 agreed to be paid by Lewis and \$3, the value the court fixed for the standing timber.

It may be that Cavin had a shadowy inchoate equity to be protected by the court, but we have difficulty in locating it. He had no claim against Lewis, even for the advance, for Lewis neither sold nor removed the timber; and it is by no means clear that he had any actionable claim against the receivers, for he was not the owner nor in possession of the timber. The amount allowed Cavin by the decree below is liberal, as we view the facts in the case; but as he has not appealed, and we cannot deny that he has some equity in his claim, we will affirm the decree in his favor.

[7] Appellee Hamman claims relief in this case by reason of a written assignment as follows:

"Know all men by these presents, that I, George W. Lewis, of the aforesaid state and county, for and in consideration of the sum of one dollar (\$1.00) to me in hand paid by John Hamman, the receipt whereof is hereby fully acknowledged, and for the additional consideration of services heretofore rendered by him to me in cause No. 1871, entitled G. W. Lewis, Appellant, v. Charles Dillingham, Receiver of Houston Oil Company of Texas, Appellee, in the U. S. Circuit Court of Appeals, Fifth Circuit, at New Orleans, have sold, assigned, transferred, and set over, and by these presents do sell, assign, transfer, and set over, unto said John Hamman, of Houston, Harris county, Texas, a full one-half ($\frac{1}{2}$) of any and all sums of money whatsoever to me inuring or accruing under and by virtue of a certain conveyance by me made to George W. Cavin, under date of October 2, 1906, and of record in the records of Newton county, Texas, to which said conveyance and the aforesaid record reference is hereby made. It is the intention hereby to set over to

the said John Hamman a full one-half ($\frac{1}{2}$) of all moneys inuring or accruing to me under and by virtue of the terms of said instrument, and to vest in him an equal right with myself therein, as well as in all rights whatsoever vested in me thereby, he, the said Hamman, being hereby subrogated to the said extent in and to my place and stead under said instrument, he being hereby authorized and empowered to collect from said Cavin one-half ($\frac{1}{2}$) of certain moneys as may accrue to me under said conveyance. To have and to hold the same unto the said John Hamman, his heirs and assigns, forever, free of all claims and demands whatsoever of myself, my heirs and assigns. "In testimony whereof, witness my hand, this transfer being executed in duplicate, this March 20, 1909. [Signed] G. W. Lewis."

This document seems to be an assignment in consideration of legal services theretofore rendered on the former appeal in this case of one-half interest in a claim Lewis was supposed to have against Cavin growing out of the timber contract between Cavin and Lewis. The assignment was made at a time when Cavin owed Lewis nothing, for he had not removed nor cut any timber under the contract, and after the receivers had already cut and removed all the timber from the Lewis tract, and there was no possibility that the contract could be further executed, so as to give Lewis any claim enforceable against Cavin.

In this present suit neither Lewis nor his assigns recover anything from Cavin by reason of the contract. On the contrary, in the decree below and in this court, Cavin practically recovers from Lewis on the nebular theory that if he had paid Lewis for the timber he would have made a profit of 75 cents per 1,000 feet out of the trespass of the receivers. Hamman has not proved in this case the extent or value of the services rendered Lewis on the former appeal in this court, and Lewis may be indebted to him for such services, and the assignment relied on furnishes no guide to adjudge any amount he may be entitled to recover in this case.

In the brief filed by appellee Hamman in this case, and signed by him as associate counsel, it is alleged that George W. Lewis was a poor, old, uneducated man, and it was not only proper, but commendable, for the court in the exercise of its equity powers to award this unprotected old man what the evidence established was his rights. This is advanced as a reason why Lewis' assignment to Conn was properly disregarded, and Conn's claim cut down to the actual advances of cash and property made by him, and we think it is equally good as applied to Hamman's assignment, obtained from the same "poor, old, uneducated man."

As the proof furnishes us no basis for determining the real amount due Hamman, we shall sufficiently recognize his demand by allowing him in the decree to be rendered such amount for his professional services in the former litigation as the parties may agree, subject to the arbitrament and approval of the court below.

George W. Lewis, the central figure in this litigation, without being made a party to the same, and after giving his evidence, of his own motion and apparently without objection, appeared by counsel and filed an entitled answer in the case as follows:

"Now comes G. W. Lewis, by his attorney herein, and makes and files this his answer to the pleadings of the defendants herein.

"I. The said G. W. Lewis refers to and adopts as his own pleadings the pleadings of the plaintiff herein, R. C. Conn.

"II. The said Lewis admits all allegations in the pleadings of the plaintiff herein, and says the matters and things therein alleged are true.

"III. The said Lewis prays that judgment be rendered herein for the said plaintiff as prayed for by him, and that the said Hamman and Cavin be adjudged to recover nothing.

"John B. Warren, Attorney for G. W. Lewis."

From which it appears that he informally joins intervener Conn as co-complainant.

[8] Under his evidence and that of intervener Conn, it appears clearly established that under titles formally conveying to Conn land and all of Lewis' right of action for and interest in and to the timber that had been carried away from his lands, yet in fact the same were in the nature of collateral security for advances made and to be made, with the understanding that after the collection of the timber claims Conn should account to Lewis as trustee. The court below took this view of the case in the decree, and to a certain extent protected Lewis in the matter. In the decree which we shall render in the case we think that Lewis' rights will be fully protected without attempting to precisely adjust or limit them.

The decree of the court below is reversed, and this cause is remanded, with instructions to enter the following decree:

It appearing to the court that the receiver of the Houston Oil Company of Texas and the receivers of the Kirby Lumber Company, acting together, during the months of October, November, and December, 1908, and January, 1909, cut and removed from the 160 acres of land of the W. C. Armstrong survey, in Newton county, Texas, the property of George W. Lewis, 1,198,500 feet of timber without right, and should account for the same, and the court finding that the said Houston Oil Company of Texas and the said Kirby Lumber Company and the receivers thereof, which have since been discharged by the court—jurisdiction, however, being retained over the same and the said companies and the properties thereof until the disposition of all pending interventions, of which this is one—are liable for the value of said timber so cut and removed, which the court finds and declares to be the sum of \$5 per 1,000 feet, amounting to the sum of \$5,992.50, it is accordingly ordered, adjudged, and decreed that the defendants, the Houston Oil Company of Texas and the Kirby Lumber Company, pay into the registry of this court said sum of \$5,992.50 in full settlement and satisfaction of the claims of all the parties hereto to said timber so cut and removed, which sum shall be distributed among the parties hereinafter named, but this decree as against said companies shall in no wise prejudice the rights of either company against the other; and it further appearing to the court that George W. Lewis did on the 2d day of October, 1906, convey to the defendant George W. Cavin the right for a period of ten years to cut and remove the said timber from the lands aforesaid in consideration of the sum of \$200 advanced and the payment thereafter of \$2.25 per 1,000 feet of timber as same should be removed and scaled, and it further appearing that the intervener R. C. Conn had notice of the conveyance of such

timber rights to the said George W. Cavin, it is ordered and decreed that out of the funds so ordered to be paid into the registry of the court the said George W. Cavin do receive the sum of \$961.40 in full settlement and satisfaction of all claims against the Houston Oil Company and the Kirby Lumber Company and the receivers of said companies and all other parties hereto of all of said Cavin's claims growing out of the timber contract between him and the said George W. Lewis; and it is also ordered and decreed that for professional services rendered by John Hamman, Esq., in the former suit between Lewis and Dillingham, Receiver, in Intervention 294, No. 54, Equity, of the docket of this court, the said Hamman be paid from such sum deposited as the parties in interest may agree, subject to the approval and arbitrament of the judge of the court below.

It is further ordered and decreed that the remainder of the said sum of \$5,992.50 be paid over to intervener R. C. Conn, who is hereby adjudged the trustee therefor of George W. Lewis, and which, after he has paid himself the advances of cash and property heretofore made by him to said Lewis, with interest thereon to this date, and his proper expenses and disbursements as trustee, and shall have paid and settled attorney's fees and other legitimate charges, he shall account for and pay over to said George Lewis; all subject to the approval and arbitrament of the judge of the court below.

It is further ordered, adjudged, and decreed that all costs be paid by the defendants the Houston Oil Company of Texas and the Kirby Lumber Company, and that the clerk shall not make up the final record herein unless, upon application of the parties in interest, the court may order it done.

GILBERT et al. v. HOPKINS et al.

(Circuit Court of Appeals, Fourth Circuit. March 11, 1913.)

No. 1,098.

1. PARTITION (§ 34*)—NATURE OF PROCEEDING.

Under the equitable practice prevailing in the courts of the United States, a proceeding in partition is equitable in its nature, administered under the rules applicable to a bill in equity for partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 88, 90; Dec. Dig. § 34.*]

2. PARTITION (§ 17*)—ISSUES—DENIAL OF PLAINTIFFS' POSSESSION OR INTEREST—TRIAL AT LAW.

Where defendants, in a suit in equity for partition, denied plaintiffs' possession of any interest in the land, and claimed sole title and seisin, they were entitled to a trial of that issue at law.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 53-59; Dec. Dig. § 17.*]

3. PARTITION (§ 17*)—TITLE—LEGAL ISSUES—TRIAL AT LAW—EFFECT OF VERDICT.

Where, in partition, defendant claimed sole title and seisin, but denied that plaintiffs had any interest in the land, and the court thereupon

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

directed a trial of that issue at law, the verdict therein was not merely for the enlightenment of the chancellor's conscience, but was determinative of the legal issue, leaving only the remaining equitable matter involved for trial before the chancellor.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 53–59; Dec. Dig. § 17.*]

4. EXECUTORS AND ADMINISTRATORS (§ 388*)—SALE BY ADMINISTRATOR—TITLE OF PURCHASER.

Rights in a tract of land in North Carolina having been transferred to G. and P. as tenants in common, G. conveyed his undivided half interest to P.; but P.'s heirs thereafter reconveyed to G. the same undivided half interest in the land by a deed which recited that no consideration had been paid by their ancestor to G. for the prior conveyance made to him, and thereafter P.'s heirs by silence and acquiescence recognized that G. was the owner of an undivided moiety in the lands. *Held*, that such reconveyance was not void, but was at most voidable, under Rev. Code N. C. c. 46, § 61, providing that a conveyance of land by the heirs of a deceased debtor within two years after his death, or the appointment of an executor or administrator, shall be void as against creditors, executors, and administrators, etc., and that the record of such deed was sufficient to impart notice to a subsequent purchaser of the land at a sale by P.'s administrator under proceedings to which the heirs of G. were not parties.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1573–1582; Dec. Dig. § 388.*]

5. EXECUTORS AND ADMINISTRATORS (§ 388*)—SALE OF LANDS—PAYMENT OF DEBTS—EFFECT.

Where the heirs of a tenant in common had reconveyed a moiety of the land to the cotenant because the consideration for the original conveyance had not been paid, subsequent proceedings by the administrator to sell their ancestor's land to pay debts passed only the remaining moiety, notwithstanding the administrator's deed, based on the proceedings, purported to convey the full estate in fee of all the lands.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1573–1582; Dec. Dig. § 388.*]

6. ADVERSE POSSESSION (§ 77*)—COLOR OF TITLE.

An administrator's deed, purporting to convey a fee in an entire tract of land, afforded good color of title for an ensuing adverse possession, though the intestate in fact owned only an undivided moiety therein.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 455–457; Dec. Dig. § 77.*]

7. INFANTS (§ 24*)—ADVERSE POSSESSION—SUSPENSION.

Where an administrator of a tenant in common sold for the payment of debts and purported to convey the whole estate, limitations would only begin to run against the heirs of the cotenant for the commencement of the period of adverse possession from the date the youngest attained majority.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 25; Dec. Dig. § 24.*]

8. EXECUTORS AND ADMINISTRATORS (§ 377*)—CONVEYANCE BY ADMINISTRATOR—RIGHTS OF HEIRS.

Where the heirs of a tenant in common of certain land were of full age in 1871, when proceedings were instituted by the administrator to sell the land to pay debts of the ancestor, and such administrator, acting also as the agent and attorney of the heirs, sold the land for \$15,000, and conveyed the same to the purchaser in 1881, and accounted for the proceeds as a part of the estate, such heirs were thereafter estopped to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

deny the sale by the administrator, or to treat the deed then executed as invalid.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1543; Dec. Dig. § 377.*]

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville; Jeter C. Pritchard, James E. Boyd, and Henry G. Connor, Judges.

Action at law by A. Louisa M. Gilbert and others, heirs at law of L. W. Gilbert, against W. R. Hopkins and others. Judgment for defendants, and plaintiffs bring error. Reversed.

See, also, 198 Fed. 849, 117 C. C. A. 491; 204 Fed. 204.

James H. Merrimon, of Asheville, N. C., and Marshall W. Bell, of Murphy, N. C. (Thomas S. Rollins and John S. Adams, of Asheville, N. C., on the briefs), for plaintiffs in error.

C. B. Matthews, of Cincinnati, Ohio, and Theodore F. Davidson and Louis M. Bourne, both of Asheville, N. C. (W. B. Council, of Hickory, N. C., and F. A. Sondley, of Asheville, N. C., on the briefs), for defendants in error.

Before GOFF, Circuit Judge, and DAYTON and SMITH, District Judges.

SMITH, District Judge. Prior to July 20, 1860, several persons had made entries entitling them to grants of land in Cherokee county, N. C., for about 62,000 acres of land. One Thomas S. Calloway was authorized to sell the rights of the parties having made the entries and on July 20, 1860, he sold these rights to L. W. Gilbert, of New York, and William H. Peet, of New Orleans, in consideration of the payment of a certain sum "already arranged" and in addition "the sum of ten thousand dollars out of the first receipts from sales of any portion of said property without interest." Gilbert and Peet thereupon paid the sum "already arranged," and the grants were issued to them jointly for the land aggregating some 63,000 acres on or about November 3, 1860. March 1, 1861, Lyman W. Gilbert conveyed his undivided one-half interest in the lands so granted to William H. Peet, and the deed of conveyance was recorded in Cherokee county on February 6, 1862. William H. Peet died in 1864, and his lands passed to his heirs at law, Edward J. Peet, Sarah H. P. Sawtelle, and Mary H. P. Bixby, all of whom were of full age when on the 1st of May, 1866, they re-conveyed to Lyman W. Gilbert the same undivided one-half interest in the lands which Gilbert had conveyed to William H. Peet on March 1, 1861; this last deed stating that:

"No valid consideration was paid by the said William H. Peet to the said Lyman W. Gilbert for the conveyance made by him as aforesaid."

It does not appear exactly when during the year 1864 William H. Peet died, but it does appear that some time in that year William A. Bartlett, an intimate friend of Peet's, administered upon his estate in Tennessee, and then or later in Louisiana. On December 3, 1867, Wil-

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William A. Bartlett, as the administrator of the estate of William H. Peet, and as agent and attorney for the heirs at law of Peet, executed a written instrument with Lyman W. Gilbert, which recited that Gilbert and Peet owned jointly some 60,000 acres of land in Cherokee county, and agreed that two persons, viz., J. E. Raht and William S. Calloway, should make an equal and equitable division of the lands between the parties entitled. No division seems ever to have been actually made as intended by this agreement, but Bartlett appears to have acted as attorney for the heirs at law of Peet, and in 1870 retained counsel for the estate of William H. Peet in Cherokee county, N. C., and on the 9th of November, 1870, petitioned the probate court for Cherokee county to be appointed administrator of the estate of William H. Peet, producing and filing an instrument in writing signed by the heirs at law of William H. Peet, dated October 21, 1870, renouncing all claims to administer on the estate of their intestate, and asking that William A. Bartlett be appointed administrator, and thereupon Bartlett was on the 9th of November, 1870, appointed by the probate court for Cherokee county administrator of the estate of William H. Peet. On the 30th of March, 1871, William A. Bartlett filed a proceeding in the probate court of Cherokee county by himself, as administrator of William H. Peet, against Edward J. Peet, George Sawtelle and wife, Sarah H. P. Sawtelle, Solomon Bixby and wife, Mary H. P. Bixby, as heirs at law of William H. Peet, deceased, for leave to sell the lands of the intestate to pay debts, and on proof of the non-residence of the parties defendant service by publication was ordered; and, no answer or plea having been put in by the defendants, the probate court for Cherokee county on June 5, 1871, made a decree in the cause permitting the administrator to sell the lands of Peet at public or private sale.

Lyman W. Gilbert died in March, 1871, leaving a wife, and two minor children, girls, one born October 27, 1861, and the other December 25, 1862. No will has been proven according to the laws of North Carolina, and therefore on Gilbert's death his interest in the lands descended to his two minor children. Gilbert's death took place about the time that Bartlett filed his petition in the probate court for leave to sell the lands. The record does not disclose whether Gilbert's death was before or after the filing of the summons against the defendants, the heirs at law of Peet; but it does disclose that the petition for the sale of the lands, which sets out that the lands belonged wholly to Peet (in direct contradiction of the agreement with Gilbert of December 3, 1867), was not filed until after the 1st of April, 1871, and therefore after Gilbert's death.

Neither Gilbert nor any of his heirs at law were named as parties to these proceedings, nor was any service made upon any of them. They were all nonresidents of North Carolina. The record does not disclose that any notice of these proceedings was ever brought home to the heirs at law of Gilbert, even if any such general notice would have been effectual to bind them. It does appear that in 1875 Mrs. Gilbert, the widow of Lyman W. Gilbert, had some correspondence both with Bartlett and with F. P. Axley, who was the attorney for and repre-

sented Bartlett in the proceedings in the probate court for leave to sell the lands. These letters disclose no knowledge on the part of Mrs. Gilbert of any proceedings to sell the lands.

On the contrary, although Bartlett in the petition to sell the lands, filed by Axley for him in April, 1871, alleges that the lands belonged to Peet, without mentioning Gilbert's interest, yet in her letter of March 10, 1875, to Axley Mrs. Gilbert states to Axley that she is informed by Bartlett that Axley, as Bartlett's lawyer, is looking after the North Carolina lands belonging to Peet and Gilbert, and asks for information as to who held the mortgage on the land, and how much was due on it, and in her later letters of June 30 and August 4, 1875, to Mr. Bartlett she still harps upon the theme that she understood there was some immediate and pressing claim on the lands, which must be paid or they would be sold. So far as the record discloses, nothing of the kind existed. The obligation given by Peet and Gilbert in July, 1860, when they acquired the rights to the grants, was for \$10,000 to be paid out of the first receipts from sales of the land. This obligation did not mature until the lands were sold, unless before that time some court of competent jurisdiction should have construed this obligation as meaning that the lands must be sold within a reasonable time, and then have fixed that time and decreed that, unless the amount should be paid within that time, the lands should be sold to pay. Nothing of that kind had occurred.

In March, 1869, one Andrew Colvard had commenced proceedings against Gilbert in the superior court of Cherokee county, and the administrator and heirs at law of Peet, on this same \$10,000 instrument; but no service of these proceedings appears to have been ever made on Gilbert or his heirs at law, and on August 5, 1870, these proceedings were by order of court dismissed without reaching final decree. In August, 1872, M. C. King, as receiver to collect this same obligation of \$10,000, also commenced proceedings in the superior court for Cherokee county against W. A. Bartlett, administrator of W. H. Peet, and Mrs. ——— Gilbert, administrator of Lyman W. Gilbert; but no service was ever made on any heirs at law or representative of Gilbert, nor any appearance entered in their behalf, and the last order made in this cause in the spring of 1875 omits all mention of the Gilberts and appears to deal with Bartlett alone. The record discloses no notice to or knowledge by Mrs. Gilbert or her daughters of any of these proceedings, and shows only on her part in 1875 a belief that there was a pressing mortgage on the property, which appears not to have been the case. In April, 1879, J. J. Colvard, sheriff of Graham county, N. C., made a tax deed for \$107.67 for a portion of these lands to J. E. Raht. Whether or not this tax deed was regular and valid does not appear to be material to the present case.

No sale was made by W. A. Bartlett as administrator of W. H. Peet under the order of the probate court made June 5, 1871, for many years. On December 31, 1881, he executed a deed of conveyance to the lands in question to D. W. Belding and others. The consideration stated is \$15,000. The deed purports to be made under authority of the order for sale made June 5, 1871, in the proceedings

against the heirs at law of Peet and of another order made July 22, 1881, in the same proceeding confirming the sale and directing the conveyance. The deed purports to convey a full estate in fee simple to the lands. They are not conveyed as a whole as one tract with a general boundary, but each tract covered by each separate grant is separately described and conveyed. The record discloses no notice to the heirs at law of Gilbert of this deed. They were at its date still minors. One arrived at her majority in 1882 and the other in 1883. Inasmuch as the purchasers under this deed by its terms purported to have acquired an absolute estate in fee simple to the lands, it constituted under the law of North Carolina good color of title to the lands, sufficient, if followed by sufficient adverse possession, to ripen into a bar under the statute and constitute statutory title. As against the two Gilberts who were minors at the date of the deed, this adverse possession could begin to run after the time they attained their majorities. The title to the lands, or such title as the purchasers took under the deed of December 31, 1881, with any further rights they may have acquired by any adverse occupation, passed by sundry mesne conveyances to the present defendants on March 3, 1903.

[1, 2] In July, 1904, the present plaintiffs commenced proceedings in the superior court for Cherokee county against the present defendants for partition of the lands; the petition for partition averring that the plaintiffs as heirs at law of Lyman W. Gilbert were entitled to an undivided one-half interest in the lands. These proceedings were by the defendants removed to the Circuit Court of the United States for the Western District of North Carolina, and the defendants appeared and answered, setting up as a defense the claim of sole seisin and the right to the exclusive title and possession of the lands. Under the statutes of North Carolina, the proceeding for a partition of lands is a proceeding at law. Under the equitable practice prevailing in the courts of the United States, a proceeding in partition is an equitable proceeding, administered under the rules applicable to a bill in equity for partition. It was so recognized by the counsel for both sides, for in the three orders made in the cause after removal (one of which was made by consent) the cause is entitled as in equity. Although on its face the bill was one for partition, yet the defendants had not admitted the possession by plaintiffs of any interest in the lands, but had set up the claim of sole title and seisin, and on that defense or issue they were entitled to a trial at law.

The Circuit Court of the United States on July 8, 1909, made an order that inasmuch as the title of the plaintiffs to the land sought to be partitioned was denied in the answer, which interposed the plea of sole seisin, the bill should be retained for 12 months, with liberty to the plaintiff in the meantime to proceed at law touching this alleged title to the lands in question, but, in case they should not proceed at law and to trial within the time mentioned, the bill should stand dismissed unless further time was given by the court, but that no final hearing of the cause should be had until after the trial of the action at law and the final disposition of the same. Thereupon, on August 19, 1909, the plaintiffs filed a complaint upon the law side of the court

against the defendants for the recovery of their one-half interest in the lands. To this complaint the defendants answered, denying any title in plaintiffs and claiming exclusive title and possession in themselves, and also pleaded the statute of limitations by adverse possession, and on the issues so joined the cause went to trial before the court and a jury on the law side of the court.

On the trial below the presiding judge ruled that the defendants were entitled to a verdict, and therefore gave to the jury a peremptory instruction to find that the plaintiffs were not the owners of any interest in the lands in dispute. The question of adverse possession does not seem to have been considered, as from the record it appears that the trial judge took the view that the plaintiffs upon the whole case had established no paper title in themselves to any part of the land in dispute. It is on a writ of error to the judgment of the Circuit Court, based on this ruling, that the cause is now before this court.

[3] The cause in the United States Circuit Court was originally a bill in equity for partition. In that case a defense or issue was set up involving, among others, one question which could only be determined in a court at law. The practice in a court of chancery in such cases has been, whilst retaining the cause for ultimate adjudication, to send the legal questions to a court of law for trial. It is not the referring of an issue of fact to a jury for the enlightenment or assistance of the conscience of the chancellor. In such case the verdict of the jury is advisory, but not binding upon the chancellor. It is the case of sending to the law court for trial of a question which upon the demand of the party can only be tried and determined by or in a trial at law. We so construe the order of the Circuit Court of the 8th of July, 1909. The legal issue was ordered to be determined in a trial at law, and the bill was retained, so as, when that determination was had, any other equitable matter involved in the cause might be determined, upon the basis that the legal issue was to be held and treated as it should be determined in the trial at law. As, for instance, if in the present case the trial at law resulted in favor of the plaintiffs, the court would then proceed with the cause in equity by decreeing the partition upon the basis of the plaintiff's interest as determined in the proceeding at law.

[4] The interest of Gilbert would appear to have been settled as against the Peets by the deed of May 1, 1866, and the succeeding acknowledgments. Taking together the deed of May 1, 1866, the agreement between Bartlett (the attorney of the heirs at law of Peet) and Gilbert of December 3, 1867, the information given by Bartlett to Mrs. Gilbert, the testimony of Axley, and the silence and acquiescence of the heirs at law of Peet, there can be no doubt but that it was entirely understood and admitted by the heirs at law of Peet that Gilbert had a one-half undivided interest in the lands; the heirs at law of Peet having the other undivided moiety. The deed of May 1, 1866, was sufficient under its terms to convey a legal title to Gilbert to this one-half. It was at the most voidable under the statute (Rev. Code N. C. c. 46, § 61), not void, and in any event on the record was sufficient to advise any intending purchaser of Gilbert's interest. The proceedings

in the court of probate for Cherokee county are the only proceedings under which, subsequent to 1866, it can be claimed there was any divesting of the interest held by the Gilberts. To those proceedings the Gilberts were in no wise ever made parties, and they are consequently not bound by them.

[5] At most, under the North Carolina statute they would operate to sell only the interest of Peet in the lands, and his interest was but one moiety. The deed of conveyance of the 31st of December, 1881, by its express terms, was based upon the proceedings in the probate court, and could have at that date no greater force in disposing of Gilbert's interest than those proceedings themselves. Upon the record the court is of the opinion that the Gilberts are shown to have had title to a one-half interest in the lands in dispute on the 31st of December, 1881, and that there is no evidence of any transfer from them by any contractual act of their own, or by the judgment of any court of competent jurisdiction of that interest.

[6, 7] The deed of 31st of December, 1881, did, however, purport to convey the lands in fee simple, and by its terms could constitute good color of title for an ensuing adverse possession. The youngest of the heirs at law of Gilbert attained her majority in 1883. From the date she attained her majority the statute of limitations could begin to run, and the period of adverse occupation could begin to be computed. To whatever portion of the lands the defendants can show adverse occupation under the color of title given by the deed of December 31, 1881, for the statutory period, the title of the Gilberts would be divested, and the defendants would be entitled to recover. This depends upon a question of fact under the issues in the pleadings, and should be submitted to a jury. The court below erred in holding that upon the whole cause the plaintiffs had not shown title to any part of the lands, and in not submitting the issues of adverse possession to a jury, so far as the plaintiffs, heirs at law of Gilbert, are concerned.

[8] The heirs at law of William H. Peet stand in different case. William A. Bartlett was the administrator of the estate of their ancestor. They were all of full age in 1871, when the proceedings to sell the lands of their ancestor were instituted in the probate court for Cherokee county. Bartlett was also their agent and attorney. Axley was retained by Bartlett as their attorney. The \$15,000 received by Bartlett in 1881 as the proceeds of sales of the lands was received and paid out and accounted for by him as the administrator of Peet. They must be presumed to have been advised of their own affairs, and to have known that this \$15,000 was received and disbursed as part of the estate to which they were entitled, and of the balance which remained, and which presumptively the administrator paid over to them. Under these circumstances they are now estopped to deny the sale of 1881, or to treat the deed there given as invalid.

The judgment is accordingly reversed, and the cause remanded to the District Court of the United States for the Western District of North Carolina for a new trial in accordance with this opinion.

Reversed.

GILBERT et al. v. HOPKINS.

(Circuit Court of Appeals, Fourth Circuit. March 11, 1913.)

No. 1,134.

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville; James E. Boyd, Judge.

Action at law by A. Louisa M. Gilbert and Ida Isabella K. Gilbert, heirs at law of Lyman W. Gilbert, deceased, Mary H. P. Lowe and her husband, Edward Lowe, William E. Bixby, Josiah P. Bixby, Maria S. Hopkins, Frederick G. Sawtelle, Franklin J. Sawtelle, and William E. Sawtelle, heirs at law of W. H. Peet, deceased, against W. R. Hopkins. Judgment for defendant, and plaintiffs bring error. Reversed.

James H. Merrimon, of Asheville, N. C., and Marshall W. Bell, of Murphy, N. C. (Thomas S. Rollins and John S. Adams, both of Asheville, N. C., on the briefs), for plaintiffs in error.

C. B. Matthews, of Cincinnati, Ohio, and Theodore F. Davidson and Bourne, Parker & Morrison, all of Asheville, N. C. (W. B. Councill, of Hickory, N. C., and F. A. Sondley, of Asheville, N. C., on the briefs), for defendant in error.

Before GOFF, Circuit Judge, and DAYTON and SMITH, District Judges.

PER CURIAM. This cause was argued together with No. 1,098, Gilbert et al. v. Hopkins et al., 204 Fed. 196, as resting upon the same facts, and as determined by the same conclusions of law. It follows that the opinion filed in that case must be taken also as filed in this, and the judgment below in this cause must be reversed, and the cause remanded to the District Court of the United States for the Western District of North Carolina for a new trial, in accordance with such opinion.

Reversed.

 AMERICAN STEEL FOUNDRIES v. LAZEAR et al.

(Circuit Court of Appeals, Third Circuit. February 13, 1913.)

No. 1,662.

1. CORPORATIONS (§ 156*)—PREFERRED STOCKHOLDERS—ACTION TO RECOVER DIVIDENDS.

A holder of preferred stock in a corporation, entitled under the charter and terms of his certificate to receive dividends at the rate of 6 per cent. per annum "when and as declared," cannot maintain an action in assumpsit against the corporation to recover dividends, when none have been declared by the directors; his remedy, in case the directors have wrongfully refused to declare dividends, being in equity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 581-583, 593-603; Dec. Dig. § 156.*]

2. CORPORATIONS (§ 156*)—PREFERRED STOCKHOLDERS—ACTION TO RECOVER DIVIDENDS.

A statement of claim in an action at law by a preferred stockholder against the corporation to recover dividends, which did not show that any dividends had been declared on such stock that were unpaid, but did show that by the action of the stockholders, including the holders of more than 90 per cent. of the preferred stock, a plan for reduction of the capital stock and the conversion of the preferred into common stock

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

had been adopted, and that most of such stock had been so converted thereunder, *held* not to state a cause of action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 581-583, 593-603; Dec. Dig. § 156.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Action at law by Thomas C. Lazear and Jesse T. Lazear, executors of the will of Alice C. Lazear, deceased, against the American Steel Foundries. Judgment for plaintiffs, and defendant brings error. Reversed.

Pam & Hurd, of Chicago, Ill., and Reed, Smith, Shaw & Beal, of Pittsburgh, Pa. (Max Pam, of Chicago, Ill., of counsel), for plaintiff in error.

H. V. Blaxter, of Pittsburgh, Pa. (Lazear & Blaxter, of Pittsburgh, Pa., of counsel), for defendants in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. The defendants in error, citizens of the state of Pennsylvania (hereinafter called the plaintiffs), brought an action of assumpsit in the court below against the plaintiff in error, a corporation of the state of New Jersey (hereinafter called the defendant), to recover the sum of \$4,029, the aggregate of certain cumulative dividends which they claimed were due and payable to them as the holders of 102 shares of the preferred stock of the defendant corporation.

Defendant demurred to the plaintiffs' statement of claim, on the general ground that the facts averred therein were not sufficient to support an action of assumpsit. On August 2, 1911, the court overruled the demurrer of defendant, and directed that an order be presented for judgment for the plaintiffs for the amount of the claim, with interest. On the same day, August 2, 1911, there is the following entry by the clerk:

"In pursuance of said opinion, judgment is hereby entered in favor of the plaintiffs, * * * and against the defendants * * * in the sum of \$4,029.00," with interest from various dates, making an aggregate of \$4,398.61.

Afterwards, the record shows an entry of the following order made by the court:

"And now, September 27, 1911, the clerk having inadvertently entered judgment without an order so to do, the same is hereby stricken off. Per Curiam."

On February 9, 1912, it appears from the record that an affidavit of defense was presented in open court and leave therefor allowed to file the same "for the information of the court." On March 7, 1912, the court filed an opinion, stating:

"This cause comes before us now upon the motion and presentation of an order for judgment, the court having heretofore overruled the defendant's demurrer in an opinion filed in the cause August 2, 1911. Upon presentation of this motion for judgment, defendant has presented to the court an

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

affidavit of defense, and has asked the court to permit it to be filed, claiming that it presents a defense to the plaintiffs' action upon the merits. We have carefully considered the affidavit of defense, in order to determine whether or not defendant has presented a defense upon the merits."

After discussing at length the various allegations of the affidavit, the court decided that there was no merit in the grounds of defense set forth and that "judgment will therefore be entered for plaintiffs for the whole amount of their claim against the defendant," and the clerk was thereupon ordered and directed to enter judgment accordingly. Pursuant to said order, such judgment was entered, and upon the same day the following order was made by the court:

"And now, to wit, March 7, 1912, the motion of defendant for leave to file the affidavit presented as an affidavit of defense to the action, is refused."

On this peculiar state of the record, the writ of error is sued out to the judgment entered by the court, after its refusal to grant the motion of defendant for leave to file the affidavit presented as a defense to the action. The affidavit was, however, as we have seen, filed for the information of the court, and was by the court discussed and considered as to its sufficiency, and because of its insufficiency the judgment of March 7, 1912, was entered. Counsel on both sides seem to have been in doubt as to whether this was a final judgment on the demurrer, or a judgment for want of a sufficient affidavit of defense, and accordingly have argued it in its dual aspect. At all events, it seems certain that the court would have declined to enter judgment on the demurrer if the affidavit filed for its information had in its opinion presented a legal defense to the action. In the following brief statement of the case, we may refer, therefore, as the court below did, to the facts presented by the affidavit of defense supplementary to those alleged in the statement of claim.

In 1897, the business and financial condition of the defendant corporation was such as to make it expedient in the interest of its stockholders that a readjustment of its outstanding stock be had. On November 7, 1907, at a directors' meeting, committees were appointed for devising a plan for such readjustment. Subsequent meetings of the directors were held for consideration of this business, resulting in a call for a special meeting of the stockholders for February 8, 1908, to consider and take action on the subject. Notices of such special meeting, with a statement of the proposed plan of readjustment, were sent to the addresses of the stockholders of record, including the plaintiffs, who, it appears, received such notice and plan of readjustment. The special meeting of stockholders called for February 8, 1908, was adjourned to March 14, 1908, and subsequent meetings and adjournments were had between that date and June 12, 1908. Some eight in number were held, as to all of which due notices were addressed to the stockholders, including the plaintiffs. At the meeting of stockholders, of June 12, 1908, the plan for readjustment of the capital stock of defendant was approved and declared effective by the affirmative vote of about 90 per cent. of all the outstanding stock, and notice of such action was sent to each of the stockholders, including the plaintiffs, and was received by them. All these matters and proceedings are set forth

in the minutes of the various meetings, and appear as exhibits attached to the affidavit of defense.

It is further averred in the affidavit that, notwithstanding plaintiffs had notice of the proceedings for the readjustment of the capital stock of the defendant corporation, and had copies of all the reports and proceedings relating thereto, with notice of each successive adjournment, yet at no time and in no way did the plaintiffs oppose or dissent from the action of the directors and stockholders of the defendant. No objection was made or protest submitted by plaintiffs, either in writing to the officers or directors of the company, or at any of the meetings of the stockholders, but, on the contrary, Thomas C. Lazear, one of the plaintiffs, who is the owner of the 102 shares of the preferred stock in question as life tenant under the terms of the will of Alice C. Lazear, actively participated in the readjustment of the capital stock of the defendant, and accepted the benefits thereof, as the owner of 71 other shares of the same preferred stock, of which he made deposit in accordance with the terms and provisions of the plan for readjustment, and received and accepted the new common stock and the new debentures of the plaintiff in error, as well as the cash dividend distributed thereon. The affidavit then states that, after the lapse of 17 days following the action of the stockholders in approving the plan, and no objection having been made, the company, on June 29, 1908, complied with the law of New Jersey, by filing with the Secretary of State of that state its certificate of change in and reduction of its capital stock, and all its proceedings in relation thereto. A notice to the effect that the Guaranty Trust Company of New York was prepared to carry into effect the readjustment so adopted and approved by the stockholders, was, under date of July 11, 1908, sent to each of the stockholders, including the plaintiffs, and was received by them. Subsequently, the preferred and common stock of defendant, theretofore outstanding and listed upon the New York Stock Exchange, were stricken from the list and the new common stock issued by defendant under said plan was substituted therefor upon the said Exchange. The affidavit then states that, notwithstanding the premises, plaintiffs at no time presented any protest or objection to the New York Stock Exchange, or to the defendant, or to any body else, or instituted any suit or proceeding to prevent the listing of the new stock by the defendant. It is further stated that out of the total of 172,400 shares of old preferred stock, all but 978 shares had assented to and been converted into the new stock. In other words, the holders of 99.66 per cent. of the old preferred stock participated in and accepted the readjustment proposed and adopted.

Upon the facts set forth in the affidavit of defense, the defendant contends:

(1) That the readjustment and conversion of the capital stock of defendant was in all respects legal and binding upon the plaintiffs and all other of its stockholders, because it received the necessary and requisite assent of the stockholders of the company, as required by the laws of the state of New Jersey, which are controlling in the premises.

(2) That such readjustment and conversion are complete and binding upon plaintiffs, because of their actual and active assent thereto

and participation therein, their conduct in the premises constituting in law an assent to the conversion of their preferred stock.

(3) That their conduct in the premises was such as to constitute in law an estoppel in pais.

Defendant therefore contends that it may avail itself of the equitable defense of estoppel allowable under the Pennsylvania practice, arising from a situation in which it appears that Thomas C. Lazear, who has a present vested life estate in the 102 shares of preferred stock, the subject of the present controversy, as the owner of 71 other shares of the same preferred stock participated in all the meetings and proceedings of stockholders had for the purpose of bringing about and putting in operation the said readjustment and plan for reducing the stock of the defendant corporation, and specifically assented thereto by the surrender of his said 71 shares of preferred stock, and receiving with the other stockholders the debentures, stock, and cash offered by the defendant in exchange for the same.

It is further contended that it is inequitable for the plaintiff to claim payment of all the undeclared and cumulative dividends on his preferred stock, withheld by him from surrender, out of a fund that was only rendered adequate for such payment in full, by reason of the surrender of their stock by other preferred stockholders.

Though judgment was entered by the court below, after discussing and passing upon all the defenses set forth in the affidavit of defense, we are constrained to regard that judgment as having been entered in the discretion of the court below on the demurrer. We therefore turn to the essential averments of the statement of claim demurred to, to wit, that the plaintiffs are the holders of 102 shares of the preferred stock of defendant company, for which certificates were duly issued to them by the company; that the contract set forth in said certificates entitled the plaintiffs to receive quarterly dividends on said stock, at the rate of 6 per centum per annum, and that in case such dividends should not be declared, the same were made cumulative. The plaintiffs received such dividends on their preferred stock until August 15, 1904, but since that date, no other dividends or payments on account of said stock had been received, defendant having suspended payment on all dividends from that date for a period of more than five years.

It is then averred that defendant has resumed the payment of dividends, but since this resumption has not paid and has refused to pay the plaintiffs anything on account of the dividends due them on their said preferred stock and paid all dividends declared by it only to the common or unpreferred stockholders, to the exclusion of all preferred stockholders. The statement of claim then states: That in the year 1908, four years after the suspension of the dividends as aforesaid, the plan of readjustment and reduction of stock was proposed and carried into effect by the assent of nearly all the stockholders, as set out in the affidavit of defense, as above referred to. That under this plan, about 90 per cent. of the preferred stockholders surrendered their stock and accepted certain debentures, cash and common stock in lieu thereof. That plaintiffs and other holders of the preferred stock declined to assent to said plan, and plaintiffs still hold their 102 shares of the preferred stock "and insist on the payment of the dividends due

thereon in accordance with the terms of the contract contained in their said certificates," which certificates are appended as an exhibit and made a part of the statement of claim. That "in the month of April, 1910, defendant set apart a dividend fund, derived from the net earnings of its business, amounting to \$214,800, and declared a dividend of $1\frac{1}{4}$ per cent. *on each share of said new or unpreferred stock above mentioned*, payable to the holders thereof on the 15th day of May, 1910, and to whom it paid the same" (italics our own). The same averment is made as to what was done by defendant in the month of July, 1910, in the month of October, 1910, and in the month of January, 1911. The statement then avers as follows:

"Of the above dividend funds so set apart as aforesaid, amounting in the aggregate to \$859,200, plaintiffs and the other holders of the said preferred stock who had not surrendered the same in exchange for said new or unpreferred stock, but still retained the same, were then entitled to receive the full amount of unpaid dividends due thereon, including the dividends which had accumulated during the said period of suspension, and the amount which plaintiffs were entitled to receive thereof was not less than \$4,029, being in the proportion of 102 shares of preferred stock held by plaintiff, to 17,224 held by all the holders of said stock and still outstanding."

[1] Upon these averments of the statement of claim, the plaintiffs' case must on the demurrer thereto stand or fall. Plaintiffs' contention is that, under the contract, evidenced by the certificates of stock, the plaintiffs were entitled to receive from the defendant company accumulated dividends of 6 per cent., when the company, through its board of directors, set apart funds constituting profits.

It is hardly correct to speak of the certificate of stock as the contract between the shareholder and the corporation, upon which this suit is brought. Such a certificate establishes the status of the shareholder as one of the owners and constituent members of the corporation, on the basis of which a contractual relation between the shareholder and the corporation and the shareholders inter sese may in certain respects be created. Certain obligations on the part of the corporation to the whole class of stockholders represented by such certificates may be, and as in the case of preferred stockholders are, defined therein. In general, such obligations—as the obligations to pay preferred dividends, and to make the same cumulative—are obligations incurred to the whole class of preferred shareholders under the authority of its charter.

Referring to the copy of the certificate held by the plaintiffs, annexed to the statement of claim, we find that, after setting forth the fact that the plaintiffs are the owners of 100 non-assessable shares of the capital stock of the defendant company, the certificate makes the following statement as to the rights of such owners:

"The holders of preferred stock shall be entitled to receive, *when and as declared*, from the surplus or net profits of the company, yearly dividends at the rate of 6% per annum, and no more, payable quarterly on dates to be fixed by the by-laws. The dividends on the preferred stock shall be cumulative, and shall be payable before any dividend on the common stock shall be paid or set apart."

This statement in nowise differs from that usually made in certificates of preferred stock, and it seems too clear for argument that such

statement creates no right in the plaintiffs to claim in this suit the payment of undeclared dividends.

The plaintiffs have brought an action of assumpsit, which must be maintained, if at all, on the ground that the sum claimed has been declared as a dividend on the preferred stock held by plaintiffs, and that therefore a promise by the defendant to pay the same is implied. Upon such implied promise, the suit is alone maintainable. Such implication of a promise arises from the declaration by the defendant company of a dividend on the preferred stock, not upon any alleged duty of the corporation or its officers to declare such dividend. What it or its officers ought to do, in this respect, pertains to the interior administration of the corporate functions, and belongs to the category of those corporate rights and duties which are justiciable only under the authority of the legislation of the state by which the corporation was created. For neglect or refusal by the officers of the corporation to perform a corporate function, as to the declaration of the dividend, or as to the distribution of funds asserted to be legally or equitably applicable to dividends, relief must be sought by an appropriate suit in equity, in which the chancellor may, while avoiding interference with the exercise of a due discretion by corporate officers, yet enforce the performance of a legal corporate duty. No individual debt, however, from the corporation to the stockholder is created until the dividend is declared. It is hardly necessary to cite authority for these propositions. Those cited by the plaintiff in error, however, are here referred to: 2 Cook on Corporations, § 542; 1 Morawetz on Private Corporations, § 276; Wheeler v. Northwestern Sleigh Co. (C. C.) 39 Fed. 347, 349; Knapp v. S. Jarvis Adams Co., 135 Fed. 1009, 1011, 70 C. C. A. 536.

[2] There is no averment in the plaintiffs' statement of claim, that the defendant had either earnings or surplus applicable to the payment of dividends on plaintiffs' preferred stock, nor is there any averment in the statement of claim that any dividends upon the preferred stock held by plaintiffs had been declared or paid by the defendant. It is merely averred that payment of dividends was resumed by defendant on May 15, 1910, but it is nowhere averred that payment of dividends upon the *preferred stock* of defendant was resumed at that or at any other time. On the contrary, it appears by the statement of claim that a plan for the reduction of capital stock of defendant and for the conversion of its preferred stock into common or unpreferred stock was submitted to all the stockholders, including the plaintiffs, and that such proposal was adopted by the holders of 90 per cent. of the preferred stock, and it is specifically averred in the statement of claim that the dividends were declared by the defendant on this common stock, and were payable to the holders thereof.

A careful reading of plaintiffs' statement of claim compels us to the conclusion that the averments therein contained do not constitute a cause of action. The demurrer thereto should have been sustained, and the judgment of the court below is therefore reversed, with instructions to the court below to enter judgment upon the demurrer in favor of the defendant.

METCALF v. HANOVER STAR MILLING CO.†

(Circuit Court of Appeals, Fifth Circuit. April 8, 1913.)

No. 2,476.

1. TRADE-MARKS AND TRADE-NAMES (§ 68*)—UNLAWFUL COMPETITION—INFRINGEMENT—PRIOR USE.

Infringement of a trade-mark is inseparably involved in a suit for unlawful competition; the right to protection against the latter depending on first and exclusive use.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. § 68.*]

2. TRADE-MARKS AND TRADE-NAMES (§§ 53, 68*)—"INFRINGEMENT"—"UNFAIR COMPETITION"—WHAT CONSTITUTES.

"Infringement" of a trade-mark is the wrongful copying of a mark and sending forth thereunder an article well calculated to be taken for one already established in the trade, being regarded in the law as analogous to a trespass; while "unfair competition" consists in placing on the established trade of another an article or commodity dressed so as to be very like the other, and palming off the imitation as the original.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 61, 79; Dec. Dig. §§ 53, 68.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3590-3594; vol. 8, p. 7174.]

3. TRADE-MARKS AND TRADE-NAMES (§ 81*)—PROTECTION—REQUISITES.

Right to protection of a trade-mark primarily depends on first invention or prior adoption and original exclusive use; this entitling the appropriator to common-law protection against similar and deceptive dressing coupled with fraudulent misrepresentation.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 91; Dec. Dig. § 81.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 81*)—UNFAIR COMPETITION.

To invoke the jurisdiction of equity to prevent infringement and unfair competition in the use of a trade-mark by another, it is incumbent upon complainant to show that he has a property right in the mark or thing which indicates the ownership or origin of the article, and that its use has been fraudulently invaded by the defendant, which property right is acquired chiefly by prior adoption and exclusive use of the mark or symbol relied on to distinguish complainant's proprietorship.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 91; Dec. Dig. § 81.*]

Unfair competition in use of trade-mark or trade-name, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

5. TRADE-MARKS AND TRADE-NAMES (§ 93*)—UNLAWFUL COMPETITION.

In a suit for infringement of complainant's "Tea Rose" trade-mark on flour and for unlawful competition, evidence held to require a finding that complainant was not the originator or first appropriator of such name and mark as applied to flour, but that both defendant and another milling concern had used the mark and name in that connection long prior to complainant's adoption thereof, and that it was therefore not entitled to relief.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. § 93.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied June 2, 1913.

6. TRADE-MARKS AND TRADE-NAMES (§ 32*)—ABANDONMENT—EVIDENCE.

Abandonment of a trade-mark will not be found, unless supported by proof of a clear intention of the owner to entirely discontinue its use.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 36; Dec. Dig. § 32.*]

Appeal from the District Court of the United States for the Middle District of Alabama; Thomas G. Jones, Judge.

Suit by the Hanover Star Milling Company against D. D. Metcalf. From a decree granting a temporary injunction, defendant appeals. Reversed and remanded, with directions to dismiss.

Edward Everett Longan, of St. Louis, Mo., J. Fred Gilster, of Chester, Ill., Lane & Lane, and C. F. Winkler, for appellant.

Clarkson & Morrisette, of Tuscaloosa, Ala., and London & Fitts, of Birmingham, Ala., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and SHEPPARD, District Judge.

SHEPPARD, District Judge. This is an appeal from the District Court of the Middle District of Alabama from an order allowing a temporary injunction against the plaintiff in error, hereafter designated defendant, by the Hanover Star Milling Company, a corporation of Germantown, Ill., hereafter referred to as plaintiff, for infringement and unfair competition under plaintiff's alleged trade-mark "Tea Rose."

The bill, in so far as it is necessary to consider to determine the merits of the controversy, charges substantially: That the plaintiff, Hanover Star Milling Company, for 27 years had been engaged at Germantown, Ill., in the manufacture of a popular grade of flour called "Tea Rose." That for 12 years this flour had been upon the market in Alabama in sacks or bags under the distinctive label or stencil brand similar to the following cut:



[Design of green rose with yellow leaves, design turned to right, and consists of one large rose, a half-open rose and small bud, etc.]

That by maintaining a high grade of flour under this brand, and by extensive advertising, plaintiff enjoyed a lucrative trade in its Tea Rose flour, and by reason of the reputation of the Tea Rose was enabled to sell to the trade in Alabama, Georgia, and Florida large quantities of other flour of its manufacture. That defendant, Metcalf, had invaded its territory in Alabama, and was offering and selling in Butler county, Ala., a product of the Steepleville Milling Company,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

located at Steeleville, Ill., a flour different from that made and sold by plaintiff in packages substantially identical with those used by plaintiff in marketing its Tea Rose flour, the similarity of brand and stencil picture being shown by appropriate exhibits to the bill, which disclose such an imitation or dressing of the package as might well mislead the trade of the Hanover Star Milling Company's product, named "Tea Rose." That Metcalf by the use of such wrappings, and by his misrepresentations that the Steeleville article is the original Tea Rose flour, constitutes unfair competition against plaintiff. Wherefore plaintiff seeks relief in equity.

Defendant, Metcalf, answered the bill, and denied specifically: The allegations of deception and misrepresentations in connection with the sale in Butler county, Ala., of the Steeleville article of flour called "Tea Rose." That he had sold and delivered as a merchant in business at Greenville, Ala., 40 barrels of the manufacture of the Steeleville Milling Company at Greenville, Ala., in packages stamped as here shown:

<p>Steeleville ROLLER MILLS [Design] TEA ROSE Guaranteed by Steeleville Milling Co. under Food & Drugs Act, June 30, 1906. Serial No. 15304. Steeleville Milling Co. Steeleville, Ills. 24 Lbs. TEA ROSE Flour Bemis, St. Louis.</p>	<p>[Design of yellow rose with green leaves, the design turned to the left, and consists of one large rose, a half-open rose, and a small bud, etc.]</p>
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That it was not represented as the Hanover Star Milling Company's flour, and that no deceit was practiced in the sale thereof. Further answering, defendant denied that plaintiff was the first to appropriate the name "Tea Rose" in the manufacture of flour; that the name "Tea Rose" had been appropriated as a brand of flour by the firm of Allen & Wheeler, of Troy, Ohio, long before plaintiff's use, and as early as 1872; that the Steeleville Milling Company has used the Tea Rose brand on flour for more than 16 years, and that for 6 years prior to plaintiff's suit the Steeleville Milling Company had been selling, with plaintiff's knowledge, to the trade in portions of Mississippi and parts of Alabama, flour in packages stamped with the cut above indicated.

The cause was submitted on bill, answer, and exhibits; and thereupon a temporary restraining order was granted, from which defendant prosecuted his appeal to this court on several grounds of error, which may be considered for the purpose of this review in one assignment—that the court erred in not denying the preliminary injunction, on the ground that the plaintiff was not the owner of the trademark "Tea Rose," and that defendant had not engaged in unfair competition.

[1, 2] The question mainly presented is unfair competition, but in the light of the authorities infringement is inseparably involved, and the right to protection against the latter depends upon the antecedent fact of first and exclusive use. Infringement is the wrongful copying and sending forth of an article well calculated to be taken for one already established in trade, and is regarded in the law as analogous to a trespass. Unfair competition consists in placing on the established trade of another an article or commodity dressed so as to be very like the other and "palming off" the imitation as the original.

[3] This leads us necessarily to ascertain what constitutes one's right in a trade-mark which the law undertakes to protect. Primarily, first invention, use, or adoption assures to the originator or owner protection from infringement. Prior adoption and original exclusive use entitles the first appropriator to the common-law protection against similar and deceptive dressing coupled with fraudulent misrepresentation. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; *Hopkins, Trade-Marks* (2d Ed.) § 30.

It does not comport with the purpose of the law to put any barriers in the way of commercial intercourse or to interfere with fair competition. It is to the best interests of society that commerce be left to the adjustment of the law of supply and demand. There are, however, exclusive property rights in trade-marks and names which may have been adopted by one to indicate his ownership, which are recognized and protected by the common law, to the extent that another will not be allowed to appropriate the name, mark, or symbol to enable the imitator to palm off on the established trade of the originator a different article or commodity, though it might be in every respect equal in quality to the original mark or brand. Such imposition constitutes what is technically termed unfair competition, which the law undertakes to prevent. *Trade-Mark Cases*, 100 U. S. 82, 25 L. Ed. 550.

[4] To invoke the jurisdiction of a court of equity to prevent infringement and unfair competition by the use of a similar trade-mark by another, it is incumbent upon the complainant to show that he has a *property right* in the mark or thing which indicates the ownership, or origin, of the article, and that its use has been fraudulently invaded by another. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; *Epperson & Co. v. Blumenthal*, 149 Ala. 125, 42 South. 863, 13 Ann. Cas. 832. The property right in a trade-mark is acquired chiefly, as we shall see, by prior adoption and exclusive use of the mark or symbol relied upon to distinguish the proprietor's ownership. The exclusive right to the use of a trade-mark rests, not so much on priority of invention, but upon such use as to indicate the origin of the plaintiff's goods, and must be early and separate enough for that purpose. Where long use is clearly shown, the mere fact that the owner has permitted the limited use by another, if such use was not calculated to mislead, will not defeat the owner's right to protection.

[5] On the question of first appropriation and exclusive use, which we have seen are the indicia of plaintiff's title, let us advert briefly to the bill and the evidence in support of its allegations on this point.

The bill avers that the plaintiff for 27 years had given the name "Tea Rose" to a flour manufactured by it; but nowhere does it state definitely the time of its first use, or when it was adopted as a mark of distinction, or when its exclusive use began, except the general allegation that plaintiff had marketed flour in Alabama for 12 years under the distinctive wrappings indicated in the cut, in which Tea Rose occurs in the ellipse after the name of the manufacturer. It is shown by several depositions in support of the bill that plaintiff had established quite an extensive trade in the particular brand of flour in Alabama and parts of Georgia, Florida, and Mississippi, over a period of from five to seven years; that it had encountered no competition in this territory from defendant until about two years ago it discovered a small shipment of defendant's brand at Tupelo, Miss., and later a shipment at West Point, Miss., to the time in February, 1912, when it is alleged Metcalf received the car load at Greenville, Ala., which precipitated the present litigation. Opposed to this array of fact by the plaintiff, the defendant's showing is that in 1899 to 1903, inclusive, it sold at divers points in Alabama and Mississippi car load lots of its Tea Rose flour under the distinctive wrappings indicated by the Steeleville Milling Company's cut, and that for 16 years flour bearing the identical trade-mark exemplified in defendant's cut had been sold by defendant in car lots in the states of Illinois, Tennessee, Louisiana, Mississippi, and Arkansas, including one lot in Alabama as long ago as 1899. It is further shown by defendant's exhibits that the Tea Rose label was first used as a trade-mark and stamped on flour manufactured by Allen & Wheeler, of Troy, Ohio, as early as 1872, and had been continuously used by said firm and its successors up to the time of this suit. It also was shown by the records of a bag factory of H. & L. Bag Company of St. Louis, which makes bags for both plaintiff and defendant, that the orders of the Steeleville Milling Company for sacks labeled with the print containing Tea Rose mark identical with that appearing in defendant's cut antedated the orders of the plaintiff's Tea Rose print fully three years.

From this summary of the evidence, at most, it does not appear that there is any preponderance favoring the contention that the plaintiff was the first appropriator of the trade-mark "Tea Rose, or that it had the exclusive right to the use of the label in the territory to which it sets up exclusive title—neither on the ground of first or prior appropriation, because by a clear preponderance of the evidence the name "Tea Rose" had been adopted as a brand of flour many years previous to plaintiff's use of the phrase for same purpose; nor on account of abandonment by the first claimant, or such intermittent use of the trade-mark by the first owner as would justify the adoption by another on that ground. On the contrary, the proofs show that defendant was for 16 years consecutively supplying an extensive trade under that particular brand in Illinois, Tennessee, Indiana, Arkansas, and Mississippi, with occasional shipments into Alabama. During most of this period bags stamped with the distinctive labels of both plaintiff and defendant were turned out by the same factory. The evidence in our opinion points indubiously to Allen & Wheeler as having first adopted the Tea Rose brand for their flour in 1872. Whether this use was so

general or continuous as to exclude any other appropriation or entitle them to protection, the evidence shows conclusively that the use by the Steeleville Milling Company of this brand, commencing in 1895, was so extensive and continuous throughout a large territory as in our judgment would wholly exclude the claim of the Hanover Star Milling Company to either act of first appropriator or exclusive use in any of the territory from which it seeks to expel defendant.

[6] Abandonment, as we have seen, must be supported by a clear intention of the owner to discontinue the use of the trade-mark. The evidence does not show any purpose on the part of defendant, in our opinion, to abandon the use of the Tea Rose in the territory generally occupied in its trade. Nor does the evidence support the right of the plaintiff on any theory of "transitory, spasmodic, or inconsiderable" use by the defendant of the trade-mark in the territory by it previously occupied. *Hopkins, Trade-Marks* (2d Ed.) 54; *O'Rourke v. Central City Soap Co.* (C. C.) 26 Fed. 576; *Heublein v. Adams* (C. C.) 125 Fed. 782; *Levy v. Waitt*, 61 Fed. 1008, 10 C. C. A. 227, 25 L. R. A. 190.

It appears to be well settled by authority that the first use of a trade-mark gives to the prior user the exclusive right to its use in trade to a commodity to which it is applied. *George v. Smith* (C. C.) 52 Fed. 830. Nor is property in a trade-mark limited to its enjoyment by territorial bounds, but may be asserted and protected wherever the law affords a remedy for wrongs. *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60; *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170.

The Steeleville Milling Company's first use, and its extensive and continuous use, established by the evidence, in the territory of its selection, gave it the unqualified right to extend unhampered its trade in flour under the Tea Rose brand into any part of the United States, and that, too, without incurring the legal odium of unfair competition. To entitle the plaintiff to protection against unfair competition in the dress of goods, it should be clearly shown that he had established the exclusive right by prior adoption to dress his goods in the manner claimed. *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; *Dietz v. Horton Mfg. Co.*, 170 Fed. 865, 96 C. C. A. 41.

We have seen that, before there can be any infringement of a trade-mark, it should appear by a clear preponderance of the evidence that complainant was the first to appropriate the mark or symbol, and his exclusive use depends upon prior appropriation. The proofs show that Allen & Wheeler were the first to appropriate the Tea Rose brand as early as 1872, and that its use by the Steeleville Milling Company began in 1895, three years before the first order for sacks bearing that dress by the Hanover Star Milling Company. *Columbia Mill Co. v. Alcorn*, *supra*; *Levy v. Waitt* (C. C.) 56 Fed. 1016.

In arriving at this conclusion, we have not overlooked the Baltimore Club Whisky Case (*Carroll v. McIlvaine* [C. C.] 171 Fed. 125), decided by Judge Hough, and emphasized by counsel for plaintiff. The distinguishing fact of that case, and upon which the decision doubtless turned, was the limited territory employed by the Baltimore

vendors of the article called "Baltimore Club," which appears to have been confined to the city of Baltimore before it was "introduced" to the trade in New York. The liquid blend of the same name in New York, if it did not enjoy a name so ancient, was equally as popular and covered a more extensive territory; and while apparently the case did not turn on that point, the sounder reason for the decision may have been put on the fact that, while the original Carroll began to sell Baltimore Club not earlier than 1870, the original McIlvaine, the New York vendor, as ascertained by the learned judge, "sold Baltimore Club whisky and obtained a considerable market for same as early as 1868."

From the facts disclosed by the record and summarized in this opinion, in the light of the authorities, we conclude that the plaintiff had no exclusive right to Tea Rose as a trade-mark for flour anywhere, and that Metcalf, by selling to his trade in Alabama the Tea Rose brand of the Steeleville Milling Company manufacture, was not engaged in such unfair competition as would authorize the jurisdiction of a court of equity to prevent.

The restraining order, therefore, should be dissolved, and the bill dismissed; and the order will be accordingly that the decree is reversed, and the cause remanded, with directions to dismiss the bill.

STAR-CHRONICLE PUB. CO. v. UNITED PRESS ASS'NS.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1913.)

No. 3,851.

1. CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE—INTERSTATE BUSINESS.

A contract between a press association, incorporated and having its headquarters in New York, and a newspaper company in St. Louis, Mo., by which the association furnished for the use of the paper daily over its leased wires, largely from one of its main offices in Chicago, news gathered by it throughout the several states and in foreign countries, related entirely to interstate business, and although the association maintained an office and an operator in the building of the newspaper company, under the decisions of the Supreme Court of the state, it was not within Rev. St. Mo. 1909, §§ 3039, 3040, relating to foreign corporations doing business in the state, and which provide that no action shall be maintained by such a corporation, which has not complied with their provisions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.*]

Foreign corporations doing business in state, see notes to Wagner v. J. & G. Meakin, 33 C. C. A. 585; Ammons v. Brunswick-Balke Collender Co., 72 C. C. A. 622.]

2. CONTRACTS (§ 217*)—NOTICE TO TERMINATE CONTINUING CONTRACT—SUFFICIENCY.

Where a continuing contract required 60 days' notice for its termination, a letter written by one party to the other, stating that it was its present intention to terminate the contract, was insufficient as such notice.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1005-1009; Dec. Dig. § 217.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. DAMAGES (§ 124*)—MEASURE OF DAMAGES—BREACH OF CONTRACT.

Plaintiff, a press association, having in operation an established and extensive system and equipment for collecting and distributing news, contracted to furnish news to defendant, a newspaper company, for a fixed term at a stated price per week. Before the expiration of the term defendant refused to longer receive and pay for the service. It was shown that the only additional expense incurred by plaintiff by reason of the contract was the cost of maintaining an office in defendant's building, with an operator who took dispatches from a main wire operated by plaintiff, which passed through the city, and transcribed the same for defendant's use. *Held*, that the measure of damages recoverable by plaintiff for breach of the contract was the difference between what it was to receive under the contract and the cost of maintaining such office.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 326-338; Dec. Dig. § 124.*]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by the United Press Associations against the Star-Chronicle Publishing Company. Judgment for plaintiff, and defendant brings error. Reversed, with leave to plaintiff to file remittitur.

Shepard Barclay, of St. Louis, Mo. (William R. Orthwein, P. H. Cullen, and Thomas T. Fauntleroy, all of St. Louis, Mo., on the brief), for plaintiff in error.

G. B. Arnold, of St. Louis, Mo. (Jay W. Curts, of Cincinnati, Ohio, and Campbell Cummings, of St. Louis, Mo., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and WM. H. MUNGER and TRIEBER, District Judges.

WM. H. MUNGER, District Judge. On the 12th day of September, 1908, at New York City, in the state of New York, the United Press Associations, a corporation, organized under the laws of the state of New York, was engaged in the business of gathering news throughout the different states of the United States, as well as through foreign countries, preparing news reports thereof in the city of New York and at other points, for distribution throughout the several states, and selling and contracting for the right and privilege of publishing said news reports by the owners and publishers of various newspapers throughout the United States, and delivering, by telegraphic communication, from said city of New York, Chicago, Ill., and other points of distribution in the several states, such reports to such publishers.

On said 12th day of September, 1908, said United Press Associations, in the city of New York, in the state of New York, entered into a contract with the Star-Chronicle Publishing Company, a corporation organized under the laws of the state of Missouri, by the terms of which said United Press Associations sold to the Star-Chronicle Publishing Company the privilege of publishing in the Sunday Star and Chronicle, a newspaper printed in the English language at St. Louis, Mo., on Sundays, the full Saturday night reports of the United Press

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Associations, and agreed to deliver to the Star-Chronicle Publishing Company its news reports, foreign and domestic, so far as it was practicable to do. The contract provided that, in all cases of rebate granted by the telegraph company on account of wire trouble, the Star-Chronicle Publishing Company was to receive the same, provided that said full Saturday night report of the United Press Associations should be filed for the Star-Chronicle Publishing Company at Chicago, Ill., or elsewhere, if the Star-Chronicle Publishing Company so elected. The Star-Chronicle Publishing Company agreed to receive and accept said news reports, publishing such parts thereof as it might desire, and to pay to the United Press Associations at its office \$25 per week; and the Publishing Company agreed to furnish the Press Associations the local news within 15 miles of the office in which the Publishing Company's newspaper was published, without cost to the Press Association. Said contract contained the following provision:

"This agreement shall continue for 12 months from the date hereof, and shall thereafter renew itself for like periods until either party has notified the other at least 60 days before the end of any of said periods of its desire to terminate this agreement."

Subsequently, and on the 9th day of November, 1908, at New York City, in the state of New York, the same parties entered into another agreement of the same character, by the terms of which the United Press Associations sold to the Publishing Company the right and privilege of publishing in the Star and Chronicle, a newspaper printed in the English language, at St. Louis, Mo., daily except Sundays, the full day report of the United Press Associations, and agreed to deliver to the said Publishing Company its news reports, foreign and domestic, so far as practicable. The contract contained the same provisions with regard to rebates granted by the telegraph company and the reports to be filed for said Publishing Company at Chicago, Ill., or elsewhere, if it so elected, and its automatic renewal unless notice was given, etc., and the Publishing Company agreed to receive and accept said news reports and pay for the same \$153 per week.

The Press Associations delivered such news to the Publishing Company pursuant to said contracts, and the same were received and paid for by the Publishing Company up to and including the week ending September 3, 1910, and the Press Associations delivered to the Publishing Company and the Publishing Company received said reports, under said contracts, for a period of 9 weeks after September 3, 1910, for which 9 weeks service the Publishing Company failed and refused to pay. On the 14th day of December, 1910, said Press Associations (as plaintiff) instituted its suit in the United States court for the Eastern judicial district of the state of Missouri, against said Publishing Company (as defendant), stating in its petition that there was due it from the defendant, on the contract of September 12, 1908, for the service which it rendered for the 9 weeks after the 3d of September, 1910, the sum of \$225, and further alleged that, on the 9th day of November, 1910, defendant, without any just cause or lawful excuse, and against the consent of the plaintiff, refused to receive and accept from plaintiff said news reports and news service, and repudiated and abandoned said agreement; that plaintiff had been ready and willing

to perform all the terms of the contract on its part to be performed up to the expiration of the contract, September 12, 1911; that it had sustained damage by reason of the breach of the contract on the part of the defendant to receive and accept such news reports, in the sum of \$836, and it asked judgment for both of said amounts, with interest upon the \$225.

It also alleged in its petition, as a further and second cause of action, that there was due it under the contract of date November 9, 1908, for the news which it had furnished under the contract, and which was received and accepted by the defendant, the sum of \$1,453.50, and it further alleged a breach of the contract by the defendant, on November 9, 1910, in the same manner as before stated in the first cause of action, and that it was damaged by reason thereof in the sum of \$6,533.80, and it prayed judgment upon its claims arising under said contract of November 9, 1908, for the sum of \$1,453.50, with interest, and the additional sum of \$6,533.80.

To this petition the Publishing Company answered, stating, in substance: First. That by the terms of the contract some of the business was to be done in the state of Missouri; that plaintiff did in fact do a great deal of its business wholly in the state of Missouri; that it had not complied with the statute of the state of Missouri and obtained a license authorizing it as a foreign corporation to transact business in said state; and that, because of such failure to comply with the statutes of the state of Missouri, no actions could be maintained upon said contract. Second. That the contract had been terminated by a notice given by the defendant to the plaintiff 60 days prior to the expiration of the contract. Third. The answer alleged a settlement and adjustment. Fourth. A general denial.

The case was tried to a jury, and a verdict returned in favor of plaintiff for the sum of \$1,678.50, with interest thereon on the first count of the petition, and for \$6,533.80 on the second count of the petition. The defendant has brought the case here for review.

[1] The first question to be determined is whether or not the plaintiff, because of not having complied with the provisions of the statute of the state of Missouri, relative to transacting business within the state by foreign corporations, can maintain an action to recover upon said contract. This requires a consideration of the nature of the contracts and the business performed by the plaintiff in the state of Missouri, respecting the fulfillment of the contracts. The applicable provisions of the statutes of Missouri are sections 3039 and 3040, Revised Statutes 1909, which sections contain the following provisions:

"Sec. 3039. * * * Every company incorporated for the purpose of gain under the laws of any other state, territory or country, now or hereafter doing business within this state, shall file in the office of the Secretary of State a copy of its charter or articles of association, duly authenticated by the proper authority, together with a sworn statement under its corporate seal, particularly setting forth the business of the corporation which it is engaged in carrying on, or which it proposes to carry on in this state; and the principal officer or agent in Missouri shall make and forward to the Secretary of State, with the affidavits required, a statement sworn to of the proportion of the capital stock of said corporation which is represented by its property located and business transacted in Missouri, which statement shall set out the location of its principal office or place in this state for the transaction

of its business, where legal service may be obtained upon it. Such corporation shall be required to pay into the state treasury upon the proportion of its capital stock represented by its property and business in Missouri, incorporating tax and fees equal to those required of similar corporations formed within and under the laws of this state, with an addition of ten dollars as a fee for issuing the license authorizing it to do business in this state. Upon compliance with these provisions by the corporation the Secretary of State shall give a certificate that said corporation has duly complied with the law, and is authorized to engage only in the business set out in the statement filed with its charter. * * * Provided, that the provisions of this article are not intended to and shall not apply to 'drummers' or traveling salesmen soliciting business in this state for foreign corporations which are entirely nonresident. * * *

"Sec. 3040. * * * Every corporation for pecuniary profit, formed in any other state, territory or country, now doing business in or which may hereafter do business in this state, which shall neglect or fail to comply with the conditions of this law, shall be subject to a fine of not less than one thousand dollars, to be recovered before any court of competent jurisdiction; * * * in addition to which penalty, on and after the going into effect of said sections no foreign corporation, as above defined, which shall fail to comply with said sections, can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of contract or tort: Provided, that the provisions of this section shall not apply to railroad companies which have heretofore built their lines of railway into or through this state; nor to 'drummers' or traveling salesmen soliciting business in this state for foreign corporations which are entirely nonresident."

The business, as transacted by the plaintiff and defendant, under these contracts was as follows: Plaintiff had the country divided into various circuits, New York being the office of the Eastern circuit, Chicago of the Central, and Denver of the Western. News gathered in all parts of the country would be filed in these main offices and sent out; for instance, that filed in the Chicago office would be sent out over the leased wires of the plaintiff and received simultaneously by its clients within that circuit. Plaintiff had a wire running from the defendant's building to its main leased wire, which ran through St. Louis. It kept and maintained an operator in the building of the defendant, who received the news which passed over the leased wires within the circuit, copied it off with a typewriter, and delivered it to the telegraph editor of the defendant, who would use such portions of it as he desired. The plaintiff also had what it called a "pony" service, which consisted in the boiling down or condensing of news which came over the leased wire to from one-fourth to one-fifth of the original amount. This would be sent to clients in smaller towns in Missouri not desiring full reports. The defendant had correspondents of its own in the several towns in the state, from which it received its Missouri news. The news which it received from the plaintiff was that which came from other parts of the country over its leased wire. The evidence clearly shows that, as to the business transacted between the plaintiff and the defendant, under the contracts in question, it was entirely interstate. Such being the case, the foregoing statutory provisions were clearly inapplicable.

In the case of *International Text-Book Co. v. Gillespie*, 229 Mo. 397, 129 S. W. 922, it appeared that the plaintiff, International Text-Book Company, was a corporation of the state of Pennsylvania; that

it taught pupils throughout the country by a system of correspondence; the students would execute a contract and forward it to the principal office in Pennsylvania for approval. In that case, Gillespie, one of its students, who lived in Missouri, declining to make payment according to the terms of the contract into which he had entered with the plaintiff, the plaintiff brought action upon such contract, and the defense interposed was that the contract was void and nonenforceable, because the plaintiff did business within the state of Missouri without having complied with the provisions of the statute before referred to. It appeared that the plaintiff, a foreign corporation, had not complied with the statute. The evidence showed that the International Text-Book Company, the plaintiff, maintained, in the state, a district superintendent, nine division superintendents, and three solicitors in each division, one district office, and nine division offices, in which were clerks and stenographers. The business of the parties engaged in these local offices was to solicit pupils for the correspondence school. These pupils were taught through correspondence with the main office in Pennsylvania, books were furnished by plaintiff to the pupils for use (though not purchased by the pupils). The Supreme Court held that, while the plaintiff, the International Text-Book Company, did business within the state of Missouri, such business was interstate, not of a domestic character, that the corporation was not required to comply with the provisions of the before-mentioned statute, and could recover upon the contract. The court, after reviewing many authorities, said:

"That while appellant is doing business in this state, yet the evidence shows that its business is confined to interstate business alone. That being true, it is not subject to state regulation within the meaning of said section of our statutes, but is governed by the Constitution of the United States, and the laws thereof. We therefore hold said sections to be unconstitutional, null, and void in so far as they apply to and affect appellant and all foreign corporations engaged in interstate commerce."

It is clear from this decision of the Supreme Court of the state that the statute has no application to contracts relating wholly to interstate business, and, as the business done between the plaintiff and defendant in the case before us was wholly of an interstate character, such contracts were unaffected by the statute. The fact that the plaintiff may have furnished some of its "pony" service to clients within the state, and as to them the business was intrastate, in no manner affected the validity of the contracts in question, as these contracts related wholly to interstate business. The news which defendants collected within a radius of 15 miles of the city of St. Louis and delivered to plaintiff was used in interstate commerce, and the business done between plaintiff and defendant in pursuance of the contracts was interstate. If the provisions of the statute already referred to could be held to apply to the contracts in question, such statute would be unconstitutional under the authority of *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649, *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, and *International Text Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103. To the same effect, *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435. We are clearly of the

opinion that the contracts in question were valid, and the rights of the parties thereunder legally enforceable.

[2] The oral conversation shown by the testimony to have taken place between Mr. Taylor, the manager of defendant, and the operator of plaintiff, in St. Louis, was clearly insufficient to constitute a notice of termination of the contract. The letter of July 5, 1910, by the defendant to the plaintiff, had it been received by the plaintiff, was insufficient as a notice of discontinuance of the contract, because of being indefinite and uncertain, in that it stated that it was the present *intention* of the defendant to discontinue, not that it *would* discontinue, the contracts. *Carpentier v. Thurston*, 30 Cal. 123. While the evidence of the defendant was that this letter was duly addressed to the plaintiff, stamped and mailed in the United States mails in St. Louis, the evidence of the plaintiff was that it was never received. The court instructed the jury upon this subject that:

"The law presumes that a letter written in St. Louis, put in an envelope with a United States postage stamp placed on the envelope and directed to a party in New York—the presumption of the law is that that letter, being so written, so stamped, and so deposited, reached its destination, and that it was received by the party to whom it was addressed. That is the presumption or prima facie evidence only. That presumption or prima facie case may be rebutted by plaintiffs showing that no such letter was received in New York. You have heard all of this testimony in reference to the matter. You have heard the letter read from the manager of this plaintiff association, to the manager of this defendant association here in October, saying that no such letter had been received. You have heard the testimony read from these depositions of the employes of the office in New York. If that letter was in fact received at New York, the court holds that the language of the letter is sufficient under these contracts to terminate the contracts."

The question as to the receipt of the letter was fairly submitted to the jury, with the statement that if it was received the contracts were terminated. The verdict of the jury was necessarily a finding that the letter was not received by the plaintiff. No evidence was offered tending to show that there had been a settlement and adjustment between the parties.

[3] Objection is made to the rule of damages for breach of the contracts. The court instructed the jury that, if they found for the plaintiff any damages for the alleged breach of the contracts, they should ascertain those damages at the difference between the contract price and the cost of maintaining the St. Louis office. The defendant contends that the profits were not the difference between what the plaintiff was entitled to receive under the contracts and what it cost to maintain the St. Louis office, but there should be deducted from what it would have received under the contracts, not only the expense of the St. Louis office, but a relative proportion of the expense of the entire business of the plaintiff. We think the measure of damages, as stated by the court, the correct rule. *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; *United Press v. Abell Co.*, 79 App. Div. 550, 80 N. Y. Supp. 454, affirmed 178 N. Y. 578, 70 N. E. 1110. The evidence discloses that the only extra expense to which plaintiff was put in performing its contracts with the defendant was the local expense incurred in maintaining the St. Louis office. All

other expense incurred by it was the same after the defendant ceased to accept its news.

Numerous objections were taken to the introduction of testimony on the part of plaintiff and to the exclusion of testimony offered by the defendant. This testimony related chiefly to the business done in Missouri through the "pony" service, the giving of the notice, and the measure of damages. In view of the law which we have herein announced, these objections are not well taken.

It appears, however, that plaintiff, upon its first cause of action only claimed a total sum of \$1,061, with interest on \$225. The jury awarded the plaintiff upon said first cause of action the sum of \$1,678.50, with interest amounting to \$100.71. As this was \$617.50, exclusive of interest, more than claimed by plaintiff in its petition upon its first cause of action, it follows that the judgment must be reversed, unless the plaintiff shall file in the court below a remittitur in the sum of \$617.50, with the proportionate amount of interest, and file with the clerk of this court a certified copy of such remittitur within 30 days from the handing down of this opinion. If such remittitur is so entered, the judgment will be affirmed. If plaintiff does not enter such remittitur in the court below, and file a certified copy of the same in this court within the time mentioned, the judgment will be reversed.

NORTHROP v. BROWNE.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1913.)

No. 3,868.

1. COURTS (§ 260*)—JURISDICTION OF FEDERAL COURTS—PROBATE AND ADMINISTRATION PROCEEDINGS.

A federal court is without jurisdiction of a suit to determine matters purely of administration with respect to the estate of a decedent, such as to revise the allowance of claims by the probate court, readjudicate the necessity and propriety of orders authorizing the sale of real estate for the payment of debts made by such court, or to revise the accounting of executors.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 792; Dec. Dig. § 260.*]

Probate jurisdiction of federal courts, see note to *Quarries Co. v. Thomlinson*, 36 C. C. A. 276.]

2. EXECUTORS AND ADMINISTRATORS (§ 513*)—ACCOUNTING—CONCLUSIVENESS OF ADJUDICATION.

A decree of a probate court, approving and settling the accounts of executors and granting their discharge, is conclusive as against collateral attack, unless impeached for fraud.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2267-2291; Dec. Dig. § 513.*]

3. EQUITY (§ 71*)—LACHES—INEXCUSABLE DELAY.

A petition by executors to a probate court for an order to sell real estate to pay debts is an adversary proceeding, and a legatee of the testator, who made no objection thereto, and took no steps to question any of the proceedings until six years after the last of such orders was made, when he commenced a suit, which was allowed to lie dormant for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

six years more, was chargeable with such laches as will debar him from the right to equitable relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204-211; Dec. Dig. § 71.*]

4. EQUITY (§ 67*)—LACHES—FAILURE TO PROSECUTE SUIT.

The mere institution of a suit does not relieve a person of the charge of laches, if he fails in its diligent prosecution.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191-196; Dec. Dig. § 67.*]

5. EXECUTORS AND ADMINISTRATORS (§ 118*)—DUTY TO SELL PERSONAL PROPERTY—CONSTRUCTION OF STATUTE.

Under Gen. St. Kan. 1909, § 3504, which requires executors and administrators to sell the personal property of the decedent within three months, except such as is specifically bequeathed, which shall not be sold until it is found that the remaining personalty is insufficient to pay the debts, executors cannot be charged with personal liability by a residuary legatee because of their failure to sell within such time bank stock which subsequently became worthless, where the will of the testator requested that it be not sold, and disposed of the dividends thereon until the expiration of the bank's charter.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 472-482; Dec. Dig. § 118.*]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit in equity by Milton C. Northrup against Kenneth L. Browne. Decree for defendant, and complainant appeals. Affirmed.

Paul R. Stinson and R. R. Brewster, both of Kansas City, Mo. (Brewster, Kelly, Brewster & Buchholz, E. H. Busiek, and Ingram D. Hook, all of Kansas City, Mo., on the brief), for appellant.

Samuel Maher, of Kansas City, Kan. (O. L. Miller and C. A. Miller, both of Kansas City, Kan., on the brief), for appellee.

Before SANBORN, Circuit Judge, and MUNGER and TRIEBER, District Judges.

WILLIAM H. MUNGER, District Judge. About the year 1875 one Hiram M. Northrup formed a partnership with his son, Thomas C. Northrup, for the purpose of conducting a banking business in Kansas City, Wyandotte county, Kan. Said partnership continued until the death of the son in 1876. Thereafter Hiram M. Northrup continued the banking business as sole owner under the name of Northrup & Son until the year 1887, when pursuant to the laws of the state of Kansas he incorporated said banking business under the corporate name of the Northrup Banking Company. For some years prior to the incorporation Kenneth L. Browne and Eldridge H. Lovelace had been in the employ of Hiram M. Northrup, and upon the incorporation Hiram M. Northrup became the president, and Kenneth L. Browne and Eldridge H. Lovelace, respectively, cashier and assistant cashier. The capital stock was \$100,000, of the par value of \$1,000 a share. Hiram M. Northrup became the owner of 52 shares, Kenneth L. Browne 24, Eldridge H. Lovelace 1 share, and Joseph S. Chick, who was then and for some years thereafter the pres-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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ident of the Kansas City National Bank, became the owner of 1 share, and the remaining other shares were owned by various other persons. For the purpose of accomplishing a transfer of the property, business, and good will of the said banking concern of Northrup & Son to the said corporation, the said Hiram M. Northrup after the incorporation duly made assignments of the securities, theretofore owned by him as the proprietor and owner of the said business of Northrup & Son, to the said Northrup Banking Company, and, as alleged in the bill hereinafter referred to, said Hiram M. Northrup did not by said transfer intend to assume any personal liability, but solely for the purpose of transferring the ownership of the assets of the bank of Northrup & Son to the Northrup Banking Company. Hiram M. Northrup continued as president and active manager of the Northrup Banking Company until his death, March 22, 1893. He left a last will and testament, which was duly probated in the probate court of said Wyandotte county March 31, 1893. The will named said Browne, Lovelace, and Chick as executors. Chick, being a nonresident of the state of Kansas, was disqualified from acting as executor, and letters testamentary issued to Browne and Lovelace.

Hiram M. Northrup upon his death was the owner of a large amount of real estate as well as personal property. Numerous specific bequests of real property were made to his grandchildren and others. To one of his grandchildren all of his real estate in Sterling, Johnson county, Neb.; to a number of others improved real estate, to be selected by his executors, to the value of \$10,000 to each, aggregating \$70,000. Various charitable bequests were made, and to keep the cemetery in Huron Place in repair and suitable adornment the total sum of \$10,500. The will contained the following provision:

"It is my will and request that all of the capital stock of the Northrup Banking Company standing in my name shall not be sold but kept intact during the existence of the charter of said Banking Company, the cash dividends declared upon said stock, after first deducting the costs and expenses of executing this will, to be paid to the legatees, one-half to Milton C. Northrup and one-half to Frank A. Northrup and Andrus B. Northrup, share and share alike. The said cash dividends to descend to the heirs of the respective bodies of the legatees in this paragraph named, if any there be; otherwise to be paid in like proportion to their legal heirs. None of said property in this paragraph named to descend to the present wife of said Milton C. Northrup. But the surplus earnings of said banking company to remain to augment its capital stock."

After the specific bequests before mentioned the will provided as follows:

"I will and bequeath one-half of the remainder of my estate both real and personal to my son, Milton C. Northrup to descend to the heirs of his body. None of such property to descend to the present wife of said Milton C. Northrup."

"I will and bequeath the remainder of my estate both real and personal, share and share alike to my grandsons Frank A. Northrup and Andrus B. Northrup, to be by them received when said Andrus B. Northrup arrives at the age of twenty-one years."

On the death of Hiram M. Northrup, Joseph S. Chick was elected president of the Banking Company, and Browne and Lovelace con-

tinued as cashier and assistant cashier. For some 10 years before the death of Hiram M. Northrup, one A. B. Hovey was in his employ in the capacity of bookkeeper.

After the probate of said will appraisers were duly appointed by the probate court to appraise the property of the deceased. The 52 shares of bank stock, par value of \$52,000, were appraised at \$78,000. On July 15, 1893, the Attorney General of the state of Kansas applied to the judge of the district court of said Wyandotte county, Kan., for the appointment of a receiver of said Banking Company on the ground that the Banking Company was insolvent. The district court appointed said A. B. Hovey receiver, who duly qualified and entered upon his duties as such.

Numerous claims were filed against the estate of Hiram M. Northrup, duly allowed by the probate court, and suits were brought by the receiver against the executors of the estate upon some of the notes which were assigned by Hiram M. Northrup to said Banking Company upon its incorporation as before mentioned, and judgments were rendered in favor of the receiver. Suits were also brought by the owners of depositors' accounts in said Banking Company against the executors to recover under the laws of the state a sum equal to the par value of the stock so held by deceased under what is denominated as the "stockholder's double liability law" of the state of Kansas. One of the suits was tried, and a stipulation entered into between the parties to the others that the remaining suits should abide the result of the one suit which was tried. Judgments were rendered upon the depositors' claims against the executors to the amount of the par value of deceased's bank stock.

November 17, 1893, the executors presented their petition to the probate court for an order to sell real estate to pay debts and taxes, etc. The statutory notice was given, and an order entered directing the sale of certain of the real estate. November 10, 1894, a second petition was presented to the court for an order to sell real estate to pay debts, etc., and after notice and hearing the order was granted. November 25, 1905, a third petition was presented to the court for an order to sell additional real estate to pay debts, etc., which order after notice and hearing was granted. On account of financial stringency, it having been difficult to sell real estate under orders for a fair value, the executors on March 4, 1898, petitioned the court for an order authorizing them to exchange real estate in payment of debts, etc., which, after notice and hearing, was by the court granted.

On January 22, 1904, Milton C. Northrup, appellant, with others, filed their bill in the United States Court for the District of Kansas against Kenneth L. Browne, Eldridge H. Lovelace, and one C. K. Wells, alleging the facts hereinbefore stated; also alleged that the District Judge who appointed Hovey receiver of said Banking Company was disqualified to act, being an interested party, in that he was indebted to said Banking Company upon a note executed by him and held by the Banking Company. It also alleged that Hovey was disqualified as receiver, because of the fact that he also was indebted to the Banking Company upon a note, and alleged that judgments ob-

tained upon the notes assigned by Hiram M. Northrup to the Banking Company were invalid, without consideration, and that no notice or protest was given Hiram M. Northrup of the nonpayment of said notes; that, while the executors made some pretended defense against said notes, they failed to make that defense. The bill alleges that many of the claims which were filed against the estate and allowed by the probate court were not valid claims against said estate. They further claimed that the executors had received the rents of certain real estate, which rents did not belong to the executors; and the bill further alleged that the orders to sell real estate were improperly granted, for the reason that the personal property would have been sufficient to have paid all of the claims which complainants in the bill alleged were just and valid claims against the estate. The bill also charged that the executors had been derelict in their duty, in that they failed to sell the shares of stock held by Hiram M. Northrup in the bank within three months after the bond, as it was alleged was their duty to do under and by virtue of statutory provisions of the state, reading as follows:

"The executor or administrator shall, within three months after the date of his bond, sell the whole of the personal property belonging to the estate, which is liable to the payment of debts, and its assets in his hands to be administered, except the following: * * * Such property as is specifically bequeathed shall not be sold until the residue of the personal estate has been sold, and is found by the executor or administrator to be insufficient for the payment of the debts of the estate." Gen. Stat. 1909, p. 798.

Their prayer for relief was that the executors be enjoined from further proceeding in the probate court with the administration of the estate, that the executors be required to make a full statement and accounting of their acts as executors, that the court ascertain the validity of the judgments before mentioned rendered against said executors, and for equitable relief. The bill contained various charges of fraud against the executors in permitting said judgments to be obtained, in the appointment of the receiver for the Banking Company, and in not properly resisting the allowance of numerous claims against the estate. These charges, however, are general, and not supported by allegations of specific facts from which fraud or misconduct could be inferred.

September 14, 1905, the action was dismissed for failure to comply with a certain order of the court relative to the payment of the costs, and on December 9, 1905, the action was reinstated by order of the court. Nothing further was done until November 7, 1911, when a supplemental bill was filed. The supplemental bill alleged that on December 8, 1905, Browne and Lovelace, as executors, filed their application for a full and final settlement of their account as executors of said estate, with proof of the publication of notice thereof. It is alleged in the said supplemental bill that said executors' account did not contain a full and accurate accounting of the moneys received and disbursed, and alleged numerous objections and exceptions to the correctness of said account. The supplemental bill shows that the hearing of the application of the executors for the final settlement was continued by the probate court from the December term, 1905, to the

February term, 1906, and various parties interested in the estate as creditors filed exceptions to the report, and that Milton C. Northrup, complainant, also appeared and filed exceptions to said report. The said Milton C. Northrup also filed a motion that the hearing on said account for final settlement and the objections and exceptions filed thereto be continued and held in abeyance until the final hearing and disposition of their suit brought in the United States court be finally heard and determined, and for the further reason that said probate court had no jurisdiction to hear and determine the questions and exceptions filed to the final account of said executors. The probate court overruled the motion, whereupon said Milton C. Northrup, by his attorneys, announced to the court that no evidence would be offered, but that he would stand upon the objections to the jurisdiction of the court to hear and determine the matters. The court entered upon a full hearing upon the exceptions filed by the other parties, heard the evidence which was offered by the parties, found generally that the exceptions were not true and well taken, and entered a final judgment approving the account of the executors, finding the residue after the payment of debts, etc., due and in the hands of the executors, and ordered distribution thereof, and that the executors be discharged as executors and from further liability as such.

On June 28, 1912, Milton C. Northrup filed an amendment to the supplemental bill, setting forth that because of his illness and financial inability, and his counsel and attorney having been engaged in other matters, he had been unable to prosecute his action more diligently. The record shows that in the meantime, before the filing of the amendment to the supplemental bill, the defendant Lovelace had died, and that for various reasons all parties complainant and defendant had been dismissed out of the case, excepting complainant, Milton C. Northrup, and Kenneth L. Browne, defendant.

A demurrer was filed to the bill and supplemental bill as amended, which demurrer was on July 2, 1912, sustained by the court, and the cause dismissed, from which judgment Milton C. Northrup, appellant, has brought the case to this court.

[1] It is to be observed that the object and purpose of the bill and supplemental bill is to obtain in the United States court an accounting of the acts of the executors, re-examination of the validity of claims allowed by the probate court, and readjudicate the necessity and propriety of the orders authorizing the sale of real estate for the payment of debts, etc., and to charge the executors with what may be found due upon such accounting. This presents the question of jurisdiction of the federal court to grant such relief. The Supreme Court in *Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80, the latest decision of that court on the subject which has been called to our attention, after reviewing the previous cases of *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260, *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, *Yonley v. Lavender*, 21 Wall. 276, 22 L. Ed. 536, *Farrell v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101, and other cases cited, said:

"In view of the cases cited, and the rules thus established, it is evident that the bill in this case goes too far in asking to have an accounting of the es-

tate, such as can only be had in the probate court having jurisdiction of the matter; for it is the result of the cases that in so far as the probate administration of the estate is concerned in the payment of debts, and the settlement of the accounts by the executor or administrator, the jurisdiction of the probate court may not be interfered with. It is also true, as was held in the court below in the case at bar, that the prior possession of the state probate court cannot be interfered with by the decree of the federal court.

* * * If the federal court finds that the complainant is entitled to the alleged lapsed legacy and the residue of the estate, while it cannot interfere with the probate court in determining the amount of the residue arising from the settlement of the estate in the court of probate, the decree can find the amount of the residue, as determined by the administration in the probate court in the hands of the executor, to belong to the complainant, and to be held in trust for her, thus binding the executor personally."

Thus it clearly appears that the federal court may in the first instance adjudicate a claim against the estate of a deceased person in an action brought by the creditors against the administrator or executor, the requisite amount in controversy and diversity of citizenship existing. The federal court may also in a proper case determine the right of a party as heir, legatee, or distributee; but the court has no jurisdiction to determine those matters which are purely matters of administration, and the relief asked in the present case relates solely to matters purely administrative.

[2] Again it appears that the executors presented their final itemized account for settlement with the probate court. Complainant had due notice thereof, filed exceptions thereto, then objected to the jurisdiction of the probate court, for the reason that jurisdiction had become vested solely in the federal court, because of the action brought therein. The probate court overruled the objections to the jurisdiction. Complainant elected to stand upon his motion, and offered no proof relative to the correctness of the executors' account. The probate court, after hearing the evidence offered by other objectors, specifically found that the objections were not well taken, that the executors had duly and faithfully administered the trust and rendered a true and correct account thereof, the same was approved by the court, and the executors discharged. This constituted a final judgment, and was conclusive as against collateral attack, unless impeached for fraud; and, as we have said, the allegations of fraud are too general and present no facts upon which it can be based. *Proctor v. Dicklow*, 57 Kan. 119, 45 Pac. 86; *Lewis v. Woodrum*, 76 Kan. 384, 92 Pac. 306.

[3, 4] Again, the complainant had an opportunity to have, at the time the application for orders to sell real estate to pay debts was made, the validity and justness of the claims which had been allowed by the probate court against the estate re-examined and reviewed. *Black v. Elliott*, 63 Kan. 211, 65 Pac. 215, 88 Am. St. Rep. 239. The proceeding for an order to sell real estate to pay debts being an adversary proceeding, complainant was a party thereto. He neglected to avail himself of this right, and took no steps to question any of the proceedings until January, 1904, nearly 11 years after the institution of the probate proceedings, 10 years after the second order of sale, and 6 years after the last order of sale was granted. Then the bill was filed. No steps were taken to prosecute the bill for 6 years thereafter. Thus we have a case in which the complainant is clearly guilty of

laches. He was not only guilty of laches before filing the original bill, but guilty of laches in not prosecuting the same with reasonable diligence; for the law is well settled that the mere institution of a suit does not relieve a person from the charge of laches, and if he fails in its diligent prosecution the consequences are the same as if no action had been begun. *Johnston v. Standard Mining Company*, 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480; *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. 176, 41 L. Ed. 531.

[5] There is no merit in the claim that the executors should be held personally liable for the value of the bank stock because of the failure to sell the same within three months after the date of their bond. We think by the terms of the will this stock was brought within the exception provided for in the statute, as it was property specifically bequeathed. The will provided, as we have seen, that it should not be sold during the existence of the charter of the Banking Company, but the dividends should be paid, one half to appellant, and the other half to two of the testator's grandchildren, the surplus earnings to remain to augment the capital stock. Upon the termination of the charter of the Banking Company, it doubtless went to the residuary legatees. In any event, however, under the circumstances, the executors cannot be charged with bad faith and rendered personally liable for the loss of the stock, because complying with the testator's request not to dispose of the same.

It is further claimed that the notice given of the hearing for the final settlement of the executors' accounts was insufficient. This is unavailing to complainant, because he alleges that he appeared at the hearing and filed exceptions to the account as before stated, and objected to the jurisdiction of the court on the ground that the case was pending in the United States court. Even if the United States court had jurisdiction to examine the accounts of the executors, and recharge and falsify the same, that would not oust the jurisdiction of the probate court, as in such case the jurisdiction of the federal court would be concurrent, rather than exclusive.

From a full consideration of the entire case, we think the demurrer was properly sustained, and the decree is therefore affirmed.

WRIGHT v. WARREN BROS. CO.

(Circuit Court of Appeals, Fourth Circuit. February 18, 1913.)

No. 1,117.

1. CORPORATIONS (§ 294*)—OFFICERS AND AGENTS—TENURE OF APPOINTMENT—WEST VIRGINIA STATUTE.

Within the meaning of Code W. Va. c. 53, § 53, which provides that the board of directors of a corporation may appoint such officers and agents of the corporation as they deem proper, who shall hold their places during the pleasure of the board, a general manager, appointed for the business of the corporation in another state, is such an agent, and not an ordinary employé, and under the construction placed on such provision by the highest court of the state he cannot enforce a contract

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for his employment for a definite term of years, but holds his position subject to discharge by the board of directors at any time.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1263-1266; Dec. § 294.*]

2. CORPORATIONS (§ 308*)—AGENTS—CONTRACT OF EMPLOYMENT.

Having such power of discharge under the law, the board of directors could not bind the corporation by contract to pay such manager an advance salary for three months in case of his discharge.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

3. CORPORATIONS (§ 308*)—STOCKHOLDERS—CONTRACTS WITH OFFICER—LEGALITY.

To render void, as against public policy, a contract by a stockholder in a corporation to pay a salary to an officer of the corporation, it should at least be shown that there are other minority stockholders, and that the contract was made without their knowledge or consent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

4. CORPORATIONS (§ 308*)—ACTION AGAINST CORPORATION ON CONTRACT—DEFENSES.

In an action against a corporation on a contract, defendant cannot set off an indebtedness from plaintiff to a subsidiary corporation of defendant, in which it is the sole or controlling stockholder, unless in case of fraud or other special circumstances; but, where the contract sued on was one to pay plaintiff a salary as an officer of the subsidiary corporation, defendant is entitled to prove any fact showing that plaintiff did not faithfully discharge his duties as such officer, and hence is not entitled to the salary promised.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action at law by John M. Wright against the Warren Bros. Company. Judgment for plaintiff, and both parties bring error. Reversed.

Price, Smith, Spilman & Clay, of Charleston, W. Va., and J. B. Cessna, of Erie, Pa., for plaintiff.

T. S. Clark, of Charleston, W. Va., and Arthur Drinkwater, of Boston, Mass. (J. M. Head and Chilton, MacCorkle & Chilton, all of Charleston, W. Va., on the briefs), for Warren Bros. Co.

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. John M. Wright was the plaintiff below. He will be here designated as such. He is a citizen of New York. Warren Bros. Company was the defendant. It will be so called. It is a West Virginia corporation. The plaintiff brought suit for what he claimed to be a balance due him under a contract by which he said he had been employed by the defendant. He obtained a judgment below for \$21,798.05. The defendant sued out a writ of error. The judgment was for much less than the plaintiff's claim. He took a cross-writ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

It will be more convenient to deal in the first place with the questions raised by his assignments of error. For that purpose we may assume in his favor many things which the defendant disputes.

The plaintiff says that he had a contract with the defendant by which he gave it the right to command his services for a period of ten years. His salary for the first year was to be at the rate of \$6,000 per annum. For five years he was annually to receive in addition \$4,000 of the defendant's common stock. In certain contingencies, the defendant was, after the first year, to increase his income directly or indirectly by dividends on the stock, by bonus, or by salary by not less than \$1,000 per year, until his income should reach \$10,000 per annum from the business. The contract contained a provision that, in case of plaintiff's dismissal for any cause within the ten years, he was to receive the balance of the common stock due according to the agreement before the dismissal was effected. By another paragraph of the agreement defendant promised, if, at any time after the first year, it dispensed with his services, to give him three months' notice in writing, or in lieu thereof to pay him three months' salary, computed at the monthly rate for the year in which he was then working.

The plaintiff says the defendant discharged him on the 17th of May, 1907, without giving him three months' notice in writing, and without paying him in lieu thereof three months' salary. Up to that time he had received only \$4,000 of the defendant's common stock. The \$4,000 per annum of said stock for the remaining four years has never been delivered to him. The plaintiff contends that its delivery to him was a condition precedent to the defendant's exercise of the right to dismiss him. The plaintiff says until the stock was delivered to him he was entitled to his salary up to the time of the trial, less the amount he might have earned elsewhere in the meanwhile.

[1] The refusal of the court below to permit a recovery upon this theory, and its rejection as irrelevant of evidence of the plaintiff's earnings between the date of his discharge and the trial, are assigned by him for error. The court refused to construe the contract as making the prior delivery of the stock a condition precedent to the exercise of the right of dismissal. In this we think it was right; but, even if we did not, the plaintiff would not have been entitled to recover anything for services after the time at which the defendant had discharged him.

Section 53 of chapter 53 of the Code of West Virginia, among other things, provides that the board of directors of a West Virginia corporation, which defendant was, "may, subject to the provisions of the law and the by-laws, appoint such officers and agents of the corporation as they may deem proper. * * * The officers and agents so appointed shall hold their places during the pleasure of the board." The construction placed upon this statute by the highest court of the state is binding upon us. That court has held that the purpose and effect of the provision in question is to inhibit the employment by the board of a corporation of such officers or agents for a definite period of time. In its language:

"They are not permitted thus to handicap the company in the conduct of its business." *Darrah v. Wheeling Ice & Storage Co.*, 50 W. Va. 417, 40 S. E. 373.

By the terms of the contract sued on, the plaintiff was to have the general management of defendant's Michigan business under the general direction of defendant's president. His duties, therefore, were of an executive character. Within the principles laid down in *Munn v. Wellsburg Banking & Trust Co.*, 66 W. Va. 204, 66 S. E. 230, 135 Am. St. Rep. 1024, he was an agent of the defendant as that word is used in section 53 of chapter 53, and was not merely an ordinary employé.

This conclusion disposes of all the plaintiff's assignments of error, except that which is based upon the court's refusal to permit him to testify as to a conversation with the president of the defendant at the time of the writing of the letter which embodied the terms of the contract.

Plaintiff's counsel argued that, in view of the fact that this letter contemplated the making of a subsequent formal contract, which was, however, never made, the agreement between the parties might well have been partly in writing and partly by parol. It is not necessary to discuss this contention.

As we shall see when we come to consider defendant's assignments of error, the contract was not binding upon the latter until ratified by its board of directors. The only action taken by the board was a resolution, passed some months after the letter was written, authorizing the defendant's president to make a contract with the plaintiff upon the general lines of the correspondence already had. Such authority was clearly based upon the *correspondence*, and not upon conversations not therein embodied.

Consideration of the defendant's assignments of error require a fuller statement of the terms of the alleged contract and of the facts and circumstances in evidence.

As already stated, the letter said to be a contract provided that the plaintiff was to have the general management of the defendant's business in Michigan. In strict theory of law the defendant, during the time the plaintiff says he was in its employ, did no business in Michigan, or none of any importance. In that state and in many others it did not operate directly in its own name. Its transactions were carried on through subsidiary companies. It actually, if not always, nominally held a large majority, if not absolutely all, of the stock of these companies. They were under its control. One of them was the Central Bitulithic Company. For brevity it will be called the Central Company. It was also a West Virginia corporation. It was through this Central Company that the defendant carried on business in Michigan.

Within a few days after writing the letter which plaintiff says constituted, or at all events in part evidenced, the contract upon which he sues, the defendant caused him to be elected president of the Central Company. It had some shares of stock put in his name. The certificate therefor he immediately returned to it, so indorsed that it could at any time cause the stock to be transferred to itself or to any one else. When it wanted to end his employment, it had this stock transferred to another name. Under the by-laws of the Central Company, when he ceased to be a stockholder he was no longer qualified to hold

the office of president. It was in this way, and apparently in this way only, that the defendant discharged him.

During the four years and a little over in which he was, as he claims, in the defendant's employ, his salary of \$6,000 per annum, or \$500 a month, was paid by the Central Company. It does not appear that he was ever given anything directly by the defendant company, except \$4,000 of its common stock. All he received, either from the defendant or the Central Company, during the time of his employment, was \$6,000 a year and this \$4,000 of stock. By the terms of the letter upon which he sues he should have annually received during the four years he was in the defendant's employ \$4,000 of such stock. The learned judge below held that, as he was in that employ for four years, he was entitled to \$16,000 of stock. He had received only \$4,000. He had a just claim to \$12,000 more. By the letter the defendant bound itself to buy at the end of ten years, or say on May 1, 1913, the common stock given to the plaintiff, and to pay par for it. The case went to the jury below on the 7th of December, 1911. The present value of \$12,000, payable May 1, 1913, was then \$10,988.

By the terms of the letter the plaintiff's salary in certain contingencies, which actually happened, was to be increased \$1,000 a year until it reached \$10,000 per annum. He was, however, to treat as part of his salary any dividends he received upon the common stock which was given him. On May 17, 1907, the date of his dismissal, there was due and unpaid him for this promised augmentation in salary the net amount of \$6,022.78. The interest thereon to the time of trial footed up \$1,890.35. In addition, the court held that under the terms of the contract he was entitled to three months' salary in lieu of notice. Such salary, it determined, was to be calculated at the rate his salary would then have been, had the increase of \$1,000 a year been made. If it had been, he would have been receiving, beginning May 1, 1907, \$10,000 per year. Three months' salary at that rate would be \$2,500. Although he was discharged as of May 17, 1907, he had, prior thereto, collected his salary for the entire month of May at the rate of \$6,000 per annum, or \$500 a month. At that rate the salary from the 17th to the 31st of the month amounted to \$225.81. The verdict below accordingly allowed him \$2,500 less \$225.81, or \$2,274.19, and interest thereon from May 17, 1907, to trial, or \$622.73. The present value of defendant's contract to give him \$12,000 of common stock and to buy it from him at par on May 1, 1913, and the annual augmentations of salary he was to receive, and salary for three months in lieu of notice, together with interest on the two last-named sums, foot up the amount for which the plaintiff below recovered judgment.

[2] We have held that the plaintiff was an agent of the defendant within the meaning of section 53 of article 53 of the Code of West Virginia. As such the corporation, acting through its board of directors, had the right to dismiss him at any time. The board could not bind the corporation to pay a penalty if it saw fit to exercise a privilege that the law of the state made inalienable. It follows that the plaintiff was not entitled to recover this sum of \$2,274.19, or the interest thereon, \$622.73, a total of \$2,896.92.

It does not appear that the defense under this statute was ever in any way taken by the defendant in the court below. Under such circumstances, it could not for the first time make the contention here; but as the point has been fully argued before us, and as the case will for other reasons have to be sent back for a new trial, we have thought it best to say about it what we have.

At the time the alleged contract was entered into the plaintiff was a director and vice president of the defendant. He remained such for about a year thereafter, if his apparently somewhat vague recollection on the subject is accurate. The defendant here argues that under the law of West Virginia no salary or compensation can be allowed a president or director for services as such without the approval of the stockholders. It is admitted that the contract between the defendant and the plaintiff was never laid before the stockholders of the former. It does not appear from the record that this objection was made below. Under such circumstances, all that need be said is that the statute does not apparently prohibit absolutely all compensation to any president or director unless the stockholders approve, but only such compensation as shall be paid him for his services as president or director. When the case is again tried, the defendant may, if it be so advised, set up this defense. The question will then have to be determined whether, upon the evidence, the services rendered by the plaintiff were rendered as a director of the defendant. If they were not, the provision of the statute now under consideration would appear to have nothing to do with the case.

[3] In the court below the defendant strenuously insisted, as he here insists, that the contract was void, even if both the parties to it had in fact attempted to make it. According to this contention it was void because sound public policy does not permit any holder of the stock of a corporation to place the officers thereof under special and peculiar obligation to him or it by agreeing to pay him something beyond that which he receives from the corporation in return for what he does for it. In support of this contention it cites *West v. Camden*, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254; *Seymour v. Detroit C. & B. Rolling Mills*, 56 Mich. 117, 22 N. W. 317, 23 N. W. 186; *Wilbur v. Stoepel*, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568. None of these cases sustain defendant's contention in the broad form in which it is made. They do hold that it is contrary to public policy for a stockholder in a corporation, who does not own all the stock, so to bind himself by contract that he will be liable in damages if the other party is not kept in office by the corporation.

The contract sued on in this case does not in form undertake to make or keep the plaintiff an officer of the Central Company. The defendant binds itself to commit to him the general management of its Michigan business. It may have been, and the record shows that it was, in the contemplation of the parties that the defendant should operate its business in Michigan through the Central Company. So far, however, as the agreement between plaintiff and defendant was concerned, the defendant could have at any moment changed its mind in this respect, without the plaintiff having any right to complain. He was entitled, so long as he remained in defendant's employ, to man-

age its Michigan business. It was for it to say whether it would or would not use the Central Company in connection with that business, and to what extent. Moreover, all the cases hold that such contracts, when void, are so because they are made without the knowledge and consent of minority stockholders. If enforceable, the majority cannot permit the removal of the other contracting party from his corporate office or employment, except at the risk of exposing themselves to personal liability to him.

When the reason for the rule does not exist, the rule is inapplicable. The defendant has not affirmatively shown that there were, otherwise than in name, any other stockholders in the Central Company. It is agreed that at all times the defendant owned 90 per cent. of the Central stock. The defendant sets up this defense. The record shows that the connection between it and the Central Company was most intimate. If it be a fact that the Central Company had other stockholders than the defendant, that such other stockholders had an appreciable pecuniary interest in it, and did not know of the contract with the plaintiff, it will be easy for the defendant to prove such facts. We think the burden of proof is on it. If there shall be a new trial of the case, the defendant may, if it wishes, show precisely who the stockholders of the Central Company were at the time the contract was made, and at any other times which it may think relevant, and what the amount and character of their holdings were.

The defendant says that in any event such a contract as that sued on in this case is beyond the corporate powers of the defendant corporation. It admits that such powers are broad. There is no question that it is expressly authorized to hold stock in such a corporation as the Central Company; but even under such circumstances, it argues, it may not use or contract to use its funds in augmenting the salary of one who is serving it, if he is serving it at all, only as an officer of a corporation in which it is a stockholder. The rules of law which should be applied to relations between one corporation and another in which it is a stockholder are still to a large extent in the making. It is quite possible that they are and should be different, when there are other real and substantial holders of stock, from what they are when to all practical intents and purposes the other corporation is the sole holder. The relation between these two corporations in this respect will doubtless be clearly shown at a new trial, if one is had. Until then we prefer not to deal with what well may become moot questions.

The defendant's assignments of error thus far discussed, so far as they were raised below at all, arose either out of the action of the court in overruling the defendant's demurrer to the plaintiff's declaration, or out of its rejection of defendant's prayer for an instructed verdict.

The defendant says there are other reasons why it was entitled to such an instruction. It claims the letter sued upon upon its face shows that a formal contract was to be substituted for it; that the contract was the act of the president alone, and was not binding upon the defendant unless and until it was ratified by its directors; and

that the plaintiff, by accepting the presidency of the Central Company and receiving salary therefrom, voluntarily rescinded or abrogated his contract with the defendant.

There was evidence in the record from which it might be found that the parties subsequently mutually agreed that it was unnecessary to formulate any other contract; that the letter of April 23d sufficiently embodied the agreement between them; that such contract was afterwards ratified by the defendant's board of directors; and that neither party considered the acceptance by the plaintiff of the presidency of the Central Company as anything else than one of the things he was expected to do under the contract.

In so far as these issues depended upon the construction of written instruments, they were for the court. So far as they in whole or in part turned upon the conclusions to be drawn from oral testimony, they were for the jury. We see no error in the action of the court below with reference to them.

We come now to the consideration of the more difficult portion of the case.

[4] Defendant had offered to prove that plaintiff had taken \$10,-785.60 out of the treasury of the Central Company and had never accounted for it. The court excluded such testimony. Defendant could not set off against what it might owe the plaintiff specific sums due by the latter to the Central Company. Its relations to its subsidiary corporation and to the other stockholders therein, if any there were, might be such that it would be bound by a contract to pay for services rendered to the company in whose prosperity it was so greatly interested. It does not follow that it can in its own name or right recover debts due the Central Company.

One corporation often finds it convenient to operate through another company, all or the majority of whose stock it owns, and whose operations it absolutely controls. Those who manage such corporations have a keen appreciation of one ultimate fact. They know that the subsidiary corporation must do whatever the controlling corporation demands. They not infrequently pay little attention to the form in which legal theory requires that corporate action shall be taken. Substantial rights thus become entangled in a mesh of legal difficulties and perplexities, both of substance and of procedure. Sometimes justice can be done only by cutting through this net, or by pushing it bodily aside. When fraud cannot be otherwise prevented, such course has often been taken. No new principle is thereby established. There is no promulgation of a doctrine which may logically lead to consequences undreamed of by the judge or chancellor who proclaimed it. Nothing more is done than to make a new application of the old rule that the courts will strip from fraud whatever mask it may assume.

There may be other circumstances under which a court would be justified in ignoring the corporate form given to the transaction, in order that right may be done to the interests involved. Whether this ever can be done, and, if so, under what circumstances, need not be here determined. It certainly ought not to be attempted unless jus-

tice cannot be otherwise attained, or unless the doing of it is in accordance with some legal principle which can properly be applied to all like cases. We know of no rule which, under the circumstances of this case, would permit the setting off against a debt due by a controlling corporation to a third party of an indebtedness of such third party to a subsidiary company.

Right and justice may be done to the defendant without making new law. The plaintiff says that substantially the whole of the services for which the defendant promised to pay him were to be performed for the Central Company. It was implied in his undertaking, as in all such contracts, that he was to discharge his duties honestly and faithfully. If he did not, he was not entitled to the compensation agreed to be paid him. Whatever his rights might be in a suit upon a quantum meruit, he could not in such case recover upon a special contract. We think, therefore, that the defendant was entitled to prove, if it could, that the plaintiff had not accounted for a large sum of money belonging to the Central Company, and which he had taken from the latter, and that it should have been allowed to do so.

By his contract he undertook to operate the promotion part of the business at an expense not to exceed 20 cents per square yard of pavement laid, and that he would take no work which would not show a profit when the calculations were made in a certain definite way. Defendant offered to prove that the promotion expenses of the Central Company during the time its operations were controlled by the plaintiff greatly exceeded 20 cents per square yard, and that much work was undertaken which did not show a profit according to the standard set up in the contract. It appears to us that this was its right, and that the refusal to permit it so to do was error.

There would seem to be only two possible contentions open to the plaintiff. Either he was to serve the defendant directly and exclusively, or he was to serve it by managing the Central Company. Upon the former alternative his contract would have ended when he entered into the employ of the latter. He claims that his agreement contemplated that he was to act through the subsidiary corporation. We have held that he was entitled to take such position. It necessarily follows that the conditions under which he undertook to do the work are applicable to what he did for that company.

Plaintiff says that he did not agree to keep promotion expenses down to 20 cents a yard and to show a profit in all the work which he took. He claims that the language in the agreement upon which defendant bases the contention that he did so is nothing more than the expression by him of an expectation that he would be able to achieve those desirable results. We cannot agree with him. There is nothing in the language of the contract which would justify such a construction. There is nothing ambiguous about it, nor is the interpretation we give it in any wise unreasonable as viewed from the position in which the parties stood at the time it was entered into. The plaintiff was then in the employ of the defendant. He was receiving a salary of \$3,000 a year. Its Michigan business was in bad shape. He was

put in charge of it. He promised to attain certain specified and highly advantageous results. It promised to pay him a greatly increased compensation. Defendant could, if it had seen fit, have waived the performance by the plaintiff of the whole or any part of what he undertook to do. We do not find in the record any documentary evidence that it did so. As a rule, whenever he asked the defendant for any of the sums for which he is now suing his attention was called to the fact that the business had not been profitable and that the promotion expenses had been too great. If there is any other evidence that the defendant waived its right to rely upon the plaintiff's breach of these undertakings on his part, it was a question for the jury under proper instructions from the court. We find nothing in this record which would justify us in holding that as a matter of law such waiver had been shown.

The judgment below must be reversed, and a new trial granted.
Reversed.

UNITED STATES v. KOLODNER.

(Circuit Court of Appeals, Third Circuit. April 17, 1913.)

No. 1,719.

ALIENS (§ 67*)—NATURALIZATION—(CONSTRUCTION OF STATUTE—"DISTRICT."

Naturalization Act June 29, 1906, c. 3592, § 3, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 529), confers on the federal courts in any state, for certain named territories, and the Supreme Court of the District of Columbia, and state courts of record and general jurisdiction, exclusive jurisdiction to naturalize aliens. Section 4 provides that an applicant must have been a resident of the United States for five years continuously, and of the "state, territory, or district" for one year, immediately preceding the application. Section 9 provides that every final hearing upon such petition shall be had in open court before a judge, and that the applicant and witnesses shall be examined under oath "before the court and in the presence of the court." Section 10 provides that, in case the petitioner has not resided in the "state, territory or district" for the full five years, he may establish the time of his residence within the state by two witnesses, and the remaining portion of his five years' residence within the United States may be proved by deposition. *Held*, that the word "district," as used in connection with the words "state" and "territory" in sections 4 and 10, refers to the District of Columbia, and not to the judicial district in which the petition is filed, and a petitioner who has resided within the state, but not within such judicial district, for the required five years, cannot establish any part of such residence by deposition.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 131-137; Dec. Dig. § 67.*

For other definitions, see Words and Phrases, vol. 3, pp. 2136-2138; vol. 8, pp. 7639, 7640.]

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Petition by the United States against Jacob Kolodner for cancellation of certificate of naturalization. Petition dismissed, and the United States appeals. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

For opinion below, see 199 Fed. 809.

Andrew B. Dunsmore, of Wellsboro, Pa., for the United States.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the order and decree of the district court of the United States for the middle district of Pennsylvania, in a proceeding under section 15 of the Act of June 29, 1906 (34 Stat. 601, c. 3592 [U. S. Comp. St. Supp. 1911, p. 537]), instituted July 13, 1912, by the district attorney of the United States for the middle district of Pennsylvania, to cancel a certificate of citizenship granted to the appellee, Jacob Kolodner, by the court below on the 28th day of November, 1910.

The petition of the district attorney represents that on the 24th day of February, 1910, the appellee, an alien, a subject of the Emperor of Russia, filed in the circuit court of the United States for the middle district of Pennsylvania his application for admission to citizenship of the United States, alleging that he had resided continuously in the United States and in the state of Pennsylvania for the term of five years at least, immediately preceding the date of his application; i. e., since the 15th day of June, A. D. 1902. The petition was supported by the affidavits of the petitioner and two witnesses. In these affidavits, the witnesses deposed that the petitioner was personally known to them, and that he had resided in the United States and in the state of Pennsylvania continuously for a period of two years immediately preceding the date of filing his application. In order to establish the other three of the five years of continuous residence required by the act of Congress, the applicant produced to the court, upon the hearing of his application, the depositions of two witnesses taken in the city of Philadelphia. These witnesses deposed to the residence of the petitioner in the United States and in the state of Pennsylvania from February 24, 1905, to a day unstated in the year 1908. Such proof, by deposition, was accepted by the court to complete the proof of that portion of petitioner's five years' residence within the United States, which was not covered by the affidavits accompanying the petition or by the testimony of the affiants in the presence of the court. Upon these proofs, the petitioner was admitted to citizenship by the court below on the 28th day of November, 1910.

After hearing argument on the proceedings for cancellation, the respondent being personally present but filing no answer, the court, on October 26, 1912, entered a decree denying the petition of the government, and from this decree the government takes the present appeal.

The facts, as stated in the petition of the government, are uncontroverted.

The act of Congress of June 29, 1906, above referred to, is entitled "An act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States." By its provisions, Congress has indicated its purpose to make more stringent than theretofore the conditions upon

which, and the procedure by which, the privilege of citizenship may be obtained by aliens. The portions of the act material to the present case are as follows:

"Section 3. That exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts:

"United States circuit and district courts now existing, or which may hereafter be established by Congress in any state, United States district courts for the territories * * * the supreme court of the District of Columbia, and the United States courts for the Indian Territory; also all courts of record in any state or territory now existing. * * *

"That the naturalization jurisdiction of all courts herein specified, state, territorial, and federal, shall extend only to aliens resident within the respective judicial districts of such courts.

* * *

"Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

* * *

"Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition:

* * *

"The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits, that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the State, Territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States.

* * *

"Sec. 9. That every final hearing upon such petition shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court.

"Sec. 10. That in case the petitioner has not resided in the state, territory, or district for a period of five years continuously and immediately preceding the filing of his petition he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the state, provided that it has been for more than one year, and the remaining portion of his five years' residence within the United States required by law to be established may be proved by the depositions of two or more witnesses who are citizens of the United States, upon notice to the Bureau of Immigration and Naturalization and the United States attorney for the district in which said witnesses may reside."

In view of these provisions of the Naturalization Act of June 29, 1906, the question here presented is, Did section 10 thereof permit the

applicant for naturalization, who had resided within the state of Pennsylvania, where his petition was filed, for a period of five years continuously and immediately preceding the filing of his petition, to take depositions in such state but outside of the judicial district where applicant lived, to establish a portion of the five years residence required to be proven by said act?

The court below has answered this question in the affirmative, on the ground that, though the applicant had resided in the state for the requisite continuous period of five years, he had not so resided for the whole of that period within the federal judicial district of that state, where his application for naturalization was filed.

The question is not without difficulty, but we think that a careful examination of the provisions of the Act above recited makes it clear that the legislative intention, as expressed by the language employed, does not justify the interpolation of the word "judicial" before the word "district," in the second line of the tenth section thereof.

It will be observed that the section immediately preceding section 10 of the act requires that every final hearing upon such petition shall be had in open court before a judge thereof, and that upon such final hearing the applicant and witnesses shall be examined under oath, before and in the presence of the court. In section 10, the framers of the Act, evidently having in mind the difficulty of producing witnesses to prove a residence for a portion of the period of five years in another and perhaps distant state or territory from that in which the application is made, provided that the depositions of such witnesses in other states or territories might be taken where they resided, and used in lieu of testimony before the court, as to the fact of residence in another state, territory or District of Columbia. Section 10 is manifestly an exception to the express rule of section 9, requiring all witnesses as to the period of residence to be examined under oath and before and in the presence of the court. The wisdom of this general rule, founded as it is upon a wide and long experience as to the best method of establishing the truth of facts alleged or in controversy, especially commends itself in a case like the present, where the law is seeking to guard the granting of the privilege of citizenship to aliens by requiring the strictest proof of the important and essential conditions of residence within the country. Clearly, the exception to the general rule should not be loosely construed, and no interpretation thereof should be indulged in, which is not warranted by express language of the act, or, where the language is doubtful, is not made necessary by the general scope and purpose of the act.

Looking through the whole act, and dwelling upon the parts thereof which have been above quoted, we think there will be little difficulty in giving its proper and intended meaning to the word "district," as used in the tenth section of the act and in the next to the last paragraph of section 4. By the third section, the United States circuit and district courts in any state and for certain named territories, and the Supreme Court of the District of Columbia, and state courts of record have conferred upon them exclusive jurisdiction to naturalize aliens. "States," named "territories" and "District of Columbia" are

all well-defined geographical and political names, and together comprise the whole or the largest part of the territory over which the jurisdiction of the Constitution and laws of the country extend. In this view, there seems to be no difficulty in referring the word "district," in section 10, to the "District of Columbia," one of the three geographical names enumerated in section 3, to describe the habitat of the courts upon which exclusive naturalization jurisdiction is conferred. The order in which the words are used is the same,—state, territories, and district. It hardly needs reference to the principle of *noscitur a sociis*, in the interpretation of this statute, to hold that the word "district," in the fourth and tenth sections, refers to the District of Columbia, mentioned in the third section, and belongs to the same class of geographical and political names to which the words "state" and "territory" immediately preceding in the fourth and tenth sections, belong. As said by the learned counsel for the government:

"It does not comport with the rules of grammatical construction to recite in series and without qualifying words, divisions of two distinct kinds."

If the word had been left out in either of the sections, there would have been no provision for the operation of those parts of the enactment in the District of Columbia. The generic name "district" is sufficient to identify the special appellation "District of Columbia," just as the word "territory" refers to the territories of Arizona, New Mexico, etc.

Moreover, the framers of the act did not omit to use the word "judicial," when they referred to judicial districts, as in the third paragraph of section 3, above quoted, and also in section 15. It cannot be claimed that the word "district" would have no force or effect if the qualifying adjective "judicial" be not read in with the provisions cited in section 4 and 10. On the other hand, if the word "judicial" is read into those sections before the word "district," the preceding words, "state" and "territory," are mere surplusage, and that canon of construction which requires that every word of a statute should, if possible, be operative, would be disregarded. Again, the evident intent to establish a uniform system of naturalization throughout the United States, its territories and District of Columbia, would be thwarted, and the strict requirements in regard to the character of the testimony requisite to establish the conditions of citizenship, as set forth throughout the act, and especially in the sections above quoted, would in some respects be inapplicable to the District of Columbia.

We think, therefore, the language of the act, taken in connection with its scope and declared purpose, does not justify the interpretation by which the word "district," in the fourth and tenth sections thereof, should be qualified by the word "judicial," and, on the contrary, that a just interpretation requires, that by the word "district," in these sections, reference is made to the generic designation of the District of Columbia, as used in the third section of the act.

This conclusion may be, and doubtless is, a hardship imposed upon the applicant in this case. We may not, however, in order to avoid the hardship of a particular case, relax the strict requirements imposed by the law making power upon those who seek to obtain the

privilege of citizenship in the United States, or impair in any degree, by judicial interpretation, the safeguards sought to be thrown around the citizenship of the country.

The judgment below is therefore reversed, with instructions to the court below to enter judgment of cancellation in accordance with the government's petition.

MAZZARIELLO v. DOHERTY.

(Circuit Court of Appeals, First Circuit. April 18, 1913.)

No. 993.

JUDGMENT (§ 828*)—RES JUDICATA—GROUNDS OF LIABILITY.

Plaintiff, while employed by defendant, was injured by the breaking of a wagon, and brought suit in the state court to recover damages, alleging a cause of action under the Massachusetts Employer's Liability Act (Rev. Laws Mass. c. 106), charging a defect in defendant's ways and works, in that the wagon was rickety, unsafe, overloaded, and unsuitable. Judgment having been rendered for defendant in that case, plaintiff sued in the federal courts, stating a cause of action for the same injuries for violation of defendant's common-law duty to furnish plaintiff with a reasonably safe place to work. Held that, since both of such alleged grounds of liability might have been pleaded and relied on by plaintiff in the state court, the Massachusetts judgment for defendant was res judicata, and a bar to the proceeding in the federal court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.*]

Conclusiveness of judgment as between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank of Memphis v. City of Memphis*, 49 C. C. A. 468; *Converse v. Stewart*, 18 C. C. A. 215.]

In Error to the District Court of the United States for the District of Massachusetts; Le Baron B. Colt, Judge.

Action by Francisco Mazzariello against James Doherty. Judgment for defendant, and plaintiff brings error. Affirmed.

John T. Wilson, of Boston, Mass., for plaintiff in error.

John F. Cronan, of Boston, Mass., for defendant in error.

Before DODGE, Circuit Judge, and ALDRICH and BROWN, District Judges.

ALDRICH, District Judge. The plaintiff first brought an action in the state court of Massachusetts to recover compensation for the same injury complained of here, and by his declaration based his supposed right upon the Employer's Liability Act (Rev. Laws Mass. c. 106), and alleged a defect in the ways and works of the defendant. The offending thing which caused the injury complained of was a wagon, which, as alleged, was rickety, unsafe, overloaded, and unsuitable. The case was turned against the plaintiff, and a general verdict directed for the defendant, after two trials upon the merits, and under instructions and a special verdict that the defendant was not the owner of the wagon in question.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Certain exceptions were taken by the plaintiff in the state court, but were not prosecuted. The plaintiff subsequently brought a suit in the United States court for the District of Massachusetts to recover for the same injury by the same offending thing, and based his right upon an alleged failure of the defendant's common-law duty to furnish a reasonably safe place for the performance of the work which the plaintiff was supposed to do.

The defendant herein pleaded the former judgment in the state court in abatement or in bar of the proceeding here, and the plea was sustained, upon the ground that the rights of the plaintiff were concluded by the trials and judgment upon the merits in the state court.

There are some cases, based upon exceptional situations, like *Union Pacific Railroad v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, and *Boston & Maine Railroad v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193, which, for the purpose of determining when the statute of limitations begins to run, treat the common-law right and a statutory right as presenting different causes of action.

We look upon these authorities as somewhat exceptional, and as by no means conclusive of the broader question before us.

The unquestionable general rule is that only a single cause of action in respect to the same injury springs from a single transaction, though it may give rise to different kinds of relief. Moreover, the situation here is a local one, and the rights of the parties are to be determined with reference to the law of Massachusetts. It was unquestionably open to the plaintiff to seek his relief in either the federal or state tribunal. He elected to have his day in the state court of Massachusetts, one which possesses and exercises the broadest possible common-law jurisdiction, under liberal rules and laws with respect to pleadings and amendments.

It is doubtless perfectly true that the plaintiff might have invoked the two supposed remedies, common-law and statutory, by joining appropriate counts for that purpose, and have elected at the end of the trial upon which he would stand; but, having stood upon the statutory count alone, it was open to him, under the liberal practice obtaining in the Massachusetts courts, at the end of the trial and before final judgment, to turn his case into one which would present the common-law right, thus presenting an issue upon which the case could reasonably have been determined upon the common-law right at the end of the trial already had, because the new pleading would be merely the assertion of a common-law duty in respect to a situation about which there had been a full trial on the merits.

Without regard to whether, in certain special limited and technical senses, there were two causes of action, one statutory and the other common law, the general proposition was early established in Massachusetts, in *Smith v. Palmer*, 6 Cush. 513, that the introduction of a new count for the enforcement of a different form of liability is not a count based upon a new cause of action.

In that case the court referred to earlier cases, saying, at page 519:

"New counts are not to be regarded as for a new cause of action, when the plaintiff in all the counts attempts to assert rights and enforce claims growing out of the same transaction, * * * however great may be the

difference in the form of liability, as contained in the new counts, from that stated in the original counts."

See, also, *Commonwealth v. Company*, 201 Mass. 248, 87 N. E. 590.

Again, in *Clare v. New York, etc., Railroad*, 172 Mass. 211, 214, 51 N. E. 1083, 1084, the court said:

"There was on the facts but one cause of action for personal injuries. This could not be split by the plaintiff into two separate causes of action. The judgment in the former action is conclusive upon the whole cause of action for personal injuries, which could have been tried and determined in that action as between the same parties."

Attention has been called to what, upon a cursory glance, would seem to present inconsistent statements in the opinion of the Massachusetts court in the *Clare Case*; but the seeming inconsistency disappears when it is seen that the court was making a distinction in the first paragraph of the opinion between a second trial for personal injuries, or, in other words, for pain and suffering, and a second trial between the same parties in an action to recover for the death, rather than for personal injuries. And while it is there conceded that a former trial for personal injuries would not operate as a bar to the prosecution of a subsequent case for death, it proceeds to point out that it would be a bar to a second trial between the same parties for the same personal injuries.

It is doubtless true that if, under different rights, there are distinct and different elements of damages recoverable under one right, and not under the other, a former trial would not be a bar to another trial in respect to damages not covered by the earlier trial. This is the doctrine of the *Clare Case*, to which reference has been made, and it is so because the two remedies would not be inconsistent. As explained in the *Clare Case*, a former trial for personal injuries would not be a bar to the subsequent statutory trial for death; and this is so because there would be two kinds of damages, one for personal injuries, or pain and suffering, and another for death. In such a case, there would manifestly be two causes of action, one for pain and suffering, and another for death, and each might be quite independent of the other. But here the damages sought are precisely the same as those sought in the state court, where the plaintiff had a full trial upon the merits; and as said at the conclusion of the opinion in the *Clare Case*, the judgment in the former action is conclusive upon the whole cause of action for personal injuries which could have been tried and determined in that action as between the same parties.

The only difference between the plaintiff's case in the state court and his case here is that the plaintiff here asserts the common-law duty to furnish a safe place, something which he might have done in the state court, thus invoking and availing himself of the common-law right at the end of his trial.

It is the imperative demand of the law that a party shall have his day in court, and a full and fair trial; but it is not the policy of the law to split remedies or facts, in order that the plaintiff may have interminable trials for a single supposed grievance; and it is because of the demands of justice that litigation shall not be endless that the

rule is established in Massachusetts, in conformity with that which exists in England, and generally in this country, that "the parties are concluded by the judgment in the former action, not only upon the issues actually tried and determined, but upon all issues which might have been tried and determined in that action." *Clare v. New York, etc., Railroad*, 172 Mass. 211, 214, 51 N. E. 1083, 1084; *Bassett v. Conn. River Railroad*, 150 Mass. 178, 22 N. E. 890; *Cotter v. Boston & Northern Railroad Co.*, 190 Mass. 302, 76 N. E. 910.

The last case cited is one in which a different right was alleged from that involved in the former trial.

As to the attitude of the authorities of the United States courts upon the question as to the extent and conclusiveness of a former trial as a bar to subsequent proceedings between the same parties, grounded upon negligence in respect to the same occurrence, see *Stark v. Starr*, 94 U. S. 477, 485, 24 L. Ed. 276; *Roberts v. No. Pacific Railroad*, 158 U. S. 1, 28, 15 Sup. Ct. 756, 39 L. Ed. 873; *Columb v. Webster Mfg. Co.*, 84 Fed. 592, 28 C. C. A. 225, 43 L. R. A. 195.

The former judgment between these parties should be treated as conclusive, because the plaintiff elected to prosecute his case before a state court, and elected to stand upon a statutory right, and to take a result based upon a full trial upon the merits, rather than invoke the common-law right by putting it in issue and having that remedy applied to the merits of his case as then and there already presented.

In the sense of the *res judicata* rule, the plaintiff is seeking here to apply a different rule of duty and liability to the occurrence, the injury, and the cause of action in respect to personal injuries, from that invoked in the proceeding in which he had a full trial before a court of general jurisdiction; upon such pleadings and issues as he saw fit to employ. What he is attempting to do here is something he could have done there as well as here, and something which he ought to have done there, if he intended to invoke the common-law right; and, having failed to do that, he is estopped from prosecuting that right in an independent proceeding before another court.

Judgment of the District Court affirmed, with costs.

In re P. SANFORD ROSS, Inc.

Appeal of WENDELIN.

(Circuit Court of Appeals, Second Circuit. February 10, 1913. On Petition for Rehearing, February 28, 1913.)

No. 178.

1. SHIPPING (§ 209*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—ISSUES—EFFECT OF PRIOR JUDGMENT.

Where a shipowner does not institute proceedings for limitation of liability until after the damage claimant has recovered a judgment against it in a state court, it is concluded in such proceedings by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

decision of the state court on all the issues involved in the action before it.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*]

2. JUDGMENT (§ 713*)—CONCLUSIVENESS OF ADJUDICATION—MATTERS CONCLUDED.

A judgment on the merits is conclusive as to every matter offered and received to sustain or defeat a demand.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.*]

3. SHIPPING (§ 209*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—ISSUES AND PROOF.

Where a judgment was recovered in a state court against a corporation, owner of a floating pile driver, for the death of an employé thereon, in which action the plaintiff alleged that the death was caused by the fault and negligence of the defendant in failing to provide a proper and safe appliance, and evidence was received on such issue, in a subsequent proceeding by such defendant for limitation of liability, the only question to be determined is whether such fault or negligence was with its privity or knowledge, and being a corporation, to entitle it to the benefit of the statute, it is required to show affirmatively that the absence of the appliance was without the privity or knowledge of its superintendent, who was charged with the duty of seeing that the vessel was properly equipped.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*]

4. SHIPPING (§ 207*)—LIMITATION OF LIABILITY—PRIVITY OR KNOWLEDGE—CORPORATION.

A corporation, owner of a floating pile driver, which for five years had lacked an appliance essential to its operation with safety to the employés working thereon, is chargeable with knowledge of the defect, and is not entitled to a limitation of liability against a claim for the death of an employé resulting from such defect.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 555, 643, 644; Dec. Dig. § 207.*]

Limitation of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

Appeal from the District Court of the United States for the Eastern District of New York; Thomas I. Chatfield, Judge.

Proceedings in admiralty by P. Sanford Ross, Incorporated, for limitation of liability. From a decree granting such limitation, *Ida Wendelin*, administratrix of *Frithof Wendelin*, deceased, appeals. Reversed.

For opinion below, see 196 Fed. 921.

See, also, 200 Fed. 1023.

The claimant's intestate was employed upon the pile driver belonging to the petitioner, which is a corporation, and while so employed received injuries from which he died. The claimant brought a common law action against the petitioner to recover damages for negligence causing the death of her intestate and obtained a verdict for \$8,000. The petitioner thereupon filed a petition for limitation of liability, surrendered the pile driver to a trustee, and without further contesting its liability for the accident, asserted the right to limit its liability to the value of the pile driver.

Two principal questions were raised before the District Court: (1) Whether the limitation of liability statutes applied in the case of a pile driver; (2)

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Whether the accident occurred without the privity or knowledge of the petitioner.

The District Court ruled upon both these questions in favor of the petitioner and the claimant has appealed to this court.

Anthony J. Ernest, of New York City, for appellant.

E. G. Benedict, of New York City, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). In considering this case it may be unnecessary to determine whether the pile driver, under all the circumstances, came within the limitation of liability statutes. If the statute applied and yet the accident occurred through fault within its privity or knowledge, the petitioner is not entitled to benefit by it. The determination of the question of privity or knowledge may be decisive.

[1] The petitioner might have applied to limit its liability as soon as the claim in question arose and thus have brought all the issues into the District Court. It did not choose to do so and left some issues to be decided in the common law court. It is bound here by the decision upon such issues. In *re Old Dominion S. S. Co.* (D. C.) 115 Fed. 845; *The Capt. Jack* (D. C.) 169 Fed. 455.

The complaint in the common law court alleged, among other things, that there were defects in the ways, works and machinery through the fault of the defendant—the petitioner. Elsewhere it stated that the defect was the absence of braces to control piles while being driven. From the testimony in the common law case which was read into the present record, it appears that the absent brace was a “chock-block” which is a wedge-shaped piece of wood used, when necessary, to prevent a pile while being driven from springing out of proper alignment. There was also testimony that no chock-block was supplied or used upon this pile driver and, although there was much evidence to the contrary, that its absence caused the accident.

[2] Upon such allegations and evidence the judgment in the common law action necessarily went much further than to find mere negligence in the petitioner's subordinate employes. It adjudicated that the petitioner was itself negligent in failing to equip the pile driver with a chock-block. These questions were raised by the pleadings, and evidence was offered upon them. They were settled by the judgment and it is not material that it may have settled other questions or that other grounds of negligence may have been charged. A judgment on the merits is conclusive as to every matter offered and received to sustain or defeat a demand. 23 Cyc. 1169, 1170.

[3] When therefore, the case came into the District Court, the only question was whether the absence of the chock-block was with the privity or knowledge of the petitioner. The finding in the common law case that the petitioner failed in its duty to properly equip did not establish that. But the petitioner is a corporation, and is charged with the knowledge of its officers or agents who have charge of the particular subject matter. Undoubtedly its high officers were not per-

sonally informed as to the details of the equipment of all the vessels belonging to their corporation. But it had a superintendent whose duty it was to see that all vessels were in repair and properly equipped. The petitioner failed to show that the absence of a chock-block was without the knowledge of such superintendent. It failed to show that the pile driver when built was supplied with a chock-block or that it ever had one. Consequently the petitioner failed to show want of privity or knowledge and, in view of the common law judgment, fails to bring itself within the limitation of liability statute. In re Jeremiah Smith & Sons, 193 Fed. 395, 113 C. C. A. 391.

The decree of the District Court is reversed with costs and the cause remanded with instructions, in case the claimant apply therefor, to decree in her behalf to the extent of the fund in the hands of the trustee without prejudice to her right to collect the remainder of her judgment.

On Petition for Rehearing.

Martin T. Manton and Anthony J. Ernest, both of New York City, for appellant.

Everett, Clark & Benedict, of New York City (Edward G. Benedict, of New York City, of counsel), for appellee.

PER CURIAM. In view of the petition and the brief accompanying it, we have again considered the question whether the petitioner sustained the burden of showing that the failure of a master's duty upon which the common law judgment was based, was without its privity or knowledge.

The petitioner is apparently a large corporation having different departments of business, over one of which Campbell was superintendent. It is not satisfactorily shown that any duly elected officers of the corporation had any duty of inspecting the pile driving plant under him. There is no proof that the pile driver, either as part of the structure or of the equipment, ever had a chock-block and Campbell certainly was aware of its condition. Under such circumstances we still think he was such a representative of the corporation that his knowledge was imputable to it. While the cases generally speak of the knowledge of managing officers as being the knowledge of the corporation, the real test is not as to their being officers in a strict sense but as to the largeness of their authority. Upon the record as it stands we are satisfied that our former conclusion was correct.

[4] The petitioner further urges that we should now take further testimony as to the authority actually possessed by Campbell. It is possible that we should give weight to this request were it not for another consideration which we did not lay stress upon in the opinion. It is entirely clear from the testimony, as already pointed out, that this vessel which was rebuilt by the petitioner as a pile driver had been lacking in a chock-block for five years before the accident. Whatever may have been the authority of the superintendent, the corporation must be presumed to have had knowledge of such condition, and this presumption is not overcome by general statements of the elected officers that they kept the vessel in good repair and knew of no defects in it.

Their testimony was not directed to chock-blocks and the proof is that none was ever supplied. A corporation cannot be excused for a long continued and apparent structural defect or for lack of necessary equipment without any proof that a supply of such equipment was available or that it was the duty of any agent to obtain it.

The case was apparently tried in the common law court upon the theory that chock-blocks were not necessary and, consequently, that the petitioner omitted no duty in failing to supply them. The common law judgment negated this theory and produced a situation where the establishment of want of knowledge or privity was particularly difficult. In such situation we think the proof offered entirely insufficient for the purpose.

The petition for a rehearing is denied.

THE RHEIN (and two other cases).

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 141.

1. COLLISION (§ 70*)—STEAMSHIP AND VESSELS MOORED AT END OF PIER—FAULT.

Three barges, placed by a steamship company at the end of one of its piers at Hoboken, where they projected some 125 feet into the river, were injured in a collision with an incoming steamship of another line. This vessel was intending to enter the third slip above, some 800 feet or more away, and when she headed in was caught by the ebb tide and carried down against the barges. It was in the daytime, with clear weather, and the barges were seen. *Held*, that it was the duty of the steamship to make due allowance for their presence and govern her movements accordingly, and that she was solely in fault for the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 91-100; Dec. Dig. § 70.*]

2. STATES (§ 12*)—BOUNDARIES—JURISDICTION OVER NAVIGABLE WATERS—HARBOR REGULATIONS—NEW YORK HARBOR.

Section 879 of the Greater New York Charter (Laws 1897, c. 378), which provides that it shall be unlawful for vessels to tie at the end of a pier in the North or East Rivers, except at their own risk of injury, does not apply to piers on the New Jersey shore, jurisdiction over which was expressly reserved to that state by the agreement of September 16, 1833, confirmed by Congress in Act June 28, 1834, c. 126, 4 Stat. 708.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 6-11; Dec. Dig. § 12.*]

These causes come here upon appeals from decrees of the District Court, Southern District of New York, which held the Hamburg-American Line solely liable for damages sustained by three barges, which lay at the end of the Hamburg pier No. 1, Hoboken, N. J., by collision with the North German Lloyd steamship Rhein. The pier in question was the upper one of three occupied by the Hamburg Line. Between 10 a. m. and the time of collision, 12:20 p. m., the latter company had shifted four barges from the slip between piers 2 and 3 to make room for a ship sailing from pier 3 at 5 p. m. There was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

room in another of its slips to place these barges, but for its own convenience it moved them thus early and placed them at the end of pier 1 abreast of each other, so that they projected out into the river about 125 feet.

The North German Lloyd occupies the three piers next above the Hamburg's of which the northmost is pier 1. The Rhein came in from sea, intending to take a berth on the southerly side of pier 1. In order to do this she would have to come in on the northeast corner of pier 2 and then warp herself into the slip between that pier and pier 1. The distance between Hamburg pier 1, where the barges lay, and North German Lloyd pier 2 was about 750 feet; pier 3 of the latter company lying between. As the Rhein drew near to pier 2 of her own line, and when about off pier 1 of the Hamburg Line, she turned towards the shore, was caught on her starboard by the ebb tide, and came down upon the barges, causing the damages to recover for which these libels were brought.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Robinson Leech, both of New York City, of counsel), for appellant.

J. L. Seager, of New York City (A. J. McMahon, of New York City, of counsel), for libelant.

Foley & Martin, of New York City (F. A. Spencer, Jr., and J. F. Foley, both of New York City, of counsel), for Wright & Cobb Co.

Choate & Larocque, of New York City (Joseph Larocque, of New York City, of counsel), for the Rhein.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). [1] Whether these four barges were tied up where they were with or without sufficient excuse, they certainly constituted no hidden peril. Neither the darkness of night, nor fog, nor falling rain or snow obscured them from an approaching vessel till she was almost upon them. It was broad daylight, and they were visible (and were seen) far enough off to advise such vessel of their whereabouts, that they were not navigating, and that if she undertook to pass them she must do so without any assistance from them.

The Rhein was, therefore, fully advised of the problem before her. She knew the strength of the ebb tide which ran true there, she knew the force and direction of the wind and its probable effect upon her own superstructure, she knew her own power and speed and her measure of steerage way, she knew how much or how little she could deflect from a heading true to the tide without precipitating the buck or sheer which would come when she finally turned in for her landing to swing down against the corner of pier 2. If with all this information she came into contact with vessels made fast, the burden of excusing herself from fault is most strongly upon her. The only excuse she offered for not dealing safely with the situation she encountered is the presence of a south-bound tug and tow. That there was such a flotilla we do not doubt. The captain and the first officer so testify, and we see no reason to doubt their testimony. We are not

satisfied, however, that their presence necessitated navigation, which brought about the sheer to port. The diagram submitted by the captain of the Rhein indicates that this tug and tow were so far to the eastward of the course the Rhein was holding, to make her pier, that there would be no occasion to modify that course because of their presence.

The captain further says that the tug and the tow sheered over to the steamer's starboard bow; whether before or after exchange of signals we do not discover. That is exactly what the tug would do under the circumstances, for her master could see the Rhein was a North German Lloyd steamer heading for the piers of that line, and, although he might be a little on her port bow when he first saw her, a prudent man would not be likely to try to run in between her and the piers. In the memorandum made at the time by both captain and first officer, no mention is made of this tug. The steamer's sheer is described as "unaccountable," which it certainly would not be if she starboarded sooner than she had intended to because a tug interfered with her, and in that way exposed herself to be bucked by the ebb tide.

Finally, the pilot who was navigating the Rhein testifies that he has no recollection of the presence of the tug and tow, which would hardly be if she had been a factor in his navigation. Moreover *his* statement to the board of pilot commissioners, made on the day of the accident, contains no reference to this tug and tow. He testified on the trial that when he got outside of the barges and nearly abreast of them he put the steamer on a course with the pier and stopped. It was then that the tide caught her bow and bore her down upon the barges. Our understanding of what happened is that the steamer's navigator turned in for his pier too soon, and that this was his own miscalculation, not brought about by the unexpected appearance of any tow which embarrassed his proceeding on the course plotted on the captain's diagram as the one they intended to take. For the results of the collision with these barges tied up to the pier we think the steamer is responsible.

It was found below that the Hamburg Line was in fault for placing those four barges at the end of the pier, so as practically to extend it 125 feet, and thereby embarrass the movements of any steamer trying to make the piers above them on an ebb tide.

It is not infrequent for barges to be tied up temporarily at the end of a Jersey pier, and we cannot see that the tying up of several of them abreast of each other can be held so to obstruct the navigable waters of the Hudson river at the place in question as to constitute negligence and make the person placing them there responsible if some vessel collided with them. The situation here is materially different from that in *The Kennebec* (D. C.) 103 Fed. 681, where the eight boats practically appropriated more than a quarter of a narrow fairway, and lay there in a thick fog without doing anything to advise other vessels of their presence.

[2] Appellee refers to section 879 of the Greater New York Charter (Laws 1897, c. 378), which provides:

"It shall not be lawful for any vessel, canal boat, barge, lighter or tug to obstruct the waters of the harbor by lying at the exterior end of wharves in the waters of the North or East River, except at their own risk of injury from vessels entering or leaving any adjacent dock or pier, and any vessel, canal boat, barge, lighter or tug so lying shall not be entitled to claim or demand damages for any injury caused by any vessel entering or leaving any adjacent pier."

But this section does not apply to piers on the Jersey shore. The agreement between the two states dated September 16, 1833 (4 Stat. at Large), which was confirmed by Congress (Act June 28, 1834, c. 126, 4 Stat. 708), and which gave New York certain jurisdiction over the waters of the North River, expressly reserved to the state of New Jersey exclusive jurisdiction over wharves and docks on the shore of said state and of vessels fastened thereto. The Public Laws of New Jersey of 1883, at page 247, prohibited vessels from anchoring in this part of the river within 300 yards of the end of a pier. This statute was superseded when Congress by Act May 16, 1888, c. 257, 25 Stat. 151 (U. S. Comp. St. 1901, p. 3549), took up the subject of anchorage ground for vessels in the bay and harbor of New York and in the Hudson and East rivers, and comprehensively disposed of it.

Although the presence of the barges at the end of this pier may have embarrassed the Rhein in making her landing, we cannot see how the Hamburg-American Line can be held in fault for the resulting collision.

The decrees are reversed, with costs of this appeal to the claimant Hamburg-American Line against the Rhein, and cause remanded, with instructions to decree in conformity with this opinion.

NEW YORK & P. R. S. S. CO. v. ÆTNA INS. CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 116.

1. INSURANCE (§ 150*)—CONSTRUCTION OF CONTRACT—EFFECT OF RIDER.

The effect of a rider, attached by the insurer to a marine insurance policy, containing a clause that "the terms and conditions of this form are to be regarded as substituted for those of the policy to which it is attached, the latter being hereby waived," is to displace all the terms of the policy, leaving only the formal parts, and substitute those of the rider, and the insurer cannot invoke, as a defense to an action thereon, a limitation contained in the policy, but not in the rider.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 305-307; Dec. Dig. § 150.*]

2. INSURANCE (§ 403*)—MARINE INSURANCE—LOSS THROUGH PERIL OF THE SEAS.

The breaking of the propeller blades of an ocean steamer on a voyage is a loss through perils of the seas, within the terms of a marine policy, where it is shown that the propeller was new, and no latent defects were found therein.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1091; Dec. Dig. § 403.*]

Marine insurance, perils of the sea, see note to *The Dunbritton*, 19 C. C. A. 465.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. INSURANCE (§ 416*)—MARINE INSURANCE—ACTION ON POLICY—DEFENSES.

Conceding that it is the American rule that if a vessel is in a port where repairs may be made, and through negligence they are not made, an insurer cannot be held liable for loss resulting therefrom, it was not such negligence as to relieve an insurer from liability for a steamship to leave port on her return voyage with two of her four propeller blades broken off at half their length, when she had safely navigated for 15 days on her outward voyage in the same condition, and the loss was caused by the stripping off of all the blades by some unknown agency.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1112, 1113; Dec. Dig. § 416.*]

Appeal from the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

Suit in admiralty by the New York & Porto Rico Steamship Company against the Ætna Insurance Company. Decree for libellant, and respondent appeals. Affirmed.

For opinion below, see, 192 Fed. 212.

Foley & Martin, of New York City (J. F. Foley and F. A. Spencer, Jr., both of New York City, of counsel), for appellant.

Burlingham, Montgomery & Beecher, of New York City (Everett Masten, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The libellant, which operates the steamer Santurce for its own account and risk, except of total loss, took out insurance with the respondent, covering the interest of the owner and of itself as charterer of the steamer, for one year from June 2, 1904, to cover risks in the policy mentioned. December 11, 1904, the steamer sailed from New York to ports in Porto Rico. She was then entirely seaworthy. Her propeller was new and she had a spare one on board. On the voyage the increased speed of the engines indicated that something had happened to the propeller. Thereupon the pressure on the intermediate cylinder was reduced, and the steamer proceeded well. At the port of Guanica the vessel was tipped so that it was ascertained that two consecutive blades, each five feet in length, had been broken about half off. On the return voyage the propeller worked well for 2½ days, when the engines speeded up again, and, as was afterwards discovered, the two whole blades and the remainder of the broken blades were stripped off. The vessel had to be helped into Nassau by the steamer Rosewood and her spare propeller there fitted in place. May 29, 1905, the libellant paid a decree rendered against it in the District Court for salvage awarded to the owners of the Rosewood in the sum of \$10,000. In September, 1905, a general average adjustment was made of the salvage and expenses, the proportion of which due by the respondent was \$960.49. May 18, 1910, the libel was filed in this case to recover this sum.

The respondent relies on two express covenants in the body of the policy, namely:

"It is agreed that all claims under this policy shall be void unless prosecuted within two years from the date of the happening of the loss."

"It is warranted by the insured seaworthy at her departure on the pres-

ent voyage, and at the commencement of each passage during the continuance of this policy."

[1] The policy sued upon was delivered by the respondent's agent at Boston, and was the usual printed form of the defendant company, executed by its officers; but upon it was pasted a rider, countersigned by the agent, which contained the following clause:

"The terms and conditions of this form are to be regarded as substituted for those of the policy to which it is attached; the latter being hereby waived."

Judge Hand correctly held that the rider displaced all the terms of the policy, and not merely those which were inconsistent with its own terms. There was nothing left of the original form except the opening clause:

"Ætna Insurance Company, Hartford, Connecticut, by this policy of insurance do make insurance and cause the United States & Porto Rico Navigation Company, as owners, and Porto Rico Steamship Company, as charterers"

—and the subscription clause, duly executed by the officers of the company:

"In witness whereof, the said Ætna Insurance Company has caused this policy to be signed by its president, and attested by its secretary, at its office in the city of Hartford, and state of Connecticut, and this policy is made and accepted upon the above expressed conditions, but shall not be valid unless countersigned by the duly authorized agent of the company at Boston, Mass.

Wm. K. Clark, President.
"Henry E. King, Secretary."

The same view was taken of a rider in *Kuh v. British American Insurance Co.*, 59 Misc. Rep. 589, 112 N. Y. Supp. 410; *Id.*, 130 App. Div. 38, 114 N. Y. Supp. 268; *Id.*, 195 N. Y. 571, 88 N. E. 1122. It follows that the restriction of the right to sue to a period within two years of the date of the loss contained in the body policy does not apply and is no defense. For the same reason the express warranty of seaworthiness at the commencement of each passage must be disregarded.

[2] The next defense is that the libellant has not shown that the loss was covered by the policy. The propeller was new, and no latent defects were discovered in the metal of the blades to explain the accident. The fact that two consecutive blades were broken on the outward voyage, when there is no evidence of racing, indicates strongly that the propeller must have struck some submerged object; likewise the fact that the two remaining blades and the halves that were left of the two broken blades were stripped off at the same time on the return voyage seems to indicate the same thing. Such an accident would clearly be a peril of the seas within the policy. Racing of propellers is too common to be regarded as dangerous. Hundreds of light vessels come to this country every year on voyages during which their propellers race most of the time. If the blades may be broken off under these circumstances in heavy seas, the damage must be regarded as a peril of the sea. The libellant sustained the burden of bringing the loss within the perils insured against.

But if it were to be held that the breaking of the propeller blades on

the return voyage was proximately caused by the negligence of the master, either in not fitting the spare propeller at Porto Rico or in not there loading 6,000 bags of sugar so as to submerge the propeller deeper, as recommended by the surveyors at Mayaguez, the respondent is liable under the Inch-Maree clause contained in the rider which reads:

"This insurance also to cover subject to the special terms of this policy, loss of and/or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the vessel, or any of them, or by the manager."

[3] Finally, respondent insists that it is discharged because the implied warranty of seaworthiness was broken by the condition the vessel was in on leaving San Juan on her return voyage. The breach of warranty of seaworthiness avoids a policy. The law in England seems to be very clear that there is no implied warranty of seaworthiness in the case of time policies. *Gow on Marine Insurance*, 272. On the other hand, our courts seem to take the view that although there may be no implied warranty of seaworthiness, still if the vessel is in a port where repairs may be made, or equipment and supplies obtained, the insured cannot recover for any loss caused by the want of due diligence in making repairs and obtaining equipment or supplies. *Capen v. Washington Ins. Co.*, 12 Cush. (Mass.) 517; *Hoxie v. Insurance Co.*, 7 Allen (Mass.) 211; *Rouse v. Insurance Co.*, 3 Wall. Jr. 367, Fed. Cas. No. 12,089; *Mr. Justice Blatchford in Union Insurance Co. v. Smith*, 124 U. S. 405, 427, 8 Sup. Ct. 534, 31 L. Ed. 497, seems to have assumed that there is an implied warranty at the beginning of the risk under a time policy. The observation was not necessary to the decision of the case, because the policy under consideration contained an express exception of losses caused by unseaworthiness. As to losses subsequently occurring, he held that want of ordinary prudence or diligence in keeping the vessel seaworthy would relieve the underwriters, not absolutely, but only of liability for damage caused by such negligence. See the cases collected in 26 Cyc. 645.

The steamer was concededly seaworthy when she left New York, and we do not think she was unseaworthy when she sailed from San Juan on her return voyage. The burden of proving unseaworthiness is, in the federal courts, upon the underwriters. We find no lack of due diligence in the master in proceeding on the voyage in her then condition. His experience seems to have justified it. The first two blades of the propeller were broken December 15th, and after reducing the pressure in the intermediate cylinder the steamer ran at her usual speed to San Juan, arriving December 17th. From there she proceeded without any trouble to Jobos, Ponce, Mayaguez, Guanica, back to Jobos, and San Juan, leaving on her return voyage December 28th, and not breaking the rest of the blades until December 31st. It is the object of insurance to protect owners, among other things, against the negligence of their servants. We do not discover, under *Insurance Company v. Smith*, such lack of diligence in the master as would discharge the respondent from liability.

The decree is affirmed, with interest and costs.

IN re OCEANIC STEAM NAVIGATION CO. Appeal of LONG ISLAND
LOAN & TRUST CO. In re CASE.

(Circuit Court of Appeals, Second Circuit. February 11, 1913.)

No. 206.

ADMIRALTY (§ 103*)—APPEAL—DECISIONS REVIEWABLE.

An order, made in a proceeding for limitation of liability, enjoining the bringing of actions by damage claimants, is a final order, and reviewable on appeal by a claimant, where it appears that the question of petitioner's right to a limitation of liability cannot be determined before such claimant's cause of action will be barred by limitation.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 712-719; Dec. Dig. § 103.*]

Appeal from the District Court of the United States for the Southern District of New York; Charles M. Hough, Judge.

In the matter of the petition of the Oceanic Steam Navigation Company, owner of the steamship Titanic, for limitation of liability. From an order granting an injunction, the Long Island Loan & Trust Company, as executor, appeals. Petition of Elizabeth C. Case for a writ of mandamus, directed to the judges of the District Court in the same proceedings. On motions to dismiss appeal and for mandamus. Both motions overruled.

See, also, 204 Fed. 260.

Hunt, Hill & Betts, of New York City (G. W. Betts and F. H. Kinnicutt, both of New York City, of counsel), for appellant.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham, J. Parker Kirlin, and N. B. Beecher, all of New York City, of counsel), for appellee.

John C. Prizer, of New York City (Frederick M. Brown, of New York City, of counsel), for claimant.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Two motions have been made: One, to dismiss an appeal; the other, for a mandamus.

As to the motion to dismiss, we think that the injunction order appealed from disposes of appellant's right (assuming that he has rights) with such absolute finality that it may, as to him, be considered a final decision within the meaning of the statute. The motion to dismiss is therefore denied.

Since the claimant in the other application may obtain relief by appeal, it is not necessary to consider the further questions presented by his application for mandamus.

The appeal may be set for argument on the 17th of February.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In re OCEANIC STEAM NAVIGATION CO.

Appeal of LONG ISLAND LOAN & TRUST CO.

(Circuit Court of Appeals, Second Circuit. February 21, 1913.)

No. 206.

SHIPPING (§ 209*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—INJUNCTION
—POWER TO MODIFY.

The authority of a court of admiralty, in proceedings for limitation of liability, in case it finds that the petitioner is not entitled to the benefit of the statute, to retain the cause and proceed to adjudicate and enforce the rights of all damage claimants is not clearly settled, and in view of such fact where it is made to appear that the usual order of injunction granted as of course under the rules, restraining the commencement or further prosecution of suits by such claimants may possibly deprive claimants of all remedy, as where there are claims for loss of life which will become barred by limitation before the right of petitioner to a limitation of liability can be determined, the court has power to modify its injunction to the extent of permitting the formal commencement of suits to preserve the rights of claimants.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*

Limitations of shipowner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

Appeal from the District Court of the United States for the Southern District of New York; Charles M. Hough, Judge.

In the matter of the petition of the Oceanic Steam Navigation Company, as owner of the steamship *Titanic*, for limitation of liability. From an order denying a motion to modify an order, entered in limitation of liability proceedings, restraining the bringing and prosecution of suits, the Long Island Loan & Trust Company, as executor, appeals. Modified.

The appellant is executor of the will of Wyckoff Van Derhoef, who lost his life in the *Titanic* disaster, and claims to have a cause of action therefor against the owner, the Oceanic Steam Navigation Company, the petitioner in the limitation of liability proceedings.

See, also, 204 Fed. 259, 295.

Hunt, Hill & Betts, of New York City (G. W. Betts and F. H. Kinnicutt, both of New York City, of counsel), for appellant.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham, J. Parker Kirlin, and N. B. Beecher, all of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. No question is made that the appellant will lose its right of action for the death of its decedent, if an action be not commenced within 12 months from the death, viz., before April 15, 1913. There is also no question that it cannot be determined before that time whether the petitioner is entitled to limit its liability under the statute. Therefore, in case it should be determined that the pe-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

tioner is not entitled to limit its liability, and that the limitation of liability proceedings cannot then be employed to enforce full liability, the appellant will, by reason of the pending injunction, lose its cause of action. Consequently the appellant contends that the injunction should be so modified that it may at least commence a suit, and so guard its rights.

If the law were well settled that the District Court has not only complete authority to determine the application of the limitation statute, but that, when it finds a petitioner not entitled to benefit by it, it may proceed to enforce the rights of all concerned, there would be no occasion for any change in the injunction. But the law upon this question cannot be regarded as definitely settled, and it seems inexpedient upon an appeal from an order of this kind to attempt to settle it, especially in view of the fact that our decision, if in favor of the appellee, can never be effectively reviewed. Besides, the question may never arise in the proceedings themselves. The petitioner may be permitted to limit its liability. If by the application of equitable principles—which are open to us in these proceedings—we can determine the question now before us, we think it our duty to do so.

In our opinion it is possible to do equity and grant relief in a case where the broad terms of an injunction may, if permitted to stand, operate to destroy many causes of action while their modification can occasion only inconvenience. And we think this relief can be granted without contravening any statute, rule, or established principle. The statute undoubtedly intends that the District Court shall have complete jurisdiction of limitation proceedings and that no other court shall interfere with it. To make such purpose effective the rule of the Supreme Court provides for restraining the prosecution of suits. The jurisdiction of the District Court is, in a broad sense, exclusive. But in our opinion it is not so absolutely exclusive as to tie the hands of the court itself, and prevent it from modifying its injunctive orders, so as to permit technical action in other tribunals not inconsistent with the full exercise of its authority. To permit the formal commencement of suits, but to stay their prosecution, is merely to permit a precautionary step—little more than a notice—and is not to interfere with the jurisdiction of the District Court. If the court should find the petitioner entitled to the benefit of the statute, the suits would end. If the court should deny the petitioner the benefit of the statute, and then assume exclusive jurisdiction to determine and enforce full liability, the suits would likewise end. It would be only in case the court should, after rejecting the application of the statute, find that it could not further proceed, or could proceed only co-ordinately with other tribunals, that the suits would be important. And they might then become important enough to prevent a failure of justice.

For these reasons, the injunction, with respect to all death claimants, may be modified, so as to permit the mere commencement of suits by summons or equivalent process, but otherwise it will stand. It will not be so modified as to permit attachments; that remedy not being essential to the preservation of the cause of action. Costs of this appeal are awarded to the appellant.

THE STEAM DREDGE A.

(Circuit Court of Appeals, Fourth Circuit. March 3, 1913.)

No. 1,139.

MARITIME LIENS (§ 37*)—LIENS FOR REPAIRS AND SUPPLIES—PRIORITIES.

The general rule is that maritime liens for repairs and supplies made or furnished during the same season and within a period of reasonable time will be placed on the same basis as to rank and priority, in the absence of special reasons existing for preferring one over the others.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 58-70; Dec. Dig. § 37.*]

Appeal from the District Court of the United States for the Eastern District of North Carolina, at New Bern; Henry G. Connor, Judge.

Suit in admiralty by Howard S. Roberts, the York Foundry & Machine Company, J. K. Petty & Co. and the Earle Gear & Machine Company against the Steam Dredge A, Edmund H. Mitchell, trading as Mitchell & Co., claimant, and others. From the decree, certain of the libelants appeal. Reversed.

Harry McMullan, of Washington, N. C. (Small, MacLean & McMullan, of Washington, N. C., and George C. Muhly, Wickoff & Lanning, Willard M. Harris, H. Alan Dawson, and Biddle, Paul & Jayne, all of Philadelphia, Pa., on the briefs), for appellants.

J. F. Duncan and C. R. Wheatley, both of Beaufort, N. C., and H. H. Little, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., and Guion & Guion, of New Bern, N. C., on the briefs), for appellees.

Before GOFF, Circuit Judge, and BOYD and SMITH, District Judges.

SMITH, District Judge. On the 28th of August, 1911, a libel in rem was filed by the claimant of a lien for repairs, supplies, and other necessities against the steam dredge A in the District Court of the United States for the Eastern District of North Carolina. This was followed by a number of libels and intervening libels filed in the same court against the same dredge by claimants of similar liens. No answer raising issues appears by the record to have been filed to any of these libels. A so-called "claim" appears to have been filed for the owner, Edmund H. Mitchell; but this claim simply alleged his ownership, and was not accompanied or followed by any further pleading traversing any allegation of any of the libels. On the 24th of October, 1911, a consent decree was entered. The decree so entered recites that the cause came on to be regularly heard upon the pleadings and proofs of the respective parties, and that after due deliberation had in the premises, the court found that all of the material allegations of the libels were true. From the record it does not appear that any proofs were offered beyond the libels themselves, and the decree was, in effect, a consent decree. This decree adjudged that the several libelants were each entitled to recover the amounts alleged in their respective libels. It made no distinction as to priority among them, but con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

demned the dredge to the payment of the sums so decreed to the respective libelants in full, if sufficient there be; otherwise, pro rata in accordance with the sums and amounts of equal dignity therein adjudged to be due and payable.

The decree further directed that the dredge be sold by the marshal and the proceeds be paid into the court to await its further order as to distribution. The dredge was sold under this decree for a sum much less than the aggregate of the liens thereon as decreed. The case then again came on to be heard upon the question of the distribution of the proceeds. No further proofs appear to have been taken, and, so far as the record discloses, the matter was heard upon the averments and statements in the libels, and a decree was rendered on the 15th of April, 1912, whereby the liens were directed to be paid in four separate classes or ranks, viz.: To certain liens for repairs and supplies furnished in the port of Beaufort, N. C., was decreed priority in payment. Next were placed the liens for repairs and supplies furnished in the port of Philadelphia, Pa., and next were placed, following as third and fourth in rank and priority, certain other claims. The decree only recites the claims and decrees their respective rank and priority. It contains no finding of facts and conclusions of law as required by the act of the 16th of February, 1875 (18 Stat. 315, c. 77 [U. S. Comp. St. 1901, p. 525]), and does not state the ground upon which this distinction in rank between claims of the same character is awarded. An appeal from this decree to this court was taken by Howard S. Roberts, Earle Gear & Machine Company, York Foundry & Machine Company, and J. K. Petty & Co., who were by the decree placed in the second rank or class as the holders of claims for repairs and supplies furnished the dredge in the port of Philadelphia, Pa.

The assignments of error on behalf of the appellants claim that the judge below should have decreed that the claims held by the appellants were paramount in lien to the claims which by the decree were given the first rank; but upon the argument before this court the counsel for the appellants admitted that this claim for priority could not be sustained, but insisted that the claims held by the libelants were entitled to rank equally with those by the decree below given priority over them. There is no testimony in the record. There are no facts found in the decree of the court below, and apparently the only way of ascertaining what the facts of the case are is by inspection of the libels filed, whose statements were by the consent decree of October 24, 1911, found to be true. From these libels it appears that all the claims which by the decree below were given a first lien, and also all the claims of the appellants, were for repairs and supplies furnished. All of these claims appear to have accrued subsequent to the act of Congress of the 23d of June, 1910, and there is no question raised as to the priority of maritime liens for supplies and repairs in a foreign port over domestic liens for those in a home port.

The decree below gives to the repairs and supplies furnished in the port of Beaufort, N. C., a superiority in lien over the repairs and supplies furnished in the port of Philadelphia. No reason is assigned for this conclusion. From the libels and the statements of claim thereto

attached the repairs and supplies in the case of those furnished in Philadelphia, as well as those furnished in Beaufort, were furnished between February and August, 1911, all in the same year. Those furnished in Philadelphia preceded as a rule in point of time those furnished in Beaufort, presumably (although the record does not disclose the fact) because the dredge was in the port of Philadelphia, and from thence proceeded to the port of Beaufort. In some instances the same party who had furnished supplies and repairs in Philadelphia continued to furnish them in Beaufort.

The general rule as to maritime liens of this class is that, in the absence of special reasons existing for preferring one over the others, they will be placed upon the same basis as to rank and priority, where the supplies and repairs have been furnished and performed for the same voyage, or purpose, or substantially during the same period, or, as it may be otherwise stated, as a rule maritime liens for supplies and repairs furnished and performed in the same season and within a period of reasonable time are placed upon the same footing. Where they are separated by distinct voyages, or by an appreciable length of time, it has been held that those furnished and performed last are entitled to priority of payment, and the courts of maritime jurisdiction have also held generally that under special circumstances attending a claim of this character, such as supplies or repairs furnished or performed under circumstances that saved the vessel from threatened loss or destruction, such a claim, although last in order of time, may yet be decreed priority in payment.

So far as the record in this case discloses, there exist no such special circumstances in favor of the claims that accrued at Beaufort, N. C., over those that accrued at Philadelphia. In the absence of any such special circumstances, the court below erred in decreeing priority of payment to the claims enumerated in the first list set out in the decree as for repairs and supplies furnished in the port of Beaufort over the claims held by the appellants, and the decree below is accordingly reversed, and the case remanded to that court for a decree in accordance with the conclusions of this opinion.

Reversed.

TRANSFER NO. 19.

CAR FLOATS 40 & 42.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

Nos. 172, 173.

COLLISION (§ 95*)—STEAM VESSELS—VIOLATION OF RULES.

A finding affirmed that a transfer tug, with a car float on each side, proceeding from Greenville channel, N. J., across Upper New York Bay to a point on East River, was solely in fault and liable for a collision between one of her tows and an outbound steamship on the west side of the ship channel, on the ground that she turned up the wrong side of the channel with the steamship in plain view, and also answered the steam-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ship's proper passing signal with a cross-signal and attempted to cross her bows.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*]

Appeal from the District Court of the United States for the Southern District of New York; George C. Holt, Judge.

Suit in admiralty for collision by the *Compania Trasatlantica*, owner of the Spanish ship *Calvo*, against Transfer No. 19 and Car Floats 40 and 42, with cross-libel by the New York, New Haven & Hartford Railroad Company, owner of the transfer and car floats. Decree for libellant, and claimant appeals. Affirmed.

For opinion below, see 198 Fed. 568.

On appeal from decrees of the District Court for the Southern District of New York holding Transfer No. 19 solely at fault for a collision which occurred between her tow and the steamship *Manuel Calvo* in the upper bay of New York on February 14, 1911. The final decree assessed the libellant's damages at \$20,941.91 and ordered judgment against the tug, and the two car floats which were being towed by her, for the said sum with interest and costs, amounting to \$20,992.36. The New York, New Haven & Hartford Railroad Company, owner of the tug, appeals, insisting that the decrees should be modified and both the tug and the *Calvo* held at fault.

James T. Kilbreth, of New York City, for Transfer No. 19.

Hunt, Hill & Betts, of New York City (George Whitefield Betts, Jr., and Francis H. Kinnicut, both of New York City, of counsel), for the *Calvo*.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The tug concedes that she was at fault but insists that the negligence of the *Calvo* contributed to the collision and that the damages should be divided between them. It is not of controlling importance to determine whether the vessels were on crossing or meeting courses. When they first sighted each other they were unquestionably on crossing courses. Subsequently, and shortly prior to the collision, they may for a brief period of time have been on meeting courses. However this may be the gross negligence of the tug sufficiently accounts for the collision, and errors of judgment on the part of the steamship, assuming them to exist, should not be held to relieve the tug from the full responsibility for her acts. She was emerging from the Greenville channel destined for Oak Point, East River. Her course was perfectly plain and had she taken it and crossed over to the Brooklyn side of the bay and thence up the river there would have been no collision. Instead of doing so, she turned to the northward, after passing the red buoy, intending to go up on the extreme westerly side of the channel. This maneuver was executed with the *Calvo* clearly in view, bound out on the side of the channel where she had a right to be and where the transfer had no right to be. The steamer seeing that the tug was turning apparently intending to go up on the westerly side of the channel, gave one whistle and ported. Instead of answering with a similar signal, the tug blew two blasts

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and starboarded, thus heading directly for the steamer's course. We are unable to see how the steamer could guard against such erratic and wholly unexpected maneuvers as the tug engaged in. Of course, if the Calvo could have surmised that the tug intended to go up on the wrong side of the channel and not content with that violation of the rules, intended also to pass on the wrong side of the steamer, even though she had to cross her bows to get there, the steamer might have done something to avert the collision. But she did not know these things and had a right to assume that the tug would follow the rules of the road applicable to such a situation and not violate them all.

The tug is so plainly in fault and is so clearly responsible for all that occurred that it is not necessary to sift the testimony to ascertain whether the steamer was guilty of some slight negligence. Her actions were the result of the unwarrantable conduct of the tug and the incompetency of her master which sufficiently accounts for all that happened. The facts are carefully discussed by Judge Ward and it is unnecessary to reiterate what he has said upon the disputed questions of fact. It is enough that we agree with him in his findings of fact and the conclusions drawn therefrom.

The decrees are affirmed with costs.

THE PASSAIC.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 99.

SHIPPING (§ 203*)—PROCEEDING FOR LIMITATION OF LIABILITY—JURISDICTION—EFFECT OF EMPLOYER'S LIABILITY ACT.

Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), does not by implication repeal the statutory provisions permitting shipowners to limit their liability, as applied to actions for injuries to employes on a vessel operated by a railroad company as part of its interstate line, nor affect the right of the company to maintain proceedings for such limitation in a court of admiralty.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 637; Dec. Dig. § 203.*]

Limitation of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

Appeal from the District Court of the United States for the Eastern District of New York; Thomas I. Chatfield, Judge.

Proceeding in admiralty by the Erie Railroad Company, as owner of the steam ferryboat Passaic, for limitation of liability. From the decree Frederick Zahn, administrator of the estate of one Wilson, deceased, claimant, appeals. Affirmed.

For opinion below, see 190 Fed. 644.

R. H. Roy, of Brooklyn, N. Y., for appellant.

Wilcox & Green, of New York City (F. B. Jennings, H. Green, and W. C. Cannon, all of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WARD, Circuit Judge. One Zahn, as administrator, brought suit against the Erie Railroad Company in the Supreme Court of the state of New York to recover damages for the death of his intestate, an oiler on its ferryboat Passaic, who was killed by the escape of steam from a fracture in the main steam pipe. The ferryboat was engaged in interstate commerce, plying between New York and New Jersey. The Erie Railroad Company filed a petition in the District Court of the United States for the Eastern District of New York to limit its liability, at the same time denying its negligence. Upon its surrender of the ferryboat to a trustee, the usual monition issued restraining further prosecution of all actions in other courts. The administrator filed proof of claim in the District Court and answered the petition.

The cause was tried before Judge Chatfield, who handed down a careful opinion holding that the claimant had failed to prove any negligence upon the part of the petitioner, and ordering that the proceeds of sale of the ferryboat, less expenses, be paid over to it. 190 Fed. 644. We concur fully, and would write nothing more, but for the grounds on which he disposed of the claimant's objection to the jurisdiction of the court, which was that the act of April 22, 1908, by implication repealed the earlier limited liability acts, so far as employes of railroad companies engaged in interstate commerce are concerned. Section 1, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), is as follows:

"Section 1. That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Judge Chatfield held that the claimant had waived this objection by filing his claim in the District Court and answering the petition. But the objection goes to the jurisdiction of the court over the subject-matter, and cannot be waived or cured by consent. Therefore we must determine whether the objection, as made, is good. We think it is not. If the limited liability acts and the acts regulating the liability of such railroads to their employes can be construed consistently with each other, so that both shall stand, they must be so construed. What shocks the mind is that whereas full compensation can be had in the case of employes of such a railroad company killed or injured on shore, often only a partial compensation or none at all can be had in the case of employes killed or injured on a vessel of the railroad company. Still this is the very distinction which Congress has made and for many years permitted to stand between lia-

bility of defendants generally for loss of or injury to persons or property on shore and liability of vessel owners for the same injuries. The acts of Congress regulating the liability of railroads to their employes do not affect the cause of action in any way, but abolish certain defenses, such as contributory negligence and assumption of risk. This is entirely consistent with previous legislation limiting the extent of the employer's liability for the cause of action.

The decree is affirmed, but without costs.

THE WYOMING.

THE E. A. PACKER.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 170.

COLLISION (§ 95*)—MEETING TUGS WITH TOWS—CHANGE OF COURSE.

The tug Wyoming, with three barges in tow abreast, was proceeding up East River at about 4 o'clock in the morning, while the tug Packer was coming down further to the westward, with three barges in tow tandem. By signal agreement a transfer tug with a car float crossed toward the Brooklyn shore ahead of the Wyoming, after which passing signals were exchanged between the latter and the Packer; but the Wyoming had in the meantime changed her course toward the Manhattan shore, and was unable successfully to execute her maneuver to starboard, and her port tow came into collision with one of the tows of the Packer. *Held*, it appearing that it was not necessary for the Wyoming to go to the westward to avoid the transfer tug, that she was solely in fault for changing her course when the approaching Packer should have been seen.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Southern District of New York; Van Vechten Veeder, Judge.

Suit in admiralty for collision by Bridget Guinan and Oscar Olsen, owner and master of the scow John G., against the steam tug Wyoming, the Lehigh Valley Railroad Company, claimant, and the tug Madison, the Delaware, Lackawanna & Western Railroad Company, claimant; also libel by the Goodwin Sand & Gravel Company, owner of the scow, against the Wyoming and the tug E. A. Packer, impleaded. Decree against the Wyoming, and her claimant appeals. Affirmed.

The following is the oral opinion of Veeder, District Judge:

The evidence in this case shows that the Packer was coming down the East River with three barges in tow, one behind the other, and that the Wyoming was going up stream with three barges abreast on a hawser, and that the Madison came out of Pier 26 on the New York shore and crossed to the other side of the river in front of the Wyoming on a signal to that effect being given by her and answered by the Wyoming. After the Madison had crossed, and the position of the approaching tugs was disclosed, it appeared that the Wyoming had sheered over toward the New York shore, either be-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cause she aimed to cross the river diagonally at this point to her destination above the Brooklyn Bridge on the Manhattan shore, as suggested by the libellant, or, as claimed by the Wyoming, in order to avoid the Madison. In this situation the Packer immediately gave a single whistle signal, which was promptly answered by one whistle from the Wyoming. They were so close upon each other's courses, however, that the Wyoming was unable to carry out successfully her maneuver to starboard, and the port barge of her tow swung around and collided with the second barge of the Packer's tow. The time was about 4 a. m. on November 19, 1910, and there was an ebb tide.

I do not find any fault at all on the part of the Madison. I do not think that her crossing interfered, or should have interfered, with the navigation of the Wyoming. In other words, I believe that she crossed so far ahead of the Wyoming that it was unnecessary for the Wyoming (whether or not she did in fact do so) to change her course or speed, going as she was at very slow speed and against the tide.

I do not appreciate why the Wyoming did not see the Packer before the view was obstructed by the crossing of the Madison, if it is a fact that she did not. The lookout of the Packer says he saw the Wyoming's red light for a considerable time before the crossing of the Madison. It is true that the Packer gave no signal at that time; but there was no reason to believe that the Wyoming would change her course, and so long as she kept on her course off the Brooklyn shore there would be no danger. The witnesses agree that the collision took place just below the Brooklyn Bridge, but there is conflict in the testimony as to what part of the river. I find as a fact that it happened about midstream.

The proximate cause of this collision was the inability of the Wyoming to carry out a maneuver which she had undertaken to carry out in answering the Packer's one whistle with one whistle of her own. Her inability arose from the fact that she had changed her course so far to port as to get in the course of southbound traffic. Even if she had not seen the Packer's lights before the Madison crossed, she was not justified, under the circumstances, in going so far to port at this point in the river.

From this point of view it is unnecessary to decide whether the hawser on the Wyoming's port barge gave way before or after the collision. I find the Wyoming in fault.

Decree accordingly, with reference to ascertain damages.

Harrington, Bigham & Englar, of New York City (D. R. Englar, of New York City, of counsel), for appellant.

Foley & Martin, of New York City (John F. Foley and F. A. Spencer, Jr., both of New York City, of counsel), for appellee the E. A. Packer.

J. L. Seager, of New York City (A. J. McMahon, of New York City, of counsel), for appellee Delaware, L. & W. R. Co.

James J. Macklin, of New York City, for appellees Guinan and another.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decree affirmed on the opinion of the District Judge.

MANHATTAN LIGHTERAGE CO. v. NEW ENGLAND NAVIGATION CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 161.

SHIPPING (§ 86*)—INJURY TO MOORED VESSEL BY SWELL—ACTION—EVIDENCE.

Evidence considered, and *held* insufficient to identify the steamer proceeded against as the one whose swell was alleged to have caused the damage to a barge sued for.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 343, 353-360; Dec. Dig. § 86.*]

Liability of vessel for injuries caused by creation of swell, see note to *The Asbury Park*, 78 C. C. A. 3.]

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, adjudging the respondent in fault for damage to the barge Morna, lying at Pier 36, East River, caused by swells from a passing steamer. The barge was loaded with 330 tons of scrap iron, and the libel charges that the steamers Richard Peck and Providence, both owned by respondent, came down the river, about 6:30 a. m., December 5, 1909, at so high a rate of speed as to raise high swells and cause the Morna to surge and roll. The testimony showed that three steamers, the Georgia, the Peck, and the Providence, came down one after the other, at intervals of about a mile. On the trial two witnesses for libellant undertook to identify the Peck as the vessel which caused the trouble, and the charges against the Providence were abandoned.

J. T. Kilbreth, of New York City, for appellant.

Burlingham, Montgomery & Beecher, of New York City (R. Leech and Charles C. Burlingham, both of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). It was shown by quite convincing evidence, including that of disinterested witnesses, that the Peck came down the river near the Brooklyn shore and at a moderate rate of speed. It was necessary for her to take that course and speed because the tide was ebb, she was a twin screw 318 feet long, and on such a tide has to make her landing, at Pier 28, by rounding to against the tide. The Georgia, a single screw, whose landing place was Pier 19, on the contrary, on such tide comes down near the New York shore, making her landing without rounding to.

The master of the Morna and the master of the barge Bath, which was tied up about 30 feet inshore of the Morna, both testified that the swells came from the Peck, and say they saw and recognized her. We do not find their evidence persuasive. The master of the Morna, who was resting in the engine room, came out when he felt the motion of his boat. He describes the swells as "awful big," presumably because the Morna rocked greatly; but she was loaded in such a way

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that moderate swells would be likely to produce excessive rocking. When he came out he says he saw the *Richard Peck* a little below, and on the trial was positive in his identification. But it is quite apparent that he was not equally positive at the time of the accident, because he went down shortly afterwards to Pier 28 to inquire what steamers had come in; and when the libel was prepared, as the verification states, "from statements made by the master of the *Morna* and eye-witnesses" (there was only one other witness), the charge of fault was made against the *Providence*, as well as the *Peck*. Moreover, he says that the boat which he saw was but a little ways from the New York shore. That vessel could not have been the *Peck*, which was close to the Brooklyn piers.

The other witness, the master of the barge *Bath*, who saw the steamer which he says made the swells, testified that she was the *Peck*. But he also testified with equal positiveness that the steamer which he did see was coming down within 200 feet of the New York piers and was going about 17 miles an hour. Manifestly the vessel thus described could not have been the *Peck*.

We are satisfied that the libelant has not identified the *Peck* as the vessel which caused the damage.

The decree is reversed, with costs, and the cause remanded, with instructions to dismiss the libel, with costs.

THE CITY OF LOWELL.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 151.

SHIPPING (§ 16*)—REGULATION OF STEAM VESSELS—NUMBER OF PASSENGERS—VIOLATION OF STATUTE.

A libel against a steam vessel by the United States to recover the penalty prescribed by Rev. St. § 4499 (U. S. Comp. St. 1901, p. 3060), for carrying a greater number of passengers than allowed by her certificate, in violation of sections 4465, 4466 (U. S. Comp. St. 1901, p. 3046), *held* not sustained by the evidence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 30-44; Dec. Dig. § 16.*]

Appeal from the District Court of the United States for the Southern District of New York; George C. Holt, Judge.

Libel by the United States against the steam vessel *City of Lowell*, the New England Navigation Company, claimant. Decree for respondent, and libelant appeals. Affirmed.

The libel was filed against the steam vessel *City of Lowell* to recover a penalty of \$500 for alleged violation of the Revised Statutes regulating the number of passengers to be carried by such vessels. The sections in question are 4465, 4466, and 4499 (U. S. Comp. St. 1901, pp. 3046, 3060).

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Henry A. Wise, U. S. Atty., and Addison S. Pratt, Asst. U. S. Atty., both of New York City, for appellant.

Charles M. Sheafe, Jr., of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The City of Lowell was allowed by law to carry 1,800 passengers on excursions and the government charges that on August 7, 1910, she made an excursion up the Hudson river, to Poughkeepsie and return, having on board passengers in excess of that number. This the appellee denies. The sole question, therefore, is one of fact and unless the finding of the trial judge is clearly against the weight of evidence, it should not be disturbed. The government called but one witness, an inspector of customs, who testified that he stood at the gangplank from the time the first passenger went aboard until the gangplank was pulled in, and that he counted all the passengers, checking them by means of a machine, and found that 1,967 had been taken aboard the vessel—or 167 more than the law permitted.

On the other hand, the vessel employed two counters, one relieving the other, who used a checking machine similar to the one used by the government inspector, and they made the total number of passengers 1,613. The appellee also proved that only 1,599 tickets were sold for this excursion, all but 2 of which were taken up by the vessel's employes. Of these tickets, 100 represented half tickets for children between 5 and 12 years of age. It also appears that when the limit of 1,600 was reached, the appellee refused to sell any more tickets, although there was a large crowd on the pier, clamoring to be permitted to go on board.

It cannot be said upon this testimony that the government has proved its case by a fair preponderance of evidence. It must be admitted that the evidence shows that the appellee was endeavoring in good faith to observe the law. It sold but 1,600 tickets, which was 200 less than the number of passengers it was permitted to carry. This left a margin of 200 which allowed for infants in arms and other persons who might get on board through mistake or otherwise. The margin would seem to be ample to cover all contingencies. In short, the government's case rested solely upon the testimony of one witness and the accuracy of the machine used by him. The appellee directly contradicts this witness by a count taken by a similar machine. Not only so, but it proves that it sold only 1,600 tickets. It cannot be said that there was error in finding for the appellee.

The decree is affirmed.

PENNSYLVANIA R. CO. v. ORTLEY.

(Circuit Court of Appeals, Third Circuit. April 4, 1913.)

No. 1,705.

RAILROADS (§ 350*)—INJURY TO PERSONS AT CROSSING—ACTION—EVIDENCE.

Evidence in an action to recover for the death of a person killed at a railroad crossing *held* insufficient to warrant the submission to the jury of the question of the negligence of the company in failing to give special protection to the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

In Error to the District Court of the United States for the District of New Jersey; Joseph Cross, Judge.

Action at law by Theodore Ortley, administrator, against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

John S. Applegate, of Red Bank, N. J., for plaintiff in error.

Clarence H. Murphy, of Point Pleasant, N. J. (John H. Backes, of Trenton, N. J., of counsel), for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

PER CURIAM. We have had some difficulty in coming to the decision that a new trial of this case must be had; but we have finally concluded that the evidence was too slight to justify the submission of the question whether the railroad company was negligent in not giving special protection to the crossing where the girl was killed. It is possible that the jury may have found the company without fault in this respect, and may have based the verdict on the other ground, namely, negligence in failing to give the statutory signals. But both subjects were submitted in the charge, and as the verdict in favor of the plaintiff is general we cannot know upon what ground the liability of the company rests. It would probably be desirable to take a special verdict on this point at the next trial.

We have given no consideration to the New Jersey Grade Crossing Act of 1910. Act April 12, 1910 (P. L. p. 490). It does not seem to have been a factor below, and the appellee's brief in this court explicitly disclaims reliance upon it.

The judgment is reversed, with costs, and a new venire is awarded.

HIGGINS v. EATON.

(Circuit Court of Appeals, Second Circuit. March 5, 1913.)

No. 125.

COSTS (§ 32*)—IN EQUITY—AWARD AGAINST PREVAILING PARTY.

Costs will seldom be awarded against the prevailing party in equity, unless he has been guilty of some fault or omission.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 108-132; Dec. Dig. § 32.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
204 F.—18

Appeal from the District Court of the United States for the Northern District of New York.

Suit in equity by Susan S. C. Higgins against Harvey E. Eaton, as executor of the will of Elizabeth S. Eaton, deceased. Decree for complainant on defendant's appeal was reversed. 202 Fed. 75. On petition for rehearing. Denied.

Martin & Jones, of Utica, N. Y. (A. F. & F. M. Freeman and B. M. Thompson, all of Ann Arbor, Mich., and Ralph Phelps, Jr., and Orla B. Taylor, both of Detroit, Mich., of counsel), for complainant.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. In view of the fact that on account of our former decision the principal questions discussed in our recent opinion were not fully presented upon the argument of the appeal, we have taken up all the questions anew, and have carefully considered them in the light of the very able briefs presented in behalf of the petitioner upon this application. As a result, however, of such consideration, a majority of the court are confirmed in the views expressed in our recent opinion, and are constrained to deny the petition for a rehearing. It would serve no useful purpose to state again our conclusions.

With respect to costs: Under the circumstances of the case we thought it equitable that no costs should be awarded against the complainant, either in this court or in the court below. But it is a different proposition to go further and award costs in her favor against the defendant. Costs can seldom be awarded against a prevailing party, unless he has been guilty of some fault or omission, and nothing is chargeable against this defendant. Nor can costs be awarded in favor of the complainant, upon theory that there is a fund in court. The petition for a rehearing is denied.

DOELGER v. GERMAN-AMERICAN FILTER CO. OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 62.

1. PATENTS (§ 327*)—SUITS FOR INFRINGEMENT—STARE DECISIS.

Where a patent has been the subject of extensive and hard-fought litigation, and has been uniformly sustained, another court should follow such decisions on substantially the same evidence, unless clearly of a different opinion.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620-625; Dec. Dig. § 327.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FILTERING PROCESS FOR BEER.

The Stockholm patent, No. 378,379, for a filtering process for beer, claims 1, 2, and 4, *held* valid, and a verdict and judgment finding infringement sustained.

In Error to the District Court of the United States for the Southern District of New York; C. M. Hough, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action at law by the German-American Filter Company of New York against Peter Doelger. Judgment for plaintiff, and defendant brings error. Affirmed.

The suit was brought to recover damages for infringement of letters patent No. 378,379 granted to H. Stockheim February 21, 1888, claims 1, 2 and 4 being involved. The patent expired in 1905. The parties will be referred to as plaintiff and defendant as they appeared in the District Court.

William R. Baird and Stephen J. Cox, both of New York City, for plaintiff in error.

Lawrence E. Sexton and Wetmore & Jenner, all of New York City, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The Stockheim patent was granted February 21, 1888, for a filtering process for beer, the object of the inventor being to remove from the beer mechanical impurities and carbonic acid gas under pressure. The specification states that in the filtration of beer it is important that the liquid should be filtered continuously in its passage from the store-cask to the keg into which it is drawn for sale, without material loss of the gas contained in the beer and without material foaming in the keg into which the filtered beer is delivered. The inventor points out that prior to the invention isinglass had been generally used, but that this method was costly and produced unsatisfactory results. The specification says:

"By my improved method of filtering I dispense entirely with the use of isinglass or other findings, and thus very great economy is secured, the beer is thoroughly clarified, all or substantially all of the yeasty particles being removed, the operation of filtering is rapid and continuous without material variation in speed and without the necessity of changing or cleansing the filtering substances, the carbonic-acid gas is substantially preserved in the beer, and the beer comes out of the filter retaining all its brilliancy and liveliness, ready to be discharged into the keg at the racking-off bench without any danger of subsequent cloudiness or other deterioration due to the filtration, and without having had imparted to it any undesirable taste."

The claims in controversy are as follows:

"1. The process of filtering beer, consisting in drawing the beer to be filtered from the cask under a pressure exceeding atmospheric pressure, conducting the same to and through a filtering apparatus in which that pressure is maintained during the filtering operation, keeping the filtering apparatus full of beer, collecting and carrying off any air entering the filter along with the beer and gas separating from the beer during the filtering operation, and discharging the filtered beer from the filter under pressure, substantially as hereinbefore set forth.

"2. The described process of filtering and keeping beer, which consists in forcing the beer under a pressure exceeding atmospheric pressure from the store-cask through a filtering apparatus and thence to the keg, keeping said apparatus full of beer during the operation, and collecting and carrying off from the beer during its passage from the store-cask to the keg air that may be mingled with the beer and gas that may separate from the beer, substantially as and for the purposes hereinbefore set forth."

"4. The process of filtering beer, consisting in drawing the beer from the cask under a pressure exceeding ordinary atmospheric pressure, forcing the

beer under said pressure through a filter, maintaining that pressure in the filter during the filtering operation, creating and maintaining a back-pressure in the filter, so as to keep the filter full of beer, and collecting and carrying off from the beer any gas separating from the beer on its way from the store-cask to or through the filtering apparatus, substantially as described."

These claims have been upheld by every court which has considered them and few patents have been the source of such vehement and protracted litigation. See *Uhlmann v. Bartholomae & Leicht Brewing Co.* (C. C.) 41 Fed. 132; *Uhlman v. Arnholdt & Schaefer Brewing Co.* (C. C.) 53 Fed. 485; *German-American Filter Co. of New York v. Erdrich* (C. C.) 98 Fed. 300; *Zwietusch v. Stockheim*, 53 Off. Gaz. 755; *German-American Filter Co. of New York v. Loew Filter Co.* (C. C.) 103 Fed. 303; *Id.*, 107 Fed. 950, 47 C. C. A. 94; *Id.* (C. C.) 155 Fed. 124; *Id.*, 164 Fed. 855, 90 C. C. A. 637. In the last of these citations Judge Lurton says at page 857, of the process described in the claims:

"That his process was a great practical success the evidence makes plain. That it was adopted and used by a great proportion of the large breweries, and that it superseded in a large measure prior methods and apparatus, is established. The single question is whether, when he conceived his method, it had already been publicly used or described in publications open to the public, and therefore anticipated."

The court, however, held the third claim, not in issue in the present case, invalid.

[1] Few patents have been so persistently attacked and so thoroughly tested in the courts. Every argument which can be urged against it was presented in the prior litigation and carefully considered. Nothing we can say will add to the unanimous conclusion reached by the courts which have preceded us. The doctrine of *stare decisis* applies. Though the decisions of other courts are not conclusive upon us, an orderly administration of the law requires us to follow them when based upon substantially the same facts, unless we are clearly of a different opinion. *Mast-Foos Co. v. Stover Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856; *Beach v. Hobbs*, 92 Fed. 146, 34 C. C. A. 248.

[2] The value of the Stockheim filter was early recognized by the brewers of this country, the defendant among the rest. We cannot resist the conclusion that the claims sued on are valid and are entitled to a liberal construction. Are the claims infringed? This question was submitted to the jury and they found for the plaintiff. The elements of the process as stated in the first claim are as follows:

First, drawing the beer to be filtered from the cask under a pressure exceeding atmospheric pressure.

Second, conducting the same to and through a filtering apparatus in which that pressure is maintained during the filtering operation.

Third, keeping the filtering apparatus full of beer.

Fourth, collecting and carrying off any air entering the filter along with the beer and gas separating from the beer during the filtering operation.

Fifth, discharging the filtered beer from the filter under pressure.

The defendant uses the Loew filter. Which one of these elements does he omit? He draws beer from the cask under pressure and conducts it through a filter in which the pressure is maintained during the operation, he keeps the filtering apparatus full of beer, he collects and carries off air and gas during the operation. It is true that he does not use the precise apparatus described and shown in the patent; it is not essential that he should. The claims are not for a machine, but for a process and any one who practices the process infringes, irrespective of the means employed to carry it out. The vital question is, does defendant use the patented process? If he does, the differences in the two machines may be disregarded. The question was tersely stated by the trial judge in his charge as follows:

"If you do not think that what Doelger did with his Loew filter involved the use of Stockholm's process, you will find for the defendant, and so end this case."

The jury found that Doelger did use the Stockholm process and their verdict, to say the least, is not against the weight of evidence. We see no error in the charge of the court upon the question of damages.

The record contains 58 assignments of error, but none of them points out an error of sufficient moment to justify a reversal.

The judgment is affirmed with costs.

SUNDH ELECTRIC CO. v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 150.

1. PATENTS (§ 312*)—SUITS FOR INFRINGEMENT—WEIGHT OF EXPERT TESTIMONY.

While in cases relating to patents for mechanical devices the deliverances of experts are mere aids to the comprehension of the structure, and if there be dispute among them the judge can examine the device and decide for himself as to which is correct, the situation is changed when the field of electric, magnetic, and chemical patents is entered, and the court must perforce depend upon the assertions of some one who has made a profound study of the subject, and the weight to be given to the testimony will necessarily depend upon the measure of confidence which the witness inspires.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. § 312.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELECTROMAGNET.

The Lindquist patents, No. 744,773 and No. 764,608, each for an alternating current electromagnet, *held* not anticipated, to involve invention, and valid as against the claim of prior invention; also infringed.

This cause comes here upon appeal from a decree of the District Court, Northern District of New York, holding two patents to be valid and infringed. The first patent, No. 744,773, was issued November 24, 1903, to David L. Lindquist, for an electric magnet; the claims

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

involved are 1, 2, 3, and 4. The second or junior patent, No. 764,608, was issued to Lindquist July 12, 1904, for an electromagnet; the claims involved are 1, 2, and 3. Both patents relate to alternating current electric magnets. The defenses are that the patents are invalid in view of the prior art, and because Lindquist was not the original inventor, and that the defendant does not infringe the claims in issue, when construed in the light of the prior art and of the history of Lindquist's own work on devices of this character. The opinion of the District Judge will be found in 198 Fed. 116.

Charles Neave and Wm. G. McKnight, both of New York City, for appellant.

Park Benjamin and Alfred Wilkinson, both of New York City, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The opinion of Judge Ray is a very full one. It sets forth in detail the substance of the various patents and summarizes the main contentions of the opposing sides. The questions involved are questions of fact, invention, anticipation, equivalency, infringement, and no discussion of these questions, as presented here, however elaborate, would add anything to the exposition of patent law. For these reasons we refrain from undertaking any exhaustive statement of the testimony bearing on these questions of fact; the opinion of the District Judge sets them forth sufficiently for any one to understand in a general way what this controversy is about, and the official reports need be incumbered with nothing further.

The contention that Lindquist was not the first inventor is based upon testimony as to a machine which is referred to as the "Ihlder prior magnet." It is asserted that this machine was completed and submitted to a satisfactory test at the Yonkers works of the Otis Elevator Company. The four principal witnesses were engineers in the employ of that company. Drawings, blueprints, and other records were produced to support their testimony. Of this testimony generally—it covers many pages of the record—it is sufficient to say that it comes far short of satisfying us that Ihlder embodied the Lindquist device in a usable structure before Lindquist's date of invention. This conclusion is strengthened by the consideration that it seems unaccountable why the carefully conducted corporation—and the evidence shows it to be such—in which these witnesses were employed should have paid a large sum of money for Lindquist's device, if its own employes had been making the same thing a year or more before he applied for a patent. Our conclusion is also fortified by the circumstance that Ihlder himself, who is alleged to have made this prior magnet, was not called as a witness. Apparently, although he was abroad, there was time and opportunity to take his testimony.

[1] With regard to the other questions of fact in the case, there are difficulties which are not prominent in the one just disposed of. In the opening of appellant's brief reference is made to a suggestion

in appellee's argument that the court is to weigh the relative qualifications of the opposing experts, and it is said:

"The arguments or contentions of the experts are of no importance. Counsel are the ones to make arguments, and the court in passing upon those arguments will not accept the conclusions of those experts, no matter who they may be, but will look to the facts."

Generally, of course, this is so. In the case of a mechanical device, like a multiple drill or a typewriting machine, the deliverances of the experts are mere aids to the comprehension of the structure. If there be dispute among them as to how various parts are correlated and how they act, a judge can examine the device and decide for himself as to which is correct. The decision may be erroneous, but it is the result of an independent mental process applied to facts, which may be determined by the exercise of the judge's independent senses.

But when we come into the field of electric, magnetic, and chemical patents the situation is changed. There are things which the independent senses cannot appreciate, which cannot be seen or felt or heard. The flow or flux of electric or magnetic currents, the reactions of bodies into some chemical union or disunion, are matters in which a court must perforce depend upon the assertions of some one who has made a profound study of the matter, and the weight to be given to the testimony will necessarily depend upon the measure of confidence which the witness inspires. Sometimes, when it is shown that some statement of a witness as to these unseen forces is contrary to the consensus of accepted expert opinion, it may be rejected. Possibly such rejection even may be error, because the witness may be the one who has himself discovered what the others have overlooked. But when there is no such satisfactory way to dispose of the contentions of an expert witness, a court is helpless to criticise them.

In this very case the writer does not know enough about the subject-matter of electric and magnetic flow and flux to determine whether some particular statement relating thereto, propounded with great positiveness by an expert, is or is not sound. If, instead of the consideration which he has been able to give to this case in the past few weeks, he should devote six months exclusive of all else to a study of electric and magnetic action, he would certainly be in no better condition, possibly in a worse one, because he might acquire that sort of half knowledge about an abstruse scientific subject, which is sometimes more misleading than none at all. This is one weak part of the judicial side of our patent system. There should be some way in which a court could have the assistance of absolutely independent scientific judgment on these obscure questions. The recent equity rules for the Southern district of New York have suggested a way to secure this, with assent of both parties to a cause, which it would seem the members of the patent bar who appear in causes like this might help to make effective.

[2] Returning now to the cause at bar. It is filled with obscure scientific questions of the sort above referred to. To illustrate: In considering the senior patent in suit in connection with an earlier

patent to Lindquist, much is made of what is called "symmetry" and "dissymmetry." So far as this relates to geometric symmetry of parts, which the court can see, it would have no difficulty in deciding whether it exists, or not, in the structure. But it appears that there is also such a thing—or such an idea—as magnetic symmetry, which the court cannot see. Whether that is or is not present in a structure it cannot decide for itself. Again: A prior patent (Schuckert) is relied on as negating invention. One expert says that with this before him a "skilled electrician" could have produced the Lindquist device. The other expert says he could not; that, so far as any practical teaching is concerned, the Schuckert patent is the mere skeleton of a dream. This court is not a "skilled electrician," and cannot see for itself what could or could not have been made out of the suggestions of that patent.

The only thing possible under these circumstances is carefully to consider the contentions of the opposing experts, not generally merely, but specifically as to each point of difference, examining the contention of each on that point, with the criticism of that contention by the other, and then deciding which, upon the whole, has the best of the argument. This we have done, and have reached the conclusion that there is nothing in the prior art which deprives either patent of validity, or that so restricts the claims in issue that defendant's device can escape infringing them.

The decree is affirmed, with costs.

ELECTRIC STORAGE BATTERY CO. v. GOULD STORAGE BATTERY CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 145.

PATENTS (§ 328*)—INFRINGEMENT—MACHINE FOR MAKING SECONDARY BATTERY GRIDS.

The Madden patent, No. 570,224, for a machine for making secondary battery grids, cannot be so broadly construed as to cover the machine of patent No. 572,363, to the same patentee, which, though issued later, was applied for first, and the machine reduced to practical use before application for No. 570,224 was filed. As so limited, *held* not infringed by machines in substantial conformity to the combination of No. 572,363.

This cause comes here upon appeal from a decree of the District Court, Western District of New York, dismissing a bill in equity. The suit is for infringement of letters patent 570,224, issued October 27, 1896, for machine for making grids for secondary battery plates, to Albert F. Madden, assignor to complainant. The specification states that the mode of operation of the machine is such that portions of a lead blank held against edgewise expansion are gradually displaced by repeatedly imbedding devices (rotary punches or disks) into it, thereby increasing its density and squeezing up face-hardened ribs above the original surface of the plate. The claim relied on is:

"2. A machine for making secondary battery grids, comprising the combination of a blank holder, cutters on each side of the holder, means for recipro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cating one of said parts in respect to the other, devices for rotating the cutters, and mechanism for feeding the sets of cutters towards each other substantially as described."

This patent was applied for January 11, 1896. On November 19, 1895, Madden had applied for a patent for a "battery grid and machine for producing same," in which a suitable blank was subjected to the spinning action of rollers provided with cutting disks. Upon this application, patent issued (No. 572,363) December 1, 1896, to Albert F. Madden, assignor to Van Winkle and Chamberlain. The assignment was filed with the application.

The opinion of the District Court will be found in 197 Fed. 745. Reference may also be had to a decision of this court in *Gould Co. v. Electric Storage Co.*, 192 Fed. 28, 112 C. C. A. 416, where testimony as to the various assignments and the title to the two patents was considered.

A. B. Stoughton and Geo. S. Graham, both of Philadelphia, Pa., for appellant.

Kenyon & Kenyon, of New York City (W. H. Kenyon and R. Eyre, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The fundamental question is: What construction shall be given to claim 2 of the patent in suit? Before that patent was applied for Madden had conceived the invention which is disclosed in patent 572,363. He had embodied it in a machine, reduced it to practice, prepared and executed an application for it, had sold, not only the machine, but all rights to be acquired to the invention embodied in that machine, and assigned the application therefor to Van Winkle and Chamberlain. This invention of 572,363 was, prior to November 19, 1895, known to and used by these persons, and apparently known to others. The assignment gave to the assignees the right to prosecute the application and obtain the patent. Madden could not, of course, reinvent the particular thing he had already invented and applied for; nor does he assert that he did so. The earlier invention he describes in his testimony as a "spinning machine"; the later invention as a machine for making the plates or grids by a process of rocking the dies or rolls, which is a different sort of a machine. Although not technically prior art, since patent for it was issued later, the invention of 572,363, which had already been reduced to practice publicly and had passed to others than the patentee, has an important bearing on the construction to be given to the claims of the patent granted on a later application. *Sundh v. Interborough*, 198 Fed. 94, 117 C. C. A. 280.

Claim 2 of patent 570,224, if construed literally, would be broad enough to cover a machine built in accordance with 572,363, although the instructions of the application for that patent had already been followed, with the result that a machine had been actually produced and successfully operated by the assignees of the applicant, before he made any application for 570,224. Such a result is avoided, however, by the

familiar rule of construing its broad terms by reference to the specifications.

Without going into details, this can readily be done by restricting claim 2 to machines which do not (like those of 572,363) operate by the spinning process, where high speed produces heat and a resulting plasticity in the metal which is spun up. Without now deciding exactly how this claim shall be construed, and what machines, other than the precise one described in 570,224, it will cover, it is sufficient to hold that it cannot cover the machine of patent 572,363, which was first applied for, and which—machine and application—were transferred to defendant's predecessors before Madden filed his second application.

The only remaining question in the case is to determine from a study of the machines of defendant now complained of (those in operation at Depew, N. Y.) whether they are in substantial conformity with the combination described in 572,363. The District Judge had the advantage of himself seeing these machines in operation, but the record very clearly describes just what they are and how they operate. The comparison of them with 572,363 is very tersely and persuasively expressed in the testimony of defendant's expert on pages 287 and 288. The only noticeable differences are that the cutting rolls are fed towards each other by pneumatic pressure, instead of a weighted lever, a manifest equivalent, and not at all the screw pressure feeding of patent 570,224. Also the rolls are applied and withdrawn when crossing a proposed strengthening rib, not automatically, which seems an immaterial matter. In 570,224 the strengthening ribs are produced automatically. The heat generated in the Depew machines was not that stated in patent 572,363, viz., 200°-300° C. That temperature is a manifest error, being about the melting point of lead; the testimony shows that it should have read 200°-300° F., and explains how the error of transcription was probably made. But there was heat generated by the spinning action of the Depew machines, and the heat was sufficient to make the lead, where spun, plastic as the patent requires. There is no appreciable heat in the machine of 570,224.

We concur, therefore, with the District Judge in the conclusion that these machines do not infringe the patent in suit.

Decree affirmed, with costs.

REIS et al. v. ROSENFELD.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 167.

1. PATENTS (§ 275*)—ACTION AT LAW FOR INFRINGEMENT—DAMAGES.

In an action at law for infringement, where validity, title, and infringement of the patent are proved, plaintiff is entitled to recover at least nominal damages, although he is unable to prove any specific amount of actual damages, without availing of inadmissible conjectures.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 422-431; Dec. Dig. § 275.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 266*)—INFRINGEMENT BY CORPORATION—LIABILITY OF OFFICER.

An officer and director of an infringing corporation cannot be held personally liable for the infringement, without proof that he was personally concerned in the same.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 410; Dec. Dig. § 266.*]

3. PATENTS (§ 274*)—ACTION FOR INFRINGEMENT—EVIDENCE—SUBSEQUENT PATENT.

Where an article alleged to infringe is made under a patent subsequent to the one in suit, such patent is admissible in evidence, and may be considered on the question of infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 419-421; Dec. Dig. § 274.*]

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, entered against plaintiff in error, who was defendant below, upon a verdict for six cents directed by the court.

The action was brought to recover \$60,000 damages for infringement of United States patent No. 728,982, granted May 26, 1903, to plaintiff, for a printing machine.

Jellenik & Stern, of New York City (A. D. Kenyon and Nathan D. Stern, both of New York City, of counsel), for plaintiffs in error.

Leonard H. Dyer and John L. Lotsch, both of New York City (L. H. Dyer, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Two claims were declared upon, Nos. 1 and 7; but plaintiff recovered only on claim 7, and he has not sought to review his defeat, as to claim 1, by any cross-writ of error.

The invention relates to the class of printing machines used for printing from an engraved plate and the like, and has for its object to provide means for guiding and feeding a continuous web or strip to be printed upon over said plate. The invention consists in details of improvement. The claim reads as follows:

"7. A printing machine of the character described, comprising a frame, a reciprocative bed or platen to carry a printing medium, a pressing or printing roller, a gripping device connected with said bed or plates and comprising a bar and a movable presser to coact to grip a web, said presser having a rotary head, and a shoe to be engaged by said head, the head and the shoe being arranged to cause the presser to grip the web when the head first engages the shoe, the head thereafter sliding in contact with the shoe during the continued stroke of the bed, substantially as described."

We do not understand that it is contended that the patent is invalid. Apparently the particular combination of parts which it describes is not found in the prior art, and the important issue is infringement. The art, however, is a crowded one, and the patent must be narrowly construed. There can be no wide range of equivalents. Defendant's machine is not a Chinese copy of the machine of the patent. Parts of it are different in structure, in movement, and in positioning relative to each other from those of the patent. To determine whether or not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

there is infringement, it must be determined whether these differing parts are equivalents of each other within the reasonable limits of equivalency which even a narrow patent covers. Do they severally perform the same function as those of the patent and in substantially the same way? That certainly is a question of fact.

At the close of the case each side asked for the direction of a verdict on this seventh claim, and neither asked to go to the jury on the case generally, or on any question in it. The trial judge found that the parts of defendant's machine were (where not identical) the equivalents of the parts of the patented machine, enumerated as the elements of claim 7, and that defendant's device infringed that claim. A writ of error does not bring up any question of fact for review, and we must accept the findings of the trial court on all such questions. See our opinion in *Heide v. Panoulis*, 188 Fed. 920, 110 C. A. 656.

[1] We cannot assent to the proposition, contended for by defendant, that when an action at law is brought to recover damages for infringement of a patent, and validity, title, and infringement is proved, but plaintiff is unable to prove some specific amount of actual damages, without availing of inadmissible conjectures, he cannot recover nominal damages, but must submit to a dismissal of his complaint, and be compelled to try the same issues over again in a suit in equity.

[2] Judgment was entered against Benjamin Reis. The record contains no testimony showing that he was personally concerned in any way with the infringement complained of. All that appears is that he was an officer and director of the company. This is not sufficient. *Hutter v. De Q. Bottle Stopper Co.*, 128 Fed. 286, 62 C. C. A. 652.

[3] Exception was reserved to a refusal to admit in evidence a patent to one Dubois under which defendant's machine is made. The application for this patent was made nearly a year subsequent to the issue of the patent in suit. The opinion in *Blanchard v. Putnam*, 75 U. S. (8 Wall.) 420, 19 L. Ed. 433, would seem to indicate that such exclusion was proper, but later decisions of the Supreme Court establish the proposition that the issuance of a later patent for a defendant's structure is a circumstance which may be considered in determining whether or not such structure infringes on earlier patents. *Miller v. Manufacturing Company*, 151 U. S. 208, 14 Sup. Ct. 310, 38 L. Ed. 121; *Boyd v. Tool Company*, 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973. See, also, *Ransom v. Hyatt*, 69 Fed. 149, 16 C. A. 185; *Illinois Steel Company v. Kilmer Mfg. Co.* (C. C.) 70 Fed. 1015; *Walker on Patents*, § 532. Whether or not this Dubois patent, if admitted, would have induced a different decision of the question of infringement, we cannot say. Therefore we cannot hold that its exclusion was a harmless error.

The judgment is reversed.

POOLE BROS. et al. v. ISAAC H. BLANCHARD CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 166.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DESK CALENDAR.

The Wilson patent, No. 585,944, for a memorandum calendar, comprising a holder for desk calendars, while not a basic one, covers a combination which is novel, and the utility of which is proved by large sales, and should be conceded invention within its narrow limits; also *held* infringed.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing the bill of complaint. The suit is one for alleged infringement of United States letters patent No. 585,944 granted July 6, 1897, to James R. Wilson for a "memorandum calendar." The invention pertains to that type of calendar holders commonly used to support desk calendars of the well-known form, in which each leaf bears the date of a different day of the year; said leaves being arranged in consecutive order upon or within a file or frame in such manner that each leaf may be exposed in turn as its date is reached. Each leaf, after use, is separated from the pad to expose the next succeeding leaf, and filed with the preceding leaves to form permanent memoranda of the data which may have been entered thereon.

Speaking generally, the patented calendar holder embodies a seat or support for the original pad, a second seat for the used leaves, and means for guiding the used leaves from the first seat to the second seat. The means for guiding is the heavy wire threaded through the leaves, which is found in several prior patents. These wires in Wilson's patent are bent so that, rising from the base of the first seat, they curve over at some little distance above said seat, themselves forming the second seat, which is not otherwise supported. The claim sued upon reads as follows:

"1. A holder for desk calendars, comprising a base for resting on the desk, and two seats for the calendar leaves, one seat being upon the base and upwardly facing, and the other being carried by and elevated above the base and rearwardly facing, and means for guiding the leaves when moved between their two seats."

For a further description of the patented device, reference may be had to *Poole Bros. v. Marshal-Jackson Co.* (C. C.) 161 Fed. 752, and the same case on appeal (Seventh Circuit) 171 Fed. 842, 96 C. C. A. 510. In these opinions the question of validity was not discussed. It was held that, under the narrow construction which the prior art required, infringement was not shown.

Offield, Towle, Graves & Offield, of Chicago, Ill., and Philip Adams, of New York City (A. H. Graves, of Chicago, Ill., of counsel), for appellants.

Smith & Bowman, of New York City (J. H. Griffin, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LACOMBE, Circuit Judge (after stating the facts as above). The patent has the *prima facie* presumption of validity arising from its issue, strengthened by the circumstance that, although the application for the Brown patent, covering a device which defendant here contends is the same as Wilson's was pending at the same time, the Patent Office did not declare or suggest an interference. There is some question whether the date of this Brown application was properly proved in this case; but, in view of the conclusion we have reached, that question need not be decided. The Brown device may be considered prior art. It is no nearer the Wilson device than other structures whose priority is conceded. Utility is established. There have been large sales. After the decision of the Court of Appeals in the Seventh Circuit, a licensee signed an agreement for a royalty of 5 cents on every calendar sold, covenanting that at least 65,000 would be sold each year, and actual sales have exceeded that number. The defendant certainly cannot maintain that it has no utility, since defendant itself uses it.

The patent is in no sense a basic one. The art was crowded; but upon this record we do not see how it can be said that the particular combination of parts shown, described, and claimed is not novel. We find nothing which anticipates this particular combination. Undoubtedly it is a very simple thing, and it may seem to involve only trumpery changes from the structures of the prior art; but many thousands of people evidently prefer it to any of the numerous other calendars which are available. Since Wilson was the first to devise the peculiar structure which pleases them, we see no good reason why he should not reap the fruits of his ingenuity in devising it, so long as he is confined strictly to the novel construction which he did disclose. *Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54; *Waterbury Buckle Company v. Aston*, 183 Fed. 120, 105 C. C. A. 410.

Defendant's device is a Chinese copy of the patentee's, and manifestly infringes.

Decree reversed, with costs, and cause remanded, with instructions to decree in conformity with this opinion.

MANHATTAN BOOK CASING MACH. CO. v. E. C. FULLER CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 138.

1. PATENTS (§ 167*)—REQUISITES AND VALIDITY—DRAWINGS—DISCLOSURE OF OPERATIVENESS OF DEVICE.

The drawings of a patent are often diagrammatic, and not drawn to a scale, and a patented device is not to be held inoperative merely because a slavish adherence to the drawings develops obstacles, which may in many cases be overcome by the exercise of common sense and ordinary mechanical skill.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

2. PATENTS (§ 328*)—VALIDITY—INOPERATIVENESS—BOOKBINDING MACHINE.

The McClellan patent, No. 603,406, for a bookbinding machine, held void, because its disclosures do not teach those practicing the art how to make an operable machine.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing a bill for infringement of patent.

The patent is No. 603,406, issued May 3, 1898, to Jackson McClellan for a bookbinding machine. It deals with that part of the process which covers the sides of a book, stitched and assembled, with glue and then places the cover of the book upon the sides after they are glued. The District Court held the patent void because its disclosures did not teach those practicing the art how to make an operable machine.

Sutro & Wright, of New York City (C. B. Mitchell, S. L. Moody, T. Sutro, and B. Wright, all of New York City, of counsel), for appellant.

J. Q. Rice and M. B. Philipp, both of New York City, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. [1] Undoubtedly a patented device is not to be held inoperable because slavish adherence to the drawings develops obstacles. Such drawings are often diagrammatic, and rarely, we fancy, drawn to a scale. So, too, there are some difficulties which a court can see for itself may be remedied by the exercise of mere common sense. Thus, if a wheel which is to make a quarter revolution by the pull of a ratchet on teeth, is drawn with 17 teeth, it is manifest that an ordinary shopman would substitute 16 or 20 teeth. So, too, when necessary further movement in some direction is stopped by a straight bar coming into contact with part of the frame of the machine, common sense would indicate that the frame might be raised, or the bar, or frame, or both, notched or curved at the point of contact, so as to give sufficient clearance. There are such defects in a machine built in strict conformity to the drawings of this patent.

[2] But there are other defects pointed out specifically in the testimony of defendant's experts—for example, the blocking of the plate C, and the failure of the turning combination with chains and weights to effect revolution. Appellant insists that these are corrected in the so-called "operative drawings" annexed to his brief, and that the changes are such as an ordinary mechanic, building a machine with such instructions as the patent gave him, would make. Maybe this is so; but we are not skilled mechanics, and do not know it to be so. Therefore, when two experts say they can see no way to make the machine operable while sticking to the specifications, and making such departures from them and the drawings as a skilled mechanic would make, and the experts on the other side say there is nothing to indicate that their statements in that regard are erroneous, we do not see how the court can hold that this is what the skilled mechanic would do. Complainant's expert, on the *prima facie*, merely testified that a machine "with the parts constructed and proportioned as shown in the patent drawings and operating as described in the specifications of the patent" would be practically operable. It is now conceded that a machine constructed and proportioned as shown in the drawings would not be operable. When the same expert was recalled in rebuttal, after the experts for defendant had testified to inoperativeness, and had pointed

out what they said were defects, which the ordinary skilled workman would not correct, he testified merely that he had seen no reason to change his original opinion. He did not testify that the changes indicated in the so-called "operative drawings" and in the "illustrative model" produced on the argument here were such as the skilled workman would have made. We concur, therefore, with the District Judge, that the machine actually disclosed by the patent was inoperable. In doing so, however, we are not to be understood as assenting to the proposition, found in the opinion, that the complainant is estopped from contending that the changes necessary to be made in order to make the machine do its work were obvious, because the patentee subsequently took out a patent for improvements on his first patent, with which improvements it was operable.

Decree affirmed, with costs.

E. H. FREEMAN ELECTRIC CO. v. JOHNS-PRATT CO.

(Circuit Court of Appeals, Third Circuit. April 25, 1913. Rehearing Denied May 26, 1913.)

No. 1,727.

1. PATENTS (§ 26*)—INVENTION—COMBINATION OF OLD ELEMENTS.

Each and every separate element of a combination may be old, and yet the combination as a whole may show patentable novelty and invention, if the several elements so coact as to produce a result which is either new in itself, or by means of such coaction is produced in a novel or improved way.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

Patentability of combinations of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

2. PATENTS (§ 66*)—ANTICIPATION—PRIOR ART.

A patent is not in the prior art with respect to another which at the time of its issuance is pending on application in the Patent Office.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. § 66.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SAFETY FUSE.

The Sachs patent, No. 660,341, for a safety fuse, consisting of a combination of elements, the most important of which is a thin, flat, safety strip of rapidly oxidizing metal, of extended area, and maximum contact with the nonconducting filling in the case, was not anticipated, and disclosed patentable novelty and invention; also *held* infringed.

Appeal from the District Court of the United States for the District of New Jersey; Joseph Cross, Judge.

Suit in equity by the Johns-Pratt Company against the E. H. Freeman Electric Company for patent infringement. Decree for complainant (201 Fed. 356), and defendant appeals. Affirmed.

David P. Wolhaupter, of Washington, D. C., for appellant.

Edmund Wetmore, of New York City, for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. [1-3] This case charges infringement of patent No. 660,341, issued to Joseph Sachs for a safety fuse in an electric circuit. It was decided in the District Court by Judge Cross, whose full and excellent discussion of the questions at issue has recently been reported in 201 Fed. 356. No question was presented to us on appeal that was not satisfactorily disposed of by him, and upon his opinion, therefore, we affirm the decree.

ORMAN v. NORTH ALABAMA ASSETS CO.

(District Court, N. D. Alabama, S. D. March 17, 1913.)

No. 206.

1. TRUSTS (§ 103*)—CONSTRUCTIVE TRUST—ATTORNEY AND CLIENT—CONVEYANCE.

Where attorneys having a claim for fees against complainant settled an attachment on certain other land of the defendant in the litigation by receiving a conveyance to themselves of a half interest in the land for the sole purpose of securing their fees, which had subsequently been paid, they would be decreed to hold their interest in trust for complainant, under the rule that equity, looking to the substance rather than the form of the transaction, will effectuate the intention of the parties by declaring the nominal parties to hold in trust for the person entitled to the beneficial interest.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 154; Dec. Dig. § 103.*]

2. COMPROMISE AND SETTLEMENT (§ 12*)—EFFECT—PAYMENT OF JUDGMENT.

Where, after complainant had obtained a personal judgment against a corporation on certain purchase-money notes secured by a mortgage afterwards foreclosed, other real property not covered by the mortgage was attached, and pending the litigation a settlement was arrived at to obtain a release of the attachment, which settlement agreement referred exclusively to the attached property and contained no stipulation that the principal judgment against the corporation should also be satisfied, such stipulation and a transfer thereunder of one-half of the attached property to complainant's attorneys for the benefit of themselves and of complainant did not satisfy the original judgment.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 54-74; Dec. Dig. § 12.*]

3. MORTGAGES (§ 417*)—ASSIGNMENT—TRANSFER OF DEBT—NECESSITY.

Assignment of a mortgage without a transfer of the debt is a nullity, and vests in the assignee no right to foreclose.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1227-1236; Dec. Dig. § 417.*]

4. MORTGAGES (§ 270*)—ASSIGNMENT—VALIDITY—TRANSFER OF DEBT.

Complainant, having secured a judgment against the corporation on certain purchase-money notes secured by a mortgage, transferred the mortgage, without a formal transfer of the debt, to his attorneys in 1893 or 1894 to secure their fees. Other property having been attached, the attorneys settled the attachment proceedings by taking a conveyance of a half interest in the attached property in their own names, but intending the same to be merely as security. In 1894 complainant made a general assignment for the benefit of his creditors, who sold complainant's interest to A. in 1900, who thereafter retransferred it to complainant in May, 1911. *Held* that, in the absence of proof that the transfer of the mortgage to the attorneys was subsequent to complainant's general assignment, there was no showing of an outstanding title at the time the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 204 F.—19.

mortgage was foreclosed by the assignees, and there being no necessity for a written transfer of the debt secured by the mortgage it would be presumed that the attorneys had full title to the debt and mortgage at the time of the foreclosure, and that the same was therefore valid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 608, 609; Dec. Dig. § 270.*]

In Equity. Bill by W. A. Orman against the North Alabama Assets Company. Decree for complainant on his original bill and dismissing defendant's cross-bill, with costs.

Percy, Benners & Burr, of Birmingham, Ala., and Williams & Jones, of Russellville, Ala., for complainant.

A. Latady, of Birmingham, Ala., for defendant.

GRUBB, District Judge. This is a suit filed by the plaintiff to compel the defendant, the North Alabama Assets Company, to convey to it the legal title to an undivided one-half interest in certain real estate described therein, upon the idea that the defendant mentioned holds the legal title to said undivided interest in trust for the plaintiff. The right of the plaintiff to compel the conveyance to it depends upon the interpretation of a contract that was entered into between the plaintiff's attorneys and the said defendant, by the terms of which a division of the land involved was provided for between the plaintiff's attorneys and the said defendant. The sole defendants originally were the Assets Company and the administratrix of one of said attorneys, but, by subsequent amendment, the legal representatives of two of the attorneys, who were dead (the third having quitclaimed his interest in the land to plaintiff before the suit was filed), were made parties defendant to the bill. The attitude of the defendant, the Assets Company, as to the relief prayed for in the original bill as disclosed in its answer was that of a stakeholder as to the title to the half interest involved, disclaiming ownership in itself and expressing its willingness to convey the legal title to the half interest to the rightful owner, when determined by decree of the court, and when it was protected in so doing by the court's decree. The defendant, the Assets Company, also filed a cross-bill, asserting that the plaintiff was accountable to it for the value of certain property, other than that described in the bill, to which it alleged it had title, unless because of the foreclosure of a mortgage on it by the plaintiff and one Milton Humes, which foreclosure was alleged to be void, (1) because the debt secured by it was fully satisfied at and before the time of the foreclosure, and (2) because the parties to the foreclosure did not own the debt, if still outstanding, when the mortgage secured by it was foreclosed. The cross-bill averred that the plaintiff had subsequently purchased a part of the lands sold under foreclosure, with notice of the invalidity of the foreclosure sale, and had thus become a trustee in invitum as to them, and, having thereafter sold them to an innocent purchaser, should be held accountable to the defendant, the Assets Company, for their value or the proceeds of the sale. The Assets Company, defendant in the original bill and plaintiff in the cross-bill, prayed for an accounting against the plaintiff in the original bill, who was made a defendant to the cross-bill, and that no decree should be rendered directing it to convey the half

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

interest in the land involved in the original bill to plaintiff in that bill until such accounting was had, and until the plaintiff in the original bill had satisfied such decree as might be entered against it as a result of the accounting under the cross-bill. These are briefly the issues presented by the pleadings.

The first question is whether the plaintiff is entitled to the relief prayed for by him in the original bill, independently of the issue presented by the cross-bill; and this depends upon whether he is shown to be the equitable owner of the half interest in the lands described in the bill. These lands were originally the property of the North Alabama Development Company, and both parties derive title from that company. The plaintiff, Orman, had sold the Development Company other lands, taking its notes, secured by purchase-money mortgage, for the deferred payments. When the Development Company became embarrassed and defaulted in paying these notes, Orman sued the Development Company on the notes, and attached lands other than those covered by the mortgage. Judgment was rendered in Orman's favor on the notes, and much litigation ensued with reference to the validity of the attachment levied on the property, an undivided one-half interest in which is involved in this suit. Finally this litigation was settled by an agreement, made between the firm of Almon & Bullock and Milton H. Humes, who were the attorneys for Orman in the litigation, and the North Alabama Assets Company, which had succeeded to the rights of the judgment debtor in the attached property, and which was executed June 29, 1896. A supplemental agreement was executed by the same parties in July, 1896. At the time of the execution of these agreements, the plaintiff, Orman, was indebted to his lawyers, who were the parties of the first part in said agreement, for legal services in relation to the litigation involved in the settlement in the sum of \$4,000. The attorneys had no other interest in the subject-matter of the agreement or the property involved than as attorneys and for their fees. While the contract does not purport to have been made by them as trustees for Orman, but in their own name and right and without mention of Orman, viewed in the light of the situation of the parties, it is clear that the contract was made in the name of the attorneys to protect them in the collection of their fees, and beyond that for the interest of their client, who alone had any interest to be subserved by it in the premises or the litigation.

[1] A court of equity, looking to the substance rather than the form of the transaction, will effectuate the intention of the parties by declaring the nominal parties to hold in trust for themselves to secure the payment of their fee, and then for their client, the plaintiff. The record shows conclusively that the fees of the attorneys, who were parties to the contract, were paid in full prior to the institution of the suit. The legal representatives of all the attorneys, except one, are before the court, and it is shown that the excepted one had executed to Orman a quitclaim for his interest before the suit was filed. A decree directing the defendant, the Assets Company, to convey the one-half interest, which it admits it held in trust, to the plaintiff, would not only accomplish the equities of the case, but would fully protect the Assets Company in the execution of the trust. Such a decree

should be entered, unless because of the relief asked by the Assets Company in its cross-bill.

The Assets Company claims the right to retain the trust property until such time as the plaintiff shall have accounted to it for what may be found due because of a trust which the Assets Company asks be declared in the proceeds of the sale of other property of its predecessor, the Development Company, purchased by Orman from the subpurchaser at a foreclosure sale under a mortgage given by the Development Company, a foreclosure which the Assets Company alleges was void, because at the time of its occurrence the debt secured had been fully satisfied, and because, if not satisfied, it was the property of another than the persons who foreclosed the mortgage under the power of sale. The allegation is that when Orman purchased he did so with notice of the invalidity of the foreclosure for the reasons mentioned and became a trustee in invitum, and, having resold the property purchased to an innocent purchaser into whose hands the Assets Company cannot follow the property, it has the right to look to the proceeds of the sale in the hands of Orman, and to hold the interest in the trust property until Orman has accounted to it under the claimed collateral trust.

[2] The first question presented as to the invalidity of the foreclosure sale is whether the secured debt was fully satisfied when the foreclosure occurred. If so, the foreclosure was void. The contention of the Assets Company in this respect is based on the contract of settlement between the attorneys of Orman and the Assets Company, of June 29, 1896. The exact question is whether the effect of that agreement was to satisfy the personal judgment which Orman had obtained against the Development Company on the purchase-money notes secured by the mortgage afterwards foreclosed, or merely to settle the rights of the respective parties, then interested in the property attached in the suit filed by Orman in which the judgment was rendered, without affecting the liability of the Development Company upon the principal judgment. Which of these views is the correct one is to be determined by the mutual intention of the parties, derived from their situation and relationship when it was entered into, and from the language of the agreement.

No appeal was ever taken from the principal judgment against the Development Company, and litigation subsequent to its rendition related altogether to the validity of the attachment levied upon the property which was the subject-matter of the agreement. The Assets Company had, after the judgment was rendered, acquired the interest of the Development Company in the attached property, but did not become personally liable on the judgment obtained against it. The title to the property covered by the attachment was not marketable, so long as the litigation relating to the attachment was pending and undetermined. It was in this attitude of the parties, with relation to the litigation and the property affected by it, that they entered into the negotiations which resulted in the agreement. It seems quite clear from the situation of the parties, as described, that the Assets Company was interested in the release of the attached property, but not in the satisfaction of the personal judgment against the Development

Company. The purpose of the parties was to make property, which had long been tied up in litigation still undetermined, available. The natural method of accomplishing the purpose was by a division of the property. There was no occasion for an agreement to satisfy the principal judgment. The pending litigation did not affect it. The Assets Company had no concern in having it satisfied. Orman, after agreeing to divide the property affected by the attachment by accepting a half interest in satisfaction of the writ of attachment, would be estopped from thereafter levying upon the Assets Company's half interest therein under subsequent process issued upon the judgment. The spirit of the agreement of division was that the Assets Company's half interest should be no longer subject to the judgment, in consideration of its conveyance to Orman of the other half interest.

The language of the agreement supports this view. It recites that the parties to it laid claim to certain property, described specifically therein and covered by the attachment, and that certain other suits were pending relating to the property, and upon injunction bonds, and that all parties were "desirous of settling all said litigation *regarding said property*." It provides for the dismissal of "all of said suits," and then specifically mentions injunction suits and a pending foreclosure suit. No mention is made specifically of the suit in which the attachment was issued. It provides that "all property involved" in the attachment suit is to be divided between the parties in equal parts and for a method of effecting the division. There is no stipulation that the principal judgment against the Development Company was to be satisfied. Dismissal of a suit is not appropriate language with reference to the satisfaction of a judgment, though it might be as to a writ of attachment issued in the cause in which the judgment was rendered. The agreement relates to the disposition of attached property, and not to the satisfaction of the judgment rendered in the suit in which the attachment was issued. As I construe the agreement of June 29, 1896, it does not have the effect of satisfying the judgment obtained by Orman against the Development Company or the purchase-money notes, secured by the mortgage which was foreclosed by Orman and Humes, and which were merged in the judgment.

[3, 4] The remaining question is whether the foreclosure was void by reason of the fact that Orman and Humes, when they foreclosed the mortgage, were not the owners of the debt thereby secured, but assignees of the mortgage alone. The assignment of the mortgage without the transfer of the debt would be a nullity, and would vest no right or title to foreclose in the assignee. *Carpenter v. Longan*, 16 Wall. 274, 21 L. Ed. 313. The evidence shows that Orman transferred the mortgage by indorsement to Humes in 1893 or 1894. It also shows that there was no written assignment of the judgment which had been obtained on the notes secured by the mortgage on October 31, 1892. The assignment of the debt, even when it is evidenced by a judgment, is not required to be in writing. In the case of *Buckheit v. Decatur Land Co.*, 140 Ala. 216, 37 South. 75, the Supreme Court said:

"The transfer of a mortgage debt, whether by writing or parol, is in equity an assignment of the mortgage."

In the case of *Gardner v. Mobile & N. W. R. R. Co.*, 102 Ala. 635, 642, 15 South. 271, 272 (48 Am. St. Rep. 84), the Supreme Court of Alabama said:

"Judgments have the assignable qualities of choses in action, and may be transferred by parol or in writing. If a statutory mode of assignment is provided, it is cumulative, in the absence of express words inhibiting other modes of assignment. The assignment, however, passes an equity which courts will recognize and protect. It entitles the assignee to sue on the judgment or to issue execution thereon in the name of the assignor, and is beyond his control or interference." *Lowery v. Peterson*, 75 Ala. 109; *Wells v. Cody*, 112 Ala. 278, 20 South. 381.

The purpose of the assignment of the mortgage by Orman to Humes was to secure the fee of Humes and associates in the litigation instituted by Humes and others to collect the debt secured by it. The subsequent agreement of June 29, 1896, between these attorneys of Orman and the Assets Company and its recognition by Orman is sufficiently persuasive that Humes and his associates were considered by Orman to have an interest in the judgment at that time, though no written transfer of it is shown to have been executed. The agreement of June 29, 1896, related to the litigation in which the judgment was rendered, and was made in the name of the attorneys for the purpose of securing their fees in that litigation, the same purpose for which the mortgage was assigned to Humes. The natural inference is that Orman transferred to his attorneys, as security for their fees, his interest in the debt they were collecting for him, and in the judgment in which it became merged, and the mortgage securing the debt along with it. No other hypothesis reasonably explains why the contract, which settled the rights of the interested parties with respect to the attached property, should have been made in the name of Humes and Almon & Bullock, instead of in the name of the plaintiff in attachment. If Humes and Almon & Bullock were transferees of the judgment debt, though by parol only, they were entitled to become transferees of the mortgage also which secured it, and the assignment of the mortgage to Humes as trustees would not then be a nullity, but would authorize its foreclosure by Humes. If the form of the assignment was insufficient to pass the legal title to the land to Humes as trustee, the defect is remedied by the joinder of Orman in the foreclosure sale and deed.

In May, 1894, Orman made a general assignment for the benefit of his creditors to Hurst, and the assignment carried with it his then interest in the judgment. Hurst retained what interest Orman had in the judgment till, as assignee, he sold it to George C. Almon in 1900, who transferred it to Orman in May, 1911. The transfer of the mortgage by Orman to Humes is shown to have occurred in 1893 or 1894, and is not shown to have occurred subsequently to the assignment. The burden was on the cross-plaintiff to establish the priority of the date of the general assignment, in order to show an outstanding title at the date of the foreclosure. It is fair to presume that the assignment of the debt accompanied the assignment of the mortgage, since they were intended to accomplish the same purpose, i. e., the securing of the fees of the attorneys, and since the assignment of the mortgage was a useless thing not so accompanied, and since it also appears that

an interest in the judgment was assigned to Humes and his associates prior to June 29, 1896, the date of the settlement agreement between Humes and his associates and the Assets Company. The assignment carried to the assignee the interest of Orman in the judgment, but subject to the interest in it which had been previously assigned to Humes, and left in Humes, at the time of the foreclosure, an interest in the judgment debt which was also secured by the mortgage, which entitled Humes to foreclose the mortgage.

The foreclosure sale having been determined to be valid, it is not necessary to determine whether, if defective, its validity could be assailed collaterally, and is an answer to the relief asked by the plaintiff, viz., the execution by defendant of an admitted trust involving other and different property.

A decree will be entered, granting the relief prayed for in the original bill and dismissing the cross-bill, and taxing the defendant in the original bill and the plaintiff in the cross-bill with the costs of the suit.

THE TITANIC.

(District Court, S. D. New York. November 13, 1912.)

SHIPPING (§ 209*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—INJUNCTION—MODIFICATION.

The institution of a proceeding for limitation of liability vests the admiralty court with full and exclusive jurisdiction, not only to determine the right of petitioner to the benefit of the statute, but, in case it denies such right, to enforce the rights of damage claimants in full; and hence it will not modify its injunctive order restraining the commencement or prosecution by claimants of suits in other courts.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*]

In Admiralty. Petition by the Oceanic Steam Navigation Company, Limited, as owner of the steamship Titanic, for limitation of liability. On motions to modify injunction. Motions denied.

See, also, 204 Fed. 259, 260, 298.

A petition for limitation having been filed, and an *ex parte* (though temporary) appraisal having been had, the usual motion and injunction order went forth. Subsequent to such issuance, and after he had received a copy of the motion and order therefor, A. L. Brougham, Esq., began an action against petitioner in the Supreme Court of the state of New York on behalf of Elizabeth H. Natsch, executrix of Charles Natsch, deceased, to recover the damages alleged to have resulted from the death of the said Natsch by reason of the sinking Titanic. Upon the institution of this action an order to show cause was obtained why Mr. Brougham should not be punished for contempt. On the return day of this order motions were made on behalf of divers persons, who had either suffered injury by reason of the Titanic disaster or had taken out letters of administration upon the estates of persons perishing therein, asking that said injunction be modified so as to permit claimants to begin actions at common law, but providing that after such commencement of action further proceedings should be stayed until determination was reached as to whether the petitioners herein are or are not entitled to the limitation of liability sought.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Mr. Burlingham and Mr. Kirlin, both of New York City, for the motion.

Graham & L'Amoreaux, Harrington, Bigham & Englar, Hunt, Hill & Betts, A. Leonard Brougham, and Frederick M. Brown, all of New York City, opposed.

HOUGH, District Judge (after stating the facts as above). The affidavit of Mr. Brougham sets forth that he did not read the injunction or monition order handed to him. This is no excuse. He is declared in contempt, of which he may purge himself by tendering a consent to the discontinuance of the action of Natsch within one week.

The motions made to lift the injunction raise a point of great importance, which in my opinion (after consulting the authorities cited) is not open in this court. The recent precedents all point one way. I feel sure that the settled practice and almost universal opinion in this district for many years is expressed by *In re Myers Excursion & Navigation Co.* (D. C.) 57 Fed. 240, affirmed as *The Republic*, 61 Fed. 109, 9 C. C. A. 386; and *The Eureka* (D. C.) 108 Fed. 672.

The first of these litigations illustrates the view that the sole function of a limitation proceeding was to limit recovery in the event of a limitable liability being found. If the liability was not capable of limitation, the proceeding was at an end. Both in the District Court and the appellate court, this doctrine is not asserted but is assumed. *The Eureka*, supra, is but another illustration of the same doctrine in holding that no ground for an admiralty limitation proceeding existed, if the only thing to be limited was the extent of one man's recovery. It was held that the statute in terms limited the proceeding to a "pro rata distribution [in] cases in which there are several distinct claims." The case last cited has been openly departed from in *The Hoffmans* (D. C.) 171 Fed. 455, and this upon the distinct ground (page 461) that:

"If there is more than one forum in which shipowners can obtain relief under the statute, it would seem that the right of selecting the court rests with them."

The assumption which underlies the action of the courts in *The Republic*, supra, has been distinctly denied in the Ninth Circuit by *In re Pacific Mail S. S. Co.*, 130 Fed. 76, 64 C. C. A. 410, 69 L. R. A. 71, and *Oregon, etc., Co. v. Portland S. S. Co.* (D. C.) 162 Fed. 912. Whatever doubt might be left after reading these cases is, I think, set at rest by *Dowdell v. U. S. District Court*, 139 Fed. 444, 71 C. C. A. 288, a case which is resolvable into the following statement, viz., that where a petitioner had taken the usual proceeding, had limited the time within which claims might be offered, and was thereafter declared to possess no right of limitation, such petitioner was still protected by the original proceeding against any claim not filed within the time limited.

It does not appear from any of these cases what would be the effect of an ultimate denial of limitation upon a party injured who had never

come into the limitation proceeding; nor does it appear whether one who files a claim and successfully defeats limitation may thereafter abandon his proceedings as claimant and resort to other forums for the enforcement of his rights; but this much does clearly appear—that a shipowner may limit even one man's recovery by affirmative suit in the admiralty, and that when that jurisdiction is invoked the District Court may proceed to enforce against the petitioner what it considers to be full liability after denying limitation.

Again without discussion the doctrine of all the cases last cited has received practical approbation by our Circuit Court of Appeals. In *re Jeremiah Smith & Sons*, 193 Fed. 395, 113 C. C. A. 391. An inspection of the record on appeal in this case shows that, although two possible claimants appeared and answered, only one filed a claim, so that, when the Circuit Court of Appeals issued its mandate, it practically directed the District Court to proceed to assess damages in an ordinary suit in personam for personal injuries.

One further step has been attempted in *Delaware River Ferry Co. v. Amos* (D. C.) 179 Fed. 756, where as against a single claimant, whose demand was obviously less than the value of the res, the petition was dismissed. It thus appears that District Courts have been commanded by Circuit Courts of Appeal to maintain the concurrence of claimants and give full damages in proceedings brought for limitation after limitation denied.

It follows that the query suggested by these motions is this: Why should this court authorize proceedings in other tribunals, when it has power to dispose of the matter itself as part of a properly pending litigation? The petitioners outflank this inquiry by denying that any power exists in the court to mitigate the severity of the statute, pointing out that the injunction is unnecessary and unimportant, and that the filing of the petition and issuance of the monition automatically stop all other litigation by legislative power, which is higher than the mandate of a court. *The San Pedro*, 223 U. S. 365, 32 Sup. Ct. 275, 56 L. Ed. 473.

No opinion is expressed on this point. It is unnecessary to do so; for, if a limitation proceeding is but the exercise of the statutory right of a shipowner (under some circumstances) to bring his creditors into concurrence, it must follow that this court should not (if it can) intrust to any other tribunal full and complete adjudication of the rights of all persons properly brought into court. It makes no difference that death cases are of such a nature that some proceeding for the enforcement of the asserted right must be brought within a time limit. To such claimants this tribunal is open. The only reason for their not coming in is a desire for a jury trial. Such trial is not a part of the right; it is no more than an incident of the remedy.

The motions to modify the injunction are severally denied.

THE TITANIC.

(District Court, S. D. New York. January 17, 1913.)

SHIPPING (§ 209*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—PROCEDURE.

In a proceeding by the British owner of a British vessel lost at sea for a limitation of liability as against claims sued in the United States, the right of a claimant to invoke the English law, by which the measure of the limitation is based on the tonnage of the vessel, will not be determined on a motion to direct the commissioner to make findings as to matters wholly irrelevant under the law of the United States, but must be directly presented by proper pleadings.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*]

In Admiralty. Petition by the Oceanic Steam Navigation Company, Limited, as owner of the steamship Titanic, for limitation of liability. On motion by one Anderson, a damage claimant, to require the commissioner to ascertain the tonnage of the Titanic, in the sense in which that word is used in the British statutes regarding the limitation of liability for losses at sea. Denied.

See, also, 204 Fed. 295.

Hunt, Hill & Betts, of New York City (Frederick M. Brown, of New York City, of counsel), for the motion.

J. Parker Kirlin, Charles C. Burlingham, and Norman B. Beecher, all of New York City, opposed.

HOUGH, District Judge. The exact thing moved for seems simple, and indeed harmless. It can do no harm to ascertain the tonnage of the Titanic, in the sense of the statute referred to, or any other sense; but it is equally true, and just as obvious, that the tonnage of the lost steamer is wholly irrelevant to any procedure for limitation of ship-owners' liability known to the statute law of the United States. So that one first asks why should this record be stuffed with matter so apparently useless?

By argument it appeared that counsel's theory is that, since the Titanic was (a) a vessel British owned and of British register, and (b) lost by collision with an iceberg, and not by the action of another ship of another nation, therefore her British owners are not entitled to all of the benefits or privileges awarded by the statutes of the United States, but may only, under the forms conveniently provided by the rules of the Supreme Court, enforce that measure of relief awarded by the only statute vitally affecting the matter, namely, the British act, which grants a limitation to £8 or £15 per ton as the case may be.

Obviously this argument suggests important and interesting legal questions. If the law of Great Britain applies at all, why does it not apply all along the line? If the shipowner cannot limit demands propounded in the United States in accordance with the law of the United States, why should he be compelled to pay in the United States more than he would have been compelled to pay in Great Britain by all

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the law of that realm? Under American law, both his liability and the limitation thereof rest upon a homogeneous system of jurisprudence. The British law in respect of limitation in passage tickets is of no more avail against the injured passenger than is the £8 or £15 valuation effective to extend the shipowner's liability beyond the value of the res in its injured condition, which is the American statutory limit.

But this motion (as argued) seeks to create something which is neither British nor American—a kind of legal centaur which would give to the claimants all the advantages of both systems of law and leave to the shipowner no discoverable defense under either. The merits or demerits of the argument probably depend in their last analysis on the question argued in *The Eagle Point*, 142 Fed. 453, 73 C. C. A. 569; i. e., whether methods or rules for apportioning and enforcing liability for loss and damage are matters of right or remedy. On this matter *The Eagle Point*, supra, is by no means the last word; but, whatever may be the result of these interesting queries, there can be no doubt that, before any such detail of administration as is here prayed for is granted, the petitioners are entitled to be heard in a direct proceeding to ascertain whether what they demand is lawful or not.

Being sued in the United States, they have demanded, not as a matter of grace, but of right, the benefit of a federal statute. They have not asked for the benefit of the British statute; still less have they asked for the amorphous compound of statutes above referred to. They are either entitled to what they demand, or they are not. If claimants think they are not, let them answer the petition, or except thereto, and so raise the matter. Until that question is directly settled, the present motion is idle, and should be and is denied.

CUBBINS v. MISSISSIPPI RIVER COMMISSION et al.

(District Court, E. D. Arkansas, E. D. April 9, 1913.)

No. 317.

1. DRAINS (§ 1*)—LEVEES (§ 1*)—POWER OF STATES TO ESTABLISH.

Under the police power of the state, when deemed necessary for the general welfare of its people, for the protection of health and property, every sovereign state has the power to construct and maintain levees, and provide for the drainage of swamps.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 1; Dec. Dig. § 1;* *Levees*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. EMINENT DOMAIN (§ 276*)—SUIT TO RESTRAIN MAINTENANCE OF LEVEE—SUFFICIENCY OF BILL.

A bill filed against the National Mississippi River Commission and the various levee boards in the several states having shore lands on the lower Mississippi, alleging that complainant is the owner of land in the valley of the river which was formerly above the reach of the flood waters, but that defendants, by the construction of levees, have so confined the waters of the river as to cause them in flood times to frequently overflow his land, interfere with its use and depreciate its value, does not state a cause of action which entitles complainant to an injunction to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

restrain the maintenance or improvement of such levees, his remedy if his land is so taken or injured as to entitle him to compensation being by an action at law against all or any number of the defendants as joint tort-feasors.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 774; Dec. Dig. § 276.*]

3. EMINENT DOMAIN (§ 288*)—INJUNCTION—LACHES—PREJUDICE FROM DELAY.

Where such bill also shows that complainant has owned his land for 30 years, during which time millions of dollars have been expended on the levees without objection on his part, it discloses such laches as will prevent a court of equity from granting him relief and estop him from claiming it.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 783-788; Dec. Dig. § 288.*]

4. INJUNCTION (§ 24*)—DEFENSES TO RELIEF—INJURY TO PUBLIC.

Injunctions are not matters of right, but of judicial discretion, and if it appears that the granting of an injunction, although complainant might otherwise be entitled to it, would inflict such great damage on the defendants or the public that the injury suffered by complainant if the injunction is refused will be relatively insignificant, it should not be granted.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 23; Dec. Dig. § 24.*]

5. LIMITATION OF ACTIONS (§ 55*)—ACCRUAL OF CAUSE OF ACTION—NUISANCE.

Whenever a nuisance is of a permanent character, and its construction and continuance is necessarily injurious, the damage is original, and may be at once fully compensated, and in such case limitation begins to run against an action for relief from the construction of the nuisance.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.*]

6. EMINENT DOMAIN (§ 2*)—FLOODING OF LAND BY CONSTRUCTION OF LEVEE—RIGHT TO COMPENSATION.

Where a levee built by public authority to protect lands from overflow of the waters of a stream in flood times causes injury to land lying between the levee and the stream by raising the level of the water in time of flood, the damage is consequential, and the flooding does not amount to a taking of the land in a constitutional sense.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

In Equity. Suit by John F. Cubbins against the Mississippi River Commission and others. On demurrer to bill. Demurrer sustained.

The complainant seeks by this bill to enjoin the Mississippi River Commission, created by an act of Congress, and also the commissioners of all the levee boards in the states of Missouri, Arkansas, Tennessee, Mississippi, and Louisiana, from maintaining and repairing, as will be more fully set out hereafter, the levees along the banks on both sides of the Mississippi river which have been constructed by the different levee districts of these states, aided by the Mississippi River Commission under acts of Congress.

The bill alleges that the plaintiff is the owner of certain property situated in the county of Shelby, state of Tennessee, exceeding in value the sum of \$3,000; that the alluvial valley of the Mississippi river extends from Cape Girardeau in the state of Missouri on both banks to the Gulf of Mexico, varying in width from 4 to 40 miles; that from time immemorial the waters of the Mississippi river during the high stages thereof, when not contained within the low water banks of the river, found outlet below Cairo, Ill., into the St. Francis river basin in the state of Arkansas, into the White

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

river, Yazoo, Tensas, Atchafalaya, and Pontchartrain basins, and through the rivers draining these basins eventually into the Gulf of Mexico; that prior to the construction of the levees and the closing of the natural basins by the defendants the lands of the plaintiff were from 3 to 10 feet above the highest flood water of the Mississippi river, and the flood waters of that river did not overflow his lands nor interfere with the use and occupancy thereof, and that the outlets and drains provided by nature through the basins aforementioned were sufficient to carry off the waters, and prevent plaintiff's lands from being injured by overflow; that in about the year 1883 the officers and agents of the United States adopted the Eads plan for the improvement of the navigation of the Mississippi river, and the defendant, the Mississippi River Commission, acting in association with the other levee boards made defendants in this bill, and contractors, constructed, maintained, enlarged, and repaired, and are now engaged in the same work, levees on both sides of said river from Cairo, Ill., to near the head of the passes to the Gulf, a distance of 1,050 miles; that since 1883 this work has been under the direct supervision and control of the Mississippi River Commission; that the lines of levees so constructed, maintained, enlarged, and repaired have been joined by the defendants into a continuous line as contemplated by the Eads plan, so that the Mississippi river is now practically leveed on both sides; that the result of these acts has been that the flood waters of the Mississippi river are confined within and between said levee lines and the hills on the eastern bank, where there are no levees, and encompassed within a narrower high-water channel than heretofore; that by reason thereof the said waters have acquired an increased velocity and higher elevation of more than 6 feet, and that such velocity and elevation are being further increased, and the current is becoming stronger and more forceful; that in June, 1910, the grade established for levees by the Mississippi River Commission and used by the defendants was from 2 to 5 feet higher than the highest known water; that since that time the grade has been changed and increased to 3 to 5 feet above the highest known water, and the levees enlarged accordingly; that even such increased grade has proved to be insufficient to retain the flood waters of the Mississippi river for the purposes of the defendants, and that in the year 1912 the said waters flowed over the said lines of levees, and broke through the same in various and numerous places; that the defendants are now engaged in closing the gaps and breaks in said lines of levee and repairing the levee system as a whole, raising the grade thereof, and contemplate further increases in such grade and further enlargement of the said levees, and for these purposes have obtained large appropriations from the Congress of the United States; that the effect of closing by the defendants the natural outlets along said river and confining the flood waters between the levee system as a whole is to obstruct the natural high water flow of the waters of said river in and along its natural bed for the entire length, thereby raising the level of the water to such an extent that said flood waters within the last five years have attained a sufficient height to flow over plaintiff's land, and when there is as now a high-water stage in said river the waters thereof overflow and remain standing upon and over his lands to a depth of from 4 to 8 feet, so that he is now being interrupted in the profitable use, occupancy, and employment of said land; that as a result thereof, said water being held back by said levees at a higher elevation as aforesaid, his land is being covered with superinduced additions of sand, silt, and gravel from 6 inches to 3 feet in depth, and the houses and fences thereon being washed away, rendering the land and the houses thereon unfit for occupancy, causing the practical destruction thereof, and destroying its market value; that the defendants state and local levee boards are insolvent; that no proceeding for the condemnation of the said lands has ever been instituted by either of the defendants, and that no provision has been made by any act of Congress or any of the states, under which the local levee boards are organized, to pay for or give compensation for his said lands now being so damaged, injured, taken, and destroyed; that complainant has no adequate remedy in a court of law against any of the defendants; that, even if he had the right to sue any or all of the defendants

in a court of law for the recovery of damages sustained by him, the injury is a continuing one, and will be repeated annually whenever the Mississippi river reaches its high-water stage, and any attempt to recover damages in a court of law would involve complainant in an interminable multiplicity of suits; that the plaintiff realizes fully the great worth and public utility of the levees and the objects for which the same are projected, as well as the great benefit to the people as a whole to be derived from the accomplishment and the successful achievement of such purposes, but he says that under the circumstances set forth in the bill it is not equitable nor just to him, nor to the numerous other persons whose lands are similarly situated, to inflict these tremendous hardships on them in the prosecution of such work; that by reason of these acts he has been deprived of his property without just compensation, in violation of the provisions of the Constitution of the United States.

The prayer of the bill is that an injunction be granted enjoining and restraining all of the defendants, their officers, agents, and contractors, from constructing, maintaining, or repairing any levee or levees along the said Mississippi river.

The only defendants who were served with process and who have entered their appearance are the St. Francis Levee District and the Cotton Belt Levee District Commissioners, who have filed a motion to dismiss upon the ground that the bill fails to state facts sufficient to entitle plaintiff to the relief prayed.

Barnette E. Moses, of Memphis, Tenn., for complainant.

T. A. Turner, of Jonesboro, Ark., and H. F. Roleson, of Marianna, Ark., for St. Francis Levee Dist.

Moore, Vineyard & Satterfield, of Helena, Ark., for Cotton Belt Levee Dist.

TRIEBER, District Judge (after stating the facts as above). The right of the states bordering on the Mississippi river and its tributaries to construct and maintain levees along the banks of said river has been exercised from time immemorial, and until the filing of this bill has never been questioned in the courts. All the territory embraced in the bill lying on the western bank of the Mississippi river was a part of the Louisiana Territory acquired by the United States from France, and under the laws of France, as well as Spain, the former owners of that territory, in force prior to and at the time of the purchase by the United States, the lands in that territory abutting on the rivers and bayous were subject to a servitude in favor of the public whereby such portions thereof as were necessary for the purpose of making and repairing public levees could be taken without compensation to the owners. The state of Louisiana by statute asserted this right ever since the purchase by this government, and the validity of this claim was expressly sustained by the Supreme Court in *Eldridge v. Trezevant*, 160 U. S. 452, 463, 16 Sup. Ct. 345, 40 L. Ed. 490. Whether such servitude exists in the other states acquired by the Louisiana purchase it is unnecessary to determine in this case, as it never has been the policy of those states to claim or exercise it. *Board of Levee Inspectors v. Crittenden*, 94 Fed. 613, 36 C. C. A. 418, where this claim was set up in behalf of a levee district created by the state of Arkansas. In *Hagar v. Reclamation District*, 111 U. S. 701, 705, 4 Sup. Ct. 663, 665 (28 L. Ed. 569), the Supreme Court speaking on that subject, said:

"In some states the reclamation is made by building levees on the banks of the streams which are subject to overflow; in other states by ditches to carry off the surplus water. Levees or embankments are necessary to protect lands on the lower Mississippi against annual inundations. The expense of such work may be charged against parties specially benefited, and may be a lien upon the property. All that is required in such case is that the charges shall be apportioned in some just and reasonable mode, according to the benefit received."

In *Leovy v. United States*, 177 U. S. 621, 625, 20 Sup. Ct. 797, 798 (44 L. Ed. 914), it was held:

"Subject, then, to the paramount jurisdiction of Congress over the navigable waters of the United States, the state of Louisiana has full power to authorize the construction and maintenance of levees, drains, and other structures necessary and suitable to reclaim swamp and overflowed lands within her limits."

In *Manigault v. Springs*, 199 U. S. 473, 479, 26 Sup. Ct. 127, 130 (50 L. Ed. 274), the court, after quoting from numerous cases relating to the power of the states to authorize the erection of bridges, said:

"While all of these cases turned upon the power of the state to authorize the erection of bridges, the same principle applies where the Legislature deems it necessary to the public welfare to make other improvements for the reclamation of swampy and overflowed lands, though certain individual proprietors may thereby be subjected to expense."

[1] The authorities as to the power of a state to construct levees or drains to protect the lands bordering on rivers from inundation are too numerous to make it necessary to cite them. The conclusion reached by this court from an examination of them is that under the police power every sovereign state has the power to construct and maintain levees and provide for the drainage of swamps, when deemed necessary for the general welfare of its people for the protection of the health and property.

In *Manigault v. Springs*, *supra*, in discussing the question whether such legislation is a proper exercise of the police power, the court said:

"Of this we have no doubt. Although it was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives, and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people by the reclamation of swampy, overflowed, and infertile lands, and the erection of dams, levees, and dikes for that purpose. We have often held that private interests are subservient to that right, except where property is taken for which compensation must be paid, and must give way to any general scheme for the reclamation or improvement of such lands."

Congress recognized this right at an early date by not only permitting the exercise of this power, but materially aiding the states by liberal donations and appropriations. By an act approved March 2, 1844 (chapter 87, 9 Stat. 352), Congress donated all of the swamp and overflowed lands owned by the national government in the state of Louisiana to that state for the purpose of aiding it "in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein." By Act April 28, 1850, c. 84, 9 Stat. 519, it granted the

same kind of aid to the state of Arkansas and "each of the other states of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated." Since then millions of dollars have been appropriated by the national Congress almost annually to aid in the construction and maintenance of levees; Congress being of the opinion that the construction and maintenance of these levees are an aid to and an improvement of navigation on these rivers. No provisions of the national Constitution or of this state have been called to the attention of the court which prohibit the exercise of that power, nor can the court find any such prohibition in either of these instruments.

When we consider the vast territory, the millions of people, the great value of the property affected by these periodical overflows, a government which would fail to take some steps to prevent the loss of life and destruction of property likely to occur by reason of these inundations which occur annually, and in some years two and three times, would be derelict in its duty to its people. Whether the levee system is the best that can be devised for that purpose, or even whether it is prejudicial, as claimed in the argument by counsel for complainant, is a matter to be determined by the legislative department of the government, and is not subject to review by the courts.

[2] It is unnecessary for the court to state what the effect of granting the injunction as prayed by plaintiff in this case would be, as that is apparent to any one at all familiar with conditions prevailing in the Mississippi River Valley. But it is claimed that under the fifth and fourteenth amendments to the Constitution of the United States neither the states nor the national government have the power to construct or maintain these levees to the great damage of many of the riparian owners situated as is the plaintiff, without first making compensation for the damage sustained. It will be noticed that there is no allegation in the bill that any part of plaintiff's land was actually taken or invaded by any of the defendants; the only allegation in the bill being:

"That by reason of the construction and maintenance of these levees his lands are frequently overflowed so that he is interrupted in the profitable use, occupation, and employment of said lands."

There is nothing in the national Constitution imposing upon a state the duty of making compensation to the owner of lands for consequential damages sustained by the construction or maintenance of an improvement beneficial to the people at large when there has been no actual taking of any of the property. *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Osborne v. Mo. Pac. Ry. Co.*, 147 U. S. 248, 13 Sup. Ct. 299, 37 L. Ed. 155; *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820; *De Lucca v. North Little Rock (C. C.)* 142 Fed. 597.

The Constitution of the state of Arkansas now, and at the time of the construction of these levees, in force, provides (article 2, § 22):

"The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

And article 12, § 9, provides:

"No property, nor right of way, shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner, in money, or first secured to him by the deposit of money, which corporation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law."

Whether these provisions of the Arkansas Constitution apply to lands in another state, or whether they apply to private corporations only and not to the state or its subsidiary agencies, it is unnecessary to determine in this action, as there is no claim for damages, but it may be well to refer to the construction placed upon these provisions of the Constitution by the highest court of the state. In *Cribbs v. Benedict*, 64 Ark. 555, 559, 44 S. W. 707, it was held that the provisions of article 12, § 9, of the Constitution, do not apply except when exercised through the instrumentality of a corporation, and that a drainage district created by the state is not a private corporation.

While the laws of the state of Arkansas provide that when the right of eminent domain is sought to be exercised by the taking of lands for a right of way, and the determination of the question in controversy in such proceedings is likely to retard the progress of the work of such railroad, the court or judge in vacation shall designate an amount of money to be deposited by such company subject to the order of the court, and, when the money is thus deposited, it shall be lawful for such company to enter upon such land and proceed with the work through and over the lands in controversy prior to the assessment and payment of damages for the use of the land. Sections 2955, 2956, Kirby's Digest of the Statutes of Arkansas. There is no provision of law authorizing such proceedings when the land is not actually taken or invaded, but only consequentially damaged. It would therefore be impossible for the commissioners of a levee district to proceed with the construction of the levee if it had to have the consequential damages caused thereby determined in advance; for how could any one know what the effect of such construction would be? *De Lucca v. City of North Little Rock* (C. C.) 142 Fed. 597, 600.

Assuming, as we must on a motion to dismiss the bill for want of equity, that the allegations in the complaint are true, and also assuming that they are sufficient to make these districts responsible for the damages sustained by plaintiff, why has he not a complete and adequate remedy at law? If the land has become utterly worthless, then the proper measure of damages would be the value of the land before the injury was inflicted; if the value of the land has not been utterly destroyed but materially damaged, then the depreciation of its value by reason of the alleged unlawful acts of the defendants would be the proper measure of compensation. Plaintiff in his bill charges that he has no adequate remedy at law, but the only reasons he sets out for this allegation are that "such injury is a continuing one, and will be repeated annually whenever the Mississippi river reaches its high-

water stage, and that if it be attempted by complainant to recover damages in a court of law from any or all of the defendants for such continuous and repeated injuries to said lands, it would involve complainant in an interminable multiplicity of suits," and that "the defendants, state and local levee boards or districts have expended practically all their funds in their effort to construct, enlarge, maintain, and repair the said levees, and that they are now insolvent."

That there need be no multiplicity of suits requires no argument, as the damages may be recovered in one action as hereinafter stated. The claim that the levee districts have expended all of their funds in constructing and maintaining levees, and for this reason are insolvent, is disposed of by the fact that there is in every act of the Legislature of the state of Arkansas under which these districts have been created a provision for the assessment of taxes on all lands comprising each district, so that any judgment recovered against the district may be collected by levying and collecting the taxes on these lands, and, if the commissioners fail to levy such tax to satisfy any judgment recovered against it, they may be compelled to do so by writ of mandamus issued by the court which rendered the judgment. For the purpose of having the damages sustained by the plaintiff assessed, the defendants have the right, under the seventh amendment to the Constitution of the United States, if the action is instituted in the national court, or under article 2, § 7, of the Constitution of the state of Arkansas, if plaintiff elects to prosecute his action in the state court, to a trial by a jury. For a court of equity to assume jurisdiction in such a case would be to deprive them of that constitutional guaranty. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873; *Lewis Pub. Co. v. Wyman* (C. C.) 168 Fed. 756, 762.

Nor is there any necessity for an apportionment of damages, which it was claimed by counsel for plaintiff in argument would prevent an adequate remedy at law. The allegations in the bill charge all the defendants as being tort-feasors, acting in conjunction with each other; and the law is elementary that each and all joint tort-feasors are responsible for the entire damage caused by their unlawful acts. There is no necessity therefore for an apportionment of damages, nor is it even necessary to join all of them in one action. If the allegations in the bill are true, the plaintiff may sue all or any of the defendants, their agents, and contractors, or any others who in any wise assisted or aided in the commission of the torts complained of, and recover in such an action all the damages he may be entitled to.

[3] Other reasons why plaintiff is not entitled to an injunction, the sole relief prayed for, are that, assuming for the purposes of this case that the injury suffered by the plaintiff could have been prevented by an injunction when the levee was first being constructed, a person cannot stand by without objection and see the work, which

will damage his property, done at an expense of millions of dollars, and, when completed, ask a court of equity to enjoin the repairing or maintenance of the same. The bill alleges that this work was begun in 1883 under the supervision of the government, and the courts will take judicial notice of the fact that levees have been constructed on the banks of the Mississippi river for over a century, and that millions have been expended in the work, but not until 1913, after the levees have all been completed, was this bill filed. Upon such a state of facts plaintiff is not only guilty of such laches as will prevent a court of equity from granting him relief, but he is estopped from claiming it. *Duke of Leeds v. Earl of Amherst*, 2 Phil. Chy. Cases, 117, decided by Lord Cottingham, and followed by American courts generally; *St. Julien v. Morgan's Railway Co.*, 35 La. Ann. 924; *Organ v. Memphis & Little Rock Ry. Co.*, 51 Ark. 235, 244, 11 S. W. 96.

The same principle has been applied in actions of ejectment when a railroad company had appropriated lands for a right of way without first having made compensation therefor. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 656, 5 Sup. Ct. 306, 28 L. Ed. 846; *Kittell v. Railway Co.*, 56 Vt. 96; *Goodin v. Cincinnati, etc., Co.*, 18 Ohio St. 169, 98 Am. Dec. 95; *Harlow v. Marquette, etc., Ry. Co.*, 41 Mich. 336, 2 N. W. 48; *Reichert v. Railway Co.*, 51 Ark. 491, 11 S. W. 696, 5 L. R. A. 183.

[4] But, if there were no other defects in the bill, plaintiff would not be entitled to an injunction as prayed for therein. Injunctions are not matters of right, and while they are issued, not in the arbitrary or whimsical will, but in the judicial discretion of the court, guided by the established principles, rules, and practice in equity, regard must be had for the comparative injury which will be sustained if the injunction were granted or refused. If it appears that the granting of the injunction, although plaintiff may be ordinarily entitled to it, would inflict such great damage on the defendants or the public that that suffered by the plaintiff, if the injunction is refused, will be relatively insignificant, an injunction must be refused. *New York City v. Pine*, supra; *Kansas v. Colorado*, 206 U. S. 46, 117, 27 Sup. Ct. 655, 51 L. Ed. 956; *McCarthy v. Bunker Hill, etc., Co.*, 164 Fed. 927, 92 C. C. A. 259; *Shubert v. Woodward*, 167 Fed. 47, 54, 92 C. C. A. 509; *In re Arkansas Railroad Rates* (C. C.) 168 Fed. 720, 722.

In *Parker v. Winnipiseogee, etc., Co.*, 2 Black, 545, 552 (17 L. Ed. 333), the Supreme Court said:

"Even after a right has been established at law, a court of chancery will not, as of course, interpose by injunction. It will consider all the circumstances, the consequences of such action and the real equity of the case."

It is a well-known fact that since the construction of these levees millions of acres of swamp lands and lands subject to annual inundation have been reclaimed and become the homes of hundreds of thousands of citizens. What was theretofore a wilderness has been made into a garden spot. To do away with the levee system at the present time would destroy these lands, and make the inhabitants

of that country homeless. No court of equity would be justified in lending its aid when such results would necessarily follow.

Equity rule 22 (33 Sup. Ct. xxv), now in force, provides:

"If at any time it appears that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be transferred to the law side and be there proceeded with, with only such alterations in the pleadings as shall be essential."

[5] If the plaintiff had claimed damages in his bill as an alternative relief in case the court held that he is not entitled to an injunction, it would have been the duty of the court to transfer the case to the law side, provided the allegations of the bill showed that he is entitled to such relief; but no such relief is asked in the bill nor do the allegations show that he would have a cause of action on the law side of the court. A transfer would therefore be a useless act. By his own statement the plaintiff's cause of action is barred by the statute of limitations, and there are no allegations to remove that bar. Whenever the nuisance is of a permanent character, or its construction or continuance are necessarily injurious, the damage is original, and may be at once fully compensated. In such a case the statute of limitation begins to run from the construction of the nuisance. That is the rule established by the highest court of this state. *St. L., I. M. & S. Ry. Co. v. Morris*, 35 Ark. 622; *Little Rock & Ft. Smith Ry. Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280; *St. L., I. M. & S. Ry. Co. v. Biggs*, 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804, 20 Am. St. Rep. 174; *Woods on Limitation* (3d Ed.) § 180.

[6] In *McCoy v. Plum Bayou Levee District*, 95 Ark. 345, 352, 129 S. W. 1097, 29 L. R. A. (N. S.) 396, it was held that:

"A levee district which builds a levee so as to protect lands from overflow of the waters of a stream at flood time will not under the Constitution and statutory provisions of the state of Arkansas become liable for injuries to land lying between the levee and the river, resulting from flood waters being raised higher between the levee and the river than before the levee was constructed."

In *Monongahela Nav. Co. v. Coons*, 6 Watts & S. (Pa.) 101, plaintiff's millsite was destroyed by the backing up of water by a dam built by a canal company under authority of law for the improvement of navigation, and the Supreme Court of Pennsylvania held this to be a mere consequential damage resulting from the prior right to improve navigation, that it was *damnum absque injuria*, and that such flooding did not amount to a taking under the Constitution. This case was cited with approval and followed in *Gibson v. United States*, 166 U. S. 269, 273, 17 Sup. Ct. 578, 41 L. Ed. 996. See, also, *St. Louis S. W. Ry. Co. v. Miller Levee Dist. No. 2* (D. C.) 197 Fed. 815, 822. While under the laws regulating pleading and practice of this state, as construed by the Supreme Court, the statute of limitations is not available by demurrer in actions at law, but must be pleaded, there is this exception: That if the complaint shows that sufficient time has elapsed to bar a cause of action, and also the nonexistence of any ground of avoidance, the statute is available on demurrer. *Collins v. Mack*, 31 Ark. 684; *Hutchinson v. Hutchinson*, 34 Ark. 164.

The motion to dismiss the bill is sustained.

In re HAWKS.

(District Court, E. D. Kansas, E. D. April 16, 1913.)

1. BANKRUPTCY (§ 228*)—FINDINGS OF REFEREE—CONCLUSIVENESS.

Findings of fact by a referee in bankruptcy, while presumptively correct, and not to be reversed unless they are clearly against the weight of the evidence, or some obvious error of law has intervened, are not so conclusive as the verdict of a jury, or the findings of fact by a judge in an action at law where a jury is waived.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

2. BANKRUPTCY (§ 312*)—COMPOSITION AGREEMENT—ADVANCEMENTS BY ONE CREDITOR—AGREEMENT TO PAY CLAIM IN FULL—FRAUD.

An insolvent having no money with which to perform a composition with his creditors, an agreement with one of them, who did not sign the composition until all the others had signed, to advance the necessary funds to carry out the composition in consideration of the insolvent's agreement to pay its claim in full, was not fraudulent, so as to preclude such creditor from subsequently proving its entire debt against the insolvent's estate in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496-500; Dec. Dig. § 312.*]

3. BANKRUPTCY (§ 184*)—TRANSFERS—VALIDITY UNDER STATE LAWS—POSSESSION.

Under the laws of Arkansas, a merchandise mortgage, with permission to the mortgagor to remain in possession and sell the merchandise without accounting to the mortgagee, is void, regardless of the intention of the parties; but a merchandise mortgage permitting the mortgagor to remain in possession as the mortgagee's agent, and requiring him to pay all moneys realized from the sale of the merchandise, less the expense of carrying on the business and the mortgagor's living expenses, to the mortgagee in satisfaction of the mortgage debt, is valid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

4. BANKRUPTCY (§ 314*)—CLAIMS PROVABLE—EFFECT OF MORTGAGE.

A mortgage on a bankrupt's stock of merchandise, fixtures, and bills and accounts receivable, to cover the bankrupt's indebtedness to the mortgagee and any amount necessary to pay prior creditors under a composition agreement, requiring the bankrupt to act as the mortgagee's agent in gathering certain crops, also included in the mortgage and in the sale of merchandise, and to account to the mortgagee for the proceeds, was a mere mortgage, and not a sale of the bankrupt's business to the mortgagee, so as to preclude the latter from proving its claim as a creditor in subsequent bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469-473, 478, 483-487, 489, 490; Dec. Dig. § 314.*]

5. PAYMENT (§ 44*)—APPLICATION.

In the absence of specific instructions from a debtor as to the application of payments, the law applies them to the oldest indebtedness.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 123; Dec. Dig. § 44.*]

6. LIMITATION OF ACTIONS (§ 167*)—EFFECT OF BAR—SECURITY.

Under the express provisions of Kirby's Dig. Ark. § 5399, no suit can be maintained to enforce a mortgage, unless brought within the period of limitations prescribed for a suit on the debt secured.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 651-653; Dec. Dig. § 167.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. BANKRUPTCY (§ 324*)—CLAIMS—AMOUNT—INTEREST.

Where a commission company, having large and continuous transactions with a bankrupt, on the 1st day of September of every year sent an itemized statement of all the dealings of the parties during that year, showing that the bankrupt was charged with interest at 8 per cent., and that the same was compounded annually, and no objections were made by the bankrupt at any time, such statements constituted accounts stated, and precluded the bankrupt's trustee from thereafter denying the company's right to charge more than 6 per cent. and to compound the interest annually.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 511; Dec. Dig. § 324.*]

8. FRAUD (§ 58*)—DECEIT.

Where circumstances relied on to prove fraud are as consistent with honesty and good faith as with a fraudulent intent, the inference of fraud is unwarranted, since, to establish fraud, the proof must be clear, unequivocal, and convincing; evidence sufficient only to create a suspicion being insufficient.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

9. FRAUD (§ 58*)—DECEIT—DIRECT EVIDENCE.

It is not essential, to prove fraud, that it be established by direct evidence; but it is sufficient if the circumstances proved are of such a nature as to be convincing and inconsistent with a presumption of honesty.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

10. BANKRUPTCY (§ 11*)—RULES OF PROCEDURE.

A court of bankruptcy, in determining an issue of fraud, must be governed by the rules of courts of equity, and, disregarding mere matters of form, ascertain the ultimate relation and liability of the parties, and base its judgment thereon.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. § 11.*]

11. BANKRUPTCY (§ 340*)—CLAIMS—FRAUDULENT CREDIT—ASSISTANCE.

Evidence *held* insufficient to warrant a finding that a claimant against a bankrupt's estate had fraudulently aided the bankrupt to obtain credit for merchandise, in order that the claimant might finally be benefited in the collection of the indebtedness due it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

12. BANKRUPTCY (§ 340*)—CLAIMS—FRAUD—EVIDENCE—KNOWLEDGE OF CREDITOR.

Failure or refusal of one creditor to inform others of the indebtedness due him from a common debtor is not evidence of fraud.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

13. BANKRUPTCY (§ 175*)—FRAUDULENT CONVEYANCES—ANTECEDENT AGREEMENT—EFFECT.

An antecedent agreement by a debtor to turn over to a creditor all his crops, farming implements, stock, horses, mules, and gin, all of which had been bought with money of the particular creditor, whenever it was desired for the creditor's protection, did not render a mortgage subsequently given to such creditor fraudulent as against the mortgagor's other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 175.*]

14. MORTGAGES (§ 50*)—FORM—DESIGNATION OF DEBT—VALIDITY.

A mortgage on real estate to secure an indebtedness of the mortgagor, by failing to designate the amount of the debt due, is not invalid for that reason; the record of such mortgage being sufficient to put a person on inquiry, a prosecution of which would disclose the amount of the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 133-140; Dec. Dig. § 50.*]

In Bankruptcy. In the matter of bankruptcy proceedings of J. M. Hawks. On petition to review a referee's decision disallowing the claim of the Allen-West Commission Company. Reversed.

The Allen-West Commission Company, referred to hereinafter as the Commission Company, presented its claim against the bankrupt estate, amounting to \$254,490.40, after allowing all credits which it claims the bankrupt is entitled to. It also claimed a lien on certain realty of the bankrupt, which the bankrupt had conveyed by mortgage for the purpose of securing any and all indebtedness due from him to the Commission Company, and asked that, after applying the proceeds from the sale of the mortgaged premises, the balance due be allowed as an unsecured claim. The referee directed the mortgaged lands to be sold free from all liens, and that the proceeds be held pending the determination of the validity of this claim, the allowance of which was objected to by the trustee. The sum realized from the sale of the mortgaged lands amounts to \$15,655, and is held subject to final determination of this claim. The original objections filed by the trustee are:

(1) Because the Commission Company holds two life insurance policies, for \$5,000 each, on the life of the bankrupt, which were assigned to it as collateral security.

(2) Because a note of \$2,500, indorsed by Joseph and Amanda Dudgeon, is barred by the statute of limitations.

The third and fourth objections are that there are included in the account charges for insurance on cotton consigned by the bankrupt to the Commission Company, and also for weighing and sampling the same, without authority of law.

(5) That the Commission Company charged 8 per cent. interest per annum on the account, and compounded it annually, without any agreement in writing therefor.

At a later day additional objections were filed by the trustee, which, for convenience, will be numbered consecutively with the original objections:

(6) That on the 1st day of August, 1899, the bankrupt being indebted to a large number of persons, including the Commission Company, the bankrupt entered into a composition agreement with his creditors, whereby the creditors agreed to accept 40 per cent. of their respective debts, which was also signed by the Commission Company; but that a secret agreement was entered into between the bankrupt and the Commission Company, whereby he promised to pay the Commission Company its debt in full, and executed his notes therefor, which notes constitute a part of the indebtedness now claimed. That these accounts are fraudulent, and should be deducted from the account, if the same is allowed.

(7) That by reason of this fraud the entire claim of the Commission Company should be disallowed.

(8) That the Commission Company was guilty of fraud ever since 1899, by willfully suppressing the fact that the bankrupt was all the time insolvent, and aided him in maintaining a false credit, whereby he was aided to become indebted to the other creditors.

It was also claimed that one of the items was a \$2,500 note executed in 1899, which was included in the account when it became due, and interest thereon charged at the rate of 8 per cent. per annum after maturity, although it was only to bear interest at the rate of 6 per cent. per annum.

Some of the items objected to were abandoned. The surrender values of the life insurance policies held by the Commission Company were credited on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the amended account, and the overcharge of the interest on the \$2,500 note, amounting to \$317, was also credited on the account, thus eliminating objections numbered 1, 2, 3, and 4.

There was a great deal of testimony taken by the parties, including almost the entire correspondence between the bankrupt and the Commission Company during the entire period of their dealings, commencing in 1899 and continuing to the date of the adjudication in bankruptcy, the latter part of 1910. The referee disallowed the entire claim, upon the finding made by him that there was co-operation and confederation between the Commission Company and the bankrupt to conceal the true condition of the business and the insolvency of the bankrupt, which was known to the Commission Company; the referee holding, "Without it (meaning the co-operation and confederation between the parties) it was impossible for the bankrupt to have obtained any rating whatever in commercial circles," and that therefore the Commission Company was guilty of such fraud as to justify the rejection of its entire claim.

To review this order the Commission Company has brought the case before this court for review.

Lyon & Swarts and Dwight D. Currie, all of St. Louis, Mo., for trustee.

Moore, Smith & Moore, of Little Rock, Ark., for claimant.

TRIEBER, District Judge (after stating the facts as above). [1] Counsel for the trustee, in their briefs and oral argument, contended that the findings of the referee, especially in view of the fact that some of the testimony was taken in his presence, a considerable part having been taken before another referee, who has since died, should be given the same effect as the verdict of the jury, and, if there is any substantial evidence to sustain his findings, the court should not set them aside. The rule thus stated is too broad. The correct rule is that the findings of fact made by a referee in bankruptcy are presumptively correct, and unless they are clearly against the weight of the evidence, or some obvious error of law has intervened in its application, will not be disturbed; but they are not conclusive, as is the verdict of a jury, or the findings of facts made by the judge in an action at law when a jury has been waived. This is the rule of law applicable to masters in chancery, and is equally applicable to findings made by a referee in bankruptcy. *Southern Pine Co. v. Savannah Trust Co.*, 142 Fed. 802, 73 C. C. A. 60; *Houck v. Christy*, 152 Fed. 612, 614, 81 C. C. A. 602, 605; *Ohio Valley Bank v. Mack*, 163 Fed. 155, 158, 89 C. C. A. 605, 608, 24 L. R. A. (N. S.) 184.

This necessitates an examination of the voluminous evidence taken in the case, for the purpose of determining whether the findings of facts made by the referee are clearly against the weight of the evidence, or whether some obvious error of law has intervened in the conclusions reached. There is little conflict in the evidence, and the referee's findings are practically based entirely on his views of the law applicable to the issues involved. In the argument before the court, counsel presented their views on the whole case, and treated the case, and the court will treat it, as tried de novo, but giving the findings of facts made by the referee that weight to which they are entitled under the rule of law hereinbefore stated.

[2] It is claimed on behalf of the trustee that the composition agree-

ment entered into in August, 1899, whereby the Commission Company was to be paid in full, while the other creditors were to receive only 40 per cent. of the amounts of their respective claims, although the Commission Company signed the composition agreement, whereby it obligated itself to accept 40 per cent. of its claim, the same as the other creditors, was such a fraud as vitiates the entire indebtedness, or at least warrants an abatement of that much of its claim. The undisputed evidence shows that at the time this composition agreement was made the bankrupt did not have the money to pay the creditors the sum of money due them under the agreement; that he thereupon entered into an agreement with the Commission Company to the effect that, if it would advance the money needed to pay these debts, he would pay its debts in full. The Commission Company did not sign the composition agreement until all the other creditors had signed it. This agreement to pay the Commission Company's claim in full was not made known to the other creditors; but there is no evidence whatever to show that there was any fraudulent concealment, or any fraud practiced upon the other creditors, nor are any of these creditors making any objections now. Numerous authorities have been cited by counsel for the trustee that this agreement was a fraud on the other creditors; but in view of the late decision of the Supreme Court of the United States in *Zavelo v. Reeves*, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. — (opinion filed February 24, 1913), this contention cannot be sustained. In that case Mr. Justice Pitney, who delivered the unanimous opinion of the court, said:

"It is certain, however, that a discharge, while releasing the bankrupt from a legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support that promise to pay the debt. And in reason, as well as by the great weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy, but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect at the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts, it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge, is as effective, when made after the filing of the petition and before the discharge, as if made after the discharge."

The facts in that case were that the defendant had been adjudicated a bankrupt; that subsequently he offered a composition to his creditors, and the offer was accepted, and a composition made in said proceedings and duly confirmed by the District Court; that the plaintiffs were then creditors of the bankrupt, and as such accepted the offer of composition and were paid a dividend thereon; that the claim sued on was a part of and was included in said claim on which the dividend was paid; that before the composition had been confirmed the defendant promised that, if plaintiff would lend him \$500 for use in paying the consideration of the composition to his creditors in the bankruptcy proceedings, he would pay plaintiffs the balance of their claims in full. Plaintiffs accepted the offer and promise, loaned the bankrupt the mon-

ey, and accepted his notes for the balance due them on their claim after the payment of the composition, and upon nonpayment of the latter instituted action. It was held they were entitled to recover.

[3] It also appears that in August, 1899, at the time the composition aforementioned was entered into, the bankrupt executed a mortgage to the Commission Company on a lot of small value in the town of Reyno, Ark., and his stock of general merchandise in his store; also the fixtures in the store and some other personalty, including all notes, mortgages, and accounts due the bankrupt, for the purpose of securing the sum of \$6,400, the amount then due the Commission Company, and also the money which it would be necessary to pay the creditors under the composition agreement. The mortgage also provided that any advances made by the Commission Company should bear interest at the rate of 8 per cent. per annum. The mortgage further provided that the possession of the property is surrendered at once to the Commission Company, and that the bankrupt is to act as its agent in gathering the crops mortgaged, and also in the sale of the merchandise; that he is to ship to the Commission Company all the cotton mortgaged as soon as it is picked, and the proceeds of sales of all merchandise and collections of the mortgaged accounts, and in case of failure to do so, or if he should purchase goods or supplies contrary to instructions or desire of the Commission Company, then the Commission Company shall have the right to take immediate possession of all the property mortgaged, including the merchandise, and sell the same for the purpose of paying its debt. It is now claimed that by reason of this mortgage the Commission Company was the real owner of the store, and therefore cannot be a creditor.

Under the laws of Arkansas, as construed by the Supreme Court of that state, a mortgage on a stock of merchandise, with permission to the mortgagor to remain in possession and sell them without accounting therefor to the mortgagee, is absolutely void, regardless of the intention of the parties. *Lund v. Fletcher*, 39 Ark. 325, 43 Am. Rep. 270; *Martin v. Ogden*, 41 Ark. 186; *Fink v. Ehrman*, 44 Ark. 310; *Gauss v. Doyle*, 46 Ark. 122; *Collins v. Lightle*, 50 Ark. 97, 6 S. W. 596; *Stix v. Chaytor*, 55 Ark. 116, 17 S. W. 707. On the other hand, it has also been held by the Supreme Court of Arkansas that a mortgage on a stock of merchandise, permitting the mortgagor to remain in possession, but requiring him to pay all moneys realized from the sale of the merchandise, less the expense of carrying on the business and the living expenses of the mortgagor, to the mortgagee, is valid. *Adler-Goldman Com. Co. v. Phillips*, 63 Ark. 40, 37 S. W. 297.

[4] All the above-cited cases were decided before the execution of this mortgage, and no doubt the attorney who prepared this mortgage had these decisions in view. The instrument, which was of record, showed on its face that it was only intended as a mortgage, and there is no evidence whatever to show that any of the creditors of the bankrupt, who extended him credit after the execution and recording of this mortgage, regarded the Commission Company as the owner, or having any interest in the business of the bankrupt, except as a mortgage creditor. If any of them had believed that the Commission Company was the owner of the store, or had any interest as a partner in

the concern, they would not have hesitated to extend all the credit that the bankrupt wanted, without any inquiry as to the financial standing of Hawks; for it appears clearly from the evidence that the Commission Company is not only solvent, but is a corporation of very large means and enjoying the very highest credit. Besides, if this contention of counsel for the trustee is correct, the Commission Company is now liable for the debts of the bankrupt.

[5] But, aside from this, the mortgage has long since ceased to be of any validity, and no claim whatever is made under it by the Commission Company. Under the rules of law governing appropriation of payments, the law, in the absence of any specific instructions from the debtor, applies them to the oldest indebtedness first. *Goldsmith v. Lewine*, 70 Ark. 516, 69 S. W. 308; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199; *McGillin v. Bennett*, 132 U. S. 445, 10 Sup. Ct. 122, 33 L. Ed. 422; *Dunnington v. Kirk*, 57 Ark. 595, 22 S. W. 430.

[6] The payments made by the bankrupt to the Commission Company in 1900 were more than sufficient to satisfy the indebtedness secured by the mortgage, which included the indebtedness arising from the composition agreement. Besides, the mortgage was due January 1, 1900, and would be barred five years from that date. Under the laws of the state of Arkansas, there can be no enforcement of a mortgage unless the suit is brought within the period of limitation prescribed for a suit on the debt secured thereby. Section 5399, Kirby's Digest of the Stat. of Arkansas. For this reason, the mortgage, if the debt intended to be secured by it had not been paid off before January 1, 1905, would cease to be of any validity on that day, being barred by the laws of the state of Arkansas.

[7] The claim that the Commission Company had no right to charge a higher rate of interest than 6 per cent. per annum, in the absence of a written agreement to that effect, and to compound the interest annually, is disposed of by the fact that the evidence shows that on the 1st day of September of every year the Commission Company sent an itemized statement of all the dealings between the parties during that year, which showed that the bankrupt was charged with interest at the rate of 8 per cent., and that the same was compounded annually. No objections were made by the bankrupt at any time, and they thereupon became accounts stated, the effect of which is that they became settled accounts, and liquidated by the parties as fully as if they had been signed by both parties. *Standard Oil Company v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 319; *Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; *Allen-West Commission Company v. Patillo*, 90 Fed. 628, 33 C. C. A. 194; *Patillo v. Allen-West Commission Company*, 131 Fed. 680, 65 C. C. A. 508.

This leaves for determination the main question in issue—whether the evidence establishes fraud on the part of the Commission Company, in aiding the bankrupt to fraudulently obtain credit for the purchase of merchandise, whereby the Commission Company would finally be benefited in the collection of the indebtedness due it.

[8] There are certain well-settled rules of law to guide the courts

in the determination of such an issue. If the circumstances proven are just as consistent with honesty and good faith as with a fraudulent intent, the inference of fraud is unwarranted. *United States Fid. & Guar. Co. v. Des Moines Nat. Bank*, 145 Fed. 273, 74 C. C. A. 553. To establish fraud, the proof must be clear, unequivocal, and convincing. *Jones v. Simpson*, 116 U. S. 609, 6 Sup. Ct. 538, 29 L. Ed. 742; *Thorwegan v. King*, 111 U. S. 549, 4 Sup. Ct. 529, 28 L. Ed. 514; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; *Walker v. Collins*, 59 Fed. 70, 8 C. C. A. 1; *Foster v. McAlester*, 114 Fed. 145, 52 C. C. A. 107; *Schagun v. Scott Mfg. Co.*, 162 Fed. 209, 89 C. C. A. 189. Proofs which only create a suspicion are not sufficient to warrant a finding of fraud. *United States v. Hancock*, 133 U. S. 193, 10 Sup. Ct. 264, 33 L. Ed. 601; *United States Fid. & Guar. Co. v. Des Moines Nat. Bank*, supra. A mere preponderance of evidence, which at the same time is vague or ambiguous, is not sufficient to warrant a finding of fraud. *Lalone v. United States*, 164 U. S. 255, 17 Sup. Ct. 74, 41 L. Ed. 425.

[9] But it is not essential that the fraud be established by direct evidence; for that is often impossible. The circumstances proved may raise a sufficient presumption to warrant a finding of fraud; but in such cases the evidence must be of such a nature as to be convincing and inconsistent with the presumption of honesty. *Bank of Little Rock v. Frank*, 63 Ark. 16, 37 S. W. 400, 58 Am. St. Rep. 65.

[10] As proceedings in bankruptcy are governed by the rules of courts of equity, the court must disregard mere matters of form, and ascertain the ultimate relation and liability of the several parties, and base its judgment thereon. It must look through forms and appearances to ascertain the true nature of the act. In *re Siegel-Hillman D. G. Co. (D. C.)* 111 Fed. 981, 986; In *re Arnold & Co. (D. C.)* 133 Fed. 789, 791. That the bankrupt was insolvent must have been known to the Commission Company at least as early as 1905. The evidence shows that the indebtedness to it from the bankrupt grew steadily from September 1, 1900, when it amounted to \$7,730, to the time of the bankruptcy, when it amounted to over \$254,000. The proof shows that the indebtedness on September 1st of each year, commencing with 1900, was as follows: (1900, \$7,730; 1901, \$53,624.58; 1902, \$61,733.07; 1903, \$63,337.17; 1904, \$83,655.57; 1905, \$98,117.17; 1906, \$105,283.58; 1907, \$134,041.96; 1908, \$148,560; 1909, \$176,714.48; 1910, \$202,242.43.

[11] It is true that during this time the assets of the bankrupt increased steadily. Starting in with one store, he opened additional stores at different places, until he had five stores. He also had bought a steam gin and invested considerable in real estate. But the liability to the Commission Company increased much more rapidly than his assets, and in view of the fact that the Commission Company also acted as the banker of the bankrupt, all drafts being drawn on it, not only for the purchase of cotton, but in payment of merchandise debts, and in view of the correspondence between the parties during all that time, it is impossible to reach any other conclusion than that, not later than 1905, the Commission Company must have known that he was then

insolvent. But mere knowledge of insolvency of a debtor is not sufficient to charge a creditor with a fraudulent intent in an action of this nature, which must be treated as if an action for deceit.

The voluminous correspondence between the parties, and the letters written by the Commission Company, it is claimed, establish conclusively that it was the intention of the Commission Company "to boost" the credit of the bankrupt, so as to enable him to procure, not only all of the merchandise he needed in his business, but as much more as possible, on credit. A careful reading of these letters does not satisfy the court that that was the intention of the Commission Company. They rather indicate that the Commission Company, having become a large creditor, was hopeful that a few profitable seasons would enable the bankrupt to pay his debts, and that its only chance to recover its money was by helping him along, assisting him with money, until good crops for a number of years in the section where the bankrupt was engaged in business, and good prices for the cotton, which is the staple crop raised in that section, would enable him to pay all of his debts, including that due the Commission Company. In almost every letter written by the Commission Company, it urges him to economize. It protests against his branching out and opening new stores, and insists upon a reduction of its indebtedness. In a letter dated March 22, 1909, the Commission Company wrote him:

"Try to get out instead of deeper in debt. You will probably never have another year with as favorable crops as you had this past year, and we think your account should show a considerable reduction; but it does not. We have always insisted upon you cutting down expenses, and doing less business on a safer and more profitable basis. Do business for profit, and not for show. * * * The difficulty is that you get in debt to these other people, and then draw on us to pay them, which, of course, increases your indebtedness with us. Now, you must not expect us to do this; if you do, we are afraid you are to be disappointed. Because we have been your friends, and have not placed an iron rule on you, as the Memphis people claim they do, you should show your appreciation by trying to reduce your indebtedness to us, instead of riding us to death."

In almost every letter he is urged to reduce his indebtedness and go less in debt to others. There is nothing in any of these letters to indicate an intention to aid the bankrupt to perpetrate a fraud on any one; but they seem to contain such advice as a creditor to whom a large sum of money is due, and whose experience in business is much greater than that of the debtor, would give. Some of the letters read as if written by a parent, interested in his son's welfare. Nor is there any evidence whatever tending to show that the bankrupt purchased any goods, except such as were needed in his business; none of his property was fraudulently disposed of, nor any of his assets concealed by him. The most that can be said of this correspondence is that it is a circumstance which should be considered with other testimony, and thus may establish fraud.

It is claimed that other matters justifying the finding of fraud are the failure of the Commission Company to advise creditors of the bankrupt or merchants to whom the bankrupt had applied for credit, and who made inquiry of it as to his financial condition, the amount of his indebtedness to it, and in other instances making willfully false

statements. In one of its letters to the bankrupt, Mr. Allen, president and general manager of the Commission Company, who it seems attended to this correspondence, wrote the bankrupt under date of October 19, 1910:

"People are coming down here to see us about you all of the time. We are doing all that we can to help you, by telling the truth about what we do tell."

In the same letter he continues:

"As you know, we have always been opposed to your spreading out so much, and trying to do so much, especially since you have no capital to do it on. * * * Do not unload everything on us, as you have been doing in the past. That is not right and just for you or for us."

The statement that "people are coming down here to see us about you all of the time" was evidently to stir him up, and was a mere figure of speech, as Mr. Allen in his evidence testified that only very few inquiries were made, and the trustee has only been able to find three parties who made such inquiry, and one instance in 1903, when the Dun Commercial Agency made inquiry of the Commission Company as to the bankrupt's financial condition by showing the statement made by the bankrupt. One letter of inquiry was received in 1901 from the Bray Clothing Company, to which Mr. Allen replied:

"We do not think you would run any risk in filling this bill for Mr. Hawks; but you must be your own judge of credits, as we never profess to judge credits for other people, and we would rather you would use your own source of information, like we do, instead of referring to us."

There is nothing to show that at that time he did not really believe this to be true, or that he believed Hawks to be insolvent at that time. The bill of the Bray Clothing Company, if credit was extended to the bankrupt upon the strength of this letter, was evidently paid promptly and this creditor is not complaining, nor is there any evidence that it was a creditor of the bankrupt at the time of the adjudication.

Another inquiry was made by W. M. Ball & Co. in 1909; and, while the answer thereto did not state the indebtedness due the Commission Company, it was evidently of such a nature as to cause Ball & Co. to decline taking the account of the bankrupt and extending to him the credit he desired.

The third inquiry was made by a Mr. Phillips, a representative of a concern selling gins; and, although he was not informed of the amount due the Commission Company, he declined to extend credit to the bankrupt. Nor was the statement to the Dun's Commercial Agency in 1903 of such a nature as to justify a finding that it was knowingly false and made with the intention of deceiving any one. Hawks had made a statement to the Commercial Agency that his net worth was \$40,000, and when inquiry was made of Mr. Allen he stated that he did not think Hawks was worth more than half that sum. There is no evidence to warrant the finding that Mr. Allen did not believe that statement to be true at the time he made it.

[12] The failure or refusal of one creditor to inform others of the indebtedness due him from a common debtor is not evidence of fraud. He has the right to refuse the information. This identical question was before the Circuit Court of Appeals for this circuit in *Foster v.*

McAlester, *supra*, where Judge Caldwell, delivering the opinion of the court, held:

"Merchants and business men are not required to answer general letters of inquiry regarding the credit, promptness, and financial standing of a named person, or to disclose their business relations or the state of their account with such persons."

In fact, the evidence does not satisfy the court that Hawks did not at that time believe his statement to be true. It seems that he had a large amount of unsold cotton in the hands of the Commission Company at that time, and his indebtedness to it depended to a large extent on the price for which the cotton would sell, which price is always uncertain, as it depends upon the fluctuations of the market, which are, at times, quite violent.

Another important fact entitled to consideration is that none of the present creditors of the bankrupt ever inquired of the Commission Company as to the bankrupt's financial standing or his indebtedness to the company. Although a number of credit men of these creditors testified in this case, none of them testified that such inquiry was ever made of the Commission Company. They seemed to rely solely upon the rating given by the mercantile agencies, which it is not claimed was based upon any information obtained from the Commission Company after 1903, and the further fact that Hawks paid his bills promptly by drawing his drafts on the Commission Company.

[13] Great stress is also laid upon a letter from the Commission Company to Hawks, dated July 7, 1903, in which it suggested to Hawks, who had previously written that he was willing to turn over all his property whenever he was requested, as it had furnished him the money with which to purchase it, a form of letter which he should write. In this letter Hawks was to agree to turn over all his crops, farming implements, stock, horses, mules, and gin, all of which had been bought with the money of the Commission Company, whenever it was desired for the protection of its interests. A similar attack was made upon a mortgage in *Foster v. McAlester*, *supra*, and it was held:

"The understanding that Terrell & Co., when required to do so, would give the plaintiff a mortgage on the goods in the Indian Territory, did not of itself render the mortgage fraudulent and void in law. As bona fide creditors of Terrell & Co. they had the right at all times, independent of any previous understanding to that effect, to demand of Terrell & Co. such security for their debt, and Terrell & Co. had an undoubted right to give it. This being the unquestioned legal right of the parties, upon what principle can it be said to be a legal fraud, or a badge of fraud, for the parties to stipulate for doing that which they would be perfectly free to do, and which would be perfectly legal for them to do, independent of such stipulation? Why should a mortgage, which the creditor had a legal right to demand and the debtor a legal right to give, be held void because the debtor had previously agreed that such security would be given when demanded? There is no such rule of law. It is an everyday practice for debtors to promise to give their creditors security when demanded, and while such promise affords slight protection to the creditors, and cannot be specifically enforced, when it is voluntarily complied with, the security is not to become invalidated."

[14] In 1909 the bankrupt executed a mortgage on some of his real estate to secure his entire indebtedness to the Commission Company; but the mortgage failed to designate the amount of the debt due it.

This it is claimed vitiated the mortgage, and in any event is a strong badge of fraud. It is sufficient to say that such mortgages have always been upheld, and especially is this the rule of law in the state of Arkansas. *Jarratt v. McDaniel*, 32 Ark. 598; *Curtis v. Flinn*, 46 Ark. 70; *Moore v. Terry*, 66 Ark. 393, 50 S. W. 998; *Hoye v. Burford*, 68 Ark. 256, 57 S. W. 795. In *Curtis v. Flinn* it was held:

"If a mortgage contains a general description sufficient to embrace the liability intended to be secured, and to put the person examining the record upon inquiry, and to direct him to the proper source for more minute and particular information of the amount of the incumbrance, it is all that fair dealing and the authorities demand."

The authorities relied upon by counsel for trustee are: In *re Rieger* (D. C.) 157 Fed. 609; In *re Friedman* (D. C.) 164 Fed. 131; In *re Kyte* (D. C.) 182 Fed. 166. The facts in these cases differ so much from the case at bar that they have no application here. Upon the facts found in these cases, the conclusions reached were undoubtedly correct; and, were the facts in the instant case similar, this court would unhesitatingly follow them.

In the *Rieger* Case there was a partnership between the creditor and the bankrupt, and the court properly held that the corporation, being a partner, is not entitled to prove its claim.

In the *Friedman* Case the court found the facts to be that the bankrupt deliberately started out to conceal his insolvency, which he knew to be a fact at the time, and to obtain goods from wholesale houses without intending to pay for same; that he bought goods on credit wherever he could obtain them, in quantities largely in excess of what he could dispose of in his business; that he sold a great many of them at wholesale; that no entries were made on the books, nor was the money paid over to the cashier, but was fraudulently appropriated by him; that some of the goods were never taken to the store of the bankrupt, but were carried in their original packages to the parties who filed these claims against the bankrupt; that according to the books there should have been on hand \$81,000 worth of merchandise when he was adjudicated a bankrupt, but instead there was only \$38,000 worth on hand, and no explanation was made of this deficit; that during the last six months of his business he purchased \$69,000 worth of goods, while for the entire previous year he only purchased \$50,000 worth; that the money, which it was claimed he had borrowed from these creditors, all of whom were his relatives or intimate friends, never reached the bankrupt's business, and the bankrupt was unable to give any explanation of that fact; that the creditors had been intimate associates with the bankrupt for many years; that when he started into business he was doing so on borrowed capital, as was well known to them, and when they made these loans they were doing business largely on borrowed capital; that they made the loans without security, although they knew that he was insolvent; that to secure the money to make these loans they hypothecated insurance policies, and one of the creditors mortgaged his homestead for the purpose of making the loan; that when the goods were sold by the trustee they were purchased by a brother-in-law of the bankrupt for the benefit of the bankrupt and these claimants. The evidence in that case conclu-

sively established a conspiracy between these creditors and the bankrupt to defraud the other creditors, and the court properly held that they were not entitled to have their claims allowed.

In the case at bar none of these facts existed. The bankrupt made no purchases of goods, except as they were needed in his several stores. No moneys were misappropriated by him. None of the goods bought were sold in any other than the usual manner. None of his assets are shown to have been concealed. None of the officers of the Commission Company were in any wise related to the bankrupt, or on such terms of intimacy as to arouse even a suspicion of a desire to aid him in the perpetration of a fraud. The Commission Company is financially one of the strongest mercantile corporations in the city of St. Louis. Not the slightest suspicion is cast by any of the voluminous testimony in the case upon its integrity or standing in the commercial world. The only charge that is established by the evidence is that it displayed poor business judgment in permitting its claim to become so large, instead of closing the matter up and making the loss before the debt had grown to these enormous proportions. As it is, its loss now will be much greater than if it had lost its entire debt at any time prior to 1906.

In the Kyte Case the bankrupt owned a building subject to a mechanic's lien amounting to over \$2,000. The lien claimants were indebted to him in the sum of nearly \$1,800. His two sons, who clerked for him and knew his financial extremity, a few days before the execution of an assignment for the benefit of his creditors, purchased the mechanic's lien, and with this money the lien claimants paid the bankrupt the back accounts. They failed to show how they obtained the money to purchase these claims, and it was a reasonable presumption that it had been furnished by their father, the bankrupt, as they had no means of their own. Upon these facts the court properly held that these liens were not valid in the hands of his sons as against the claims of the general creditors.

From a careful examination of the entire evidence, the court is of the opinion that the findings of the referee were reached from erroneous conclusions of law applicable to a case of this nature, and that the evidence does not justify a finding that the Commission Company was guilty of any conspiracy or any fraud which would warrant the court to refuse the allowance of its claim, or postpone it until after the other creditors have been paid, which would, in effect, be the same as a disallowance.

The order of the referee disallowing the claim will be set aside, with directions to allow the claim as an unsecured claim, after deducting therefrom the money realized from the sale of the real estate covered by the mortgage of 1909, now in the registry of the court, and that it is entitled to the money realized from the sale of the mortgaged premises, that being a preferred claim.

Ex parte DICKEY.

(District Court, D. Maine. April 10, 1913.)

No. 251.

1. ARMY AND NAVY (§ 39*)—COURT-MARTIAL—CHARGES—SUFFICIENCY.

Article 8 of the articles for the government of the navy (U. S. Comp. St. 1901, p. 1105), under the head of offenses punishable at the discretion of a court-martial, provides that such punishment as the court-martial may adjudge may be inflicted on any person of the navy who is guilty of profane swearing, falsehood, drunkenness, gambling, fraud, theft, and any other scandalous conduct tending to the destruction of good morals. *Held*, that a charge against a chief commissary steward on board a battleship of scandalous conduct tending to the destruction of good morals, in that on one occasion he made an affidavit confessing certain frauds against the government in connection with supply contractors for the government, while on another occasion he testified under oath before a duly constituted court of inquiry, and denied the truth of his former statement, was sufficient.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. § 79; Dec. Dig. § 39.*]

2. ARMY AND NAVY (§ 49*)—JUDICIAL POWER—CIVIL AND MILITARY COURTS.

Const. U. S. art. 1, confers on Congress the right to make rules for the government and regulation of the land and naval forces, and article 3 gives Congress the power to create certain federal courts. *Held*, that such powers are independent of each other, and hence that determinations of military courts-martial within their jurisdiction are not reviewable by the civil courts.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. § 95; Dec. Dig. § 49.*]

3. ARMY AND NAVY (§ 47*)—MILITARY COURT-MARTIAL—CHARGE—FORM AND SUFFICIENCY.

Where a charge against a person tried by a military court is within the court's jurisdiction, and is authorized by the army or navy regulations, the manner of setting out the offense is a matter of pleading, rather than jurisdiction, the sufficiency of which is for the exclusive determination of the court-martial.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 93-95; Dec. Dig. § 47.*]

4. HABEAS CORPUS (§ 16*)—REVIEW OF PROCEEDINGS OF COURT-MARTIAL.

Where a court-martial had jurisdiction to try petitioner for an offense against the naval regulations and to impose sentence authorized thereby, a civil court in a habeas corpus proceeding could only review the question of jurisdiction, and could not pass on alleged errors of law committed by the court-martial or on the severity of the sentence imposed.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 16; Dec. Dig. § 16; * Courts, Cent. Dig. § 1417.]

Petition by William W. Dickey for a writ of habeas corpus to review the validity of his imprisonment under a judgment of a naval court-martial on a charge of scandalous conduct tending to the destruction of good morals. Writ denied.

Page, Bartlett & Mitchell, of Portsmouth, N. H., for petitioner.
Robert T. Whitehouse, U. S. Dist. Atty., of Portland, Me.

HALE, District Judge. The petition of William W. Dickey shows that on the 2d day of October, 1912, he was an enlisted man in the United States navy, occupying the position of chief commissary steward on board the United States battleship Kansas; that he continued to be in such service of the United States up to December 2, 1912, when a court-martial was held on board the United States ship Louisiana; that he was tried before such court-martial for scandalous conduct tending to the destruction of good morals; that the specification under this charge set out at length a statement sworn to by the petitioner on the 13th day of November, 1912, before Commander Frederick B. Bassett, Jr., acting as commanding officer of the United States ship Utah, in which statement the petitioner swore that he had at several times, detailed therein, practiced frauds on the United States in conjunction with representatives of certain government contractors named therein, from whom supplies for the navy were purchased, and that such frauds had netted him money, amounting to about \$2,000 in certain cases named in said sworn statement; that thereafterwards, on November 19, 1912, while a witness under oath before a duly constituted court of inquiry, the petitioner gave certain testimony, set out in the specification, in which he denied the truth of his previous statement, and testified that he had never at any time received any money from contractors, and that his former statement was untrue. The specification then concludes:

"And that the said William W. Dickey, chief commissary steward United States navy, did by submitting the said written statement or confession, and by testifying as above shown, make statements inconsistent the one with the other, and one of which must have been, and was, known by him to be false and misleading, and intended to deceive and defeat the ends of justice."

Upon this charge and specification the court-martial found the petitioner guilty, and sentenced him to five years at hard labor, deprivation of his pay for that time, and dishonorable discharge at the end of the five years, the same being under the provisions of article 1797 of the Navy Regulations, as changed by order of the Secretary of the Navy November 9, 1911. The petitioner is now confined pursuant to this sentence in the United States naval prison at Portsmouth Navy Yard, in Kittery, in the District of Maine. The petitioner now prays for the issuance of a writ of habeas corpus for substantially the following reasons:

1. That the charge upon which he was tried did not set out any offense cognizable by a court-martial, or known to civil or military law.
2. It was therefore in contravention of article 43 for the government and regulation of the navy, which provides that the accused should be furnished with a true copy of the charges against him, and specification of the same at the time he was put under arrest.
3. That a court-martial is a court of limited and special jurisdiction; and, unless article 43 was complied with, it had no jurisdiction to punish the petitioner.
4. That the petitioner's conviction and imprisonment is in contravention of article 6 of the amendments to the Constitution of the United States, because the specification of the charge shows that the petitioner made one statement on November 13, 1912, and a contradictory statement on November 22, 1912, without alleging which

statement was true or which was false, and that as the specification did not set up for which statement the petitioner was being tried, he has therefore never been advised of the offense for which he was convicted. 5. That the court-martial before whom the petitioner was tried did not have authority to impose the sentence imposed upon him, for certain reasons set forth relating to the punishment imposed.

[1] At the hearing before me, upon the order to show cause why the writ should not issue, the petitioner based his demand for the writ upon the ground that he had never been tried upon any clear, definite, and distinct charge, which set forth an offense known either to the civil or military law, and that hence the court had no jurisdiction to try him and to punish him. He complains that he was charged with making a false statement, either on November 13, 1912, or November 22, 1912, that he never has been informed as to which statement was false, and that therefore the proceedings have not complied with article 43 for the government of the navy (U. S. Comp. St. 1901, p. 1117). Upon examination of the charge on which the petitioner was tried, it will be found that it did not attempt to charge the petitioner in the court-martial with "perjury," which offense is defined under article 14 of the articles for the government of the navy (U. S. Comp. St. 1901, p. 1108) as a distinct offense, namely, the making of an oath to any fact or writing, knowing such oath to be false, for the purpose of obtaining, or aiding others to obtain, the approval or allowance of any claim against the United States, or officer thereof. It is clear that the pleadings upon which the accused was tried in the court-martial alleged a lesser offense than "perjury." The offense set up was "scandalous conduct tending to the destruction of good morals." Under this charge the specification made a substantial charge of false swearing, although it did not set forth the charge with the clearness and definiteness required in a civil court. This general charge is well known in courts-martial, and authorized by article 8 of the articles for the government of the navy (U. S. Comp. St. 1901, p. 1105), which, under the head of offenses punishable at the discretion of the court-martial, provides as follows:

"Such punishment as the court-martial may adjudge may be inflicted upon any person of the navy who is guilty of profane swearing, falsehood, drunkenness, gambling, fraud, theft, and any other scandalous conduct tending to the destruction of good morals."

In *Carter v. Roberts*, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. Ed. 861, speaking for the Supreme Court, Chief Justice Fuller says:

"The eighth section of article 1 of the Constitution provides that the Congress shall have power 'to make rules for the government and regulation of the land and naval forces,' and in the exercise of that power Congress has enacted rules for the regulation of the army known as the Articles of War, Rev. Stat. § 1342 [U. S. Comp. St. 1901, p. 944]. Every officer, before he enters the duties of his office, subscribes to these articles, and places himself within the power of courts-martial to pass on any offense which he may have committed in contravention of them. Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction; and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and wheth-

er. though having such jurisdiction, it had exceeded its powers in the sentence pronounced."

In *Swain v. United States*, 165 U. S. 553, 562, 566, 17 Sup. Ct. 448, 451, 453 (41 L. Ed. 823) Judge Shiras declares the doctrine of the court on this subject:

"Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business. *Smith v. Whitney*, 116 U. S. 178 [6 Sup. Ct. 570, 29 L. Ed. 601]. * * * As we have reached the conclusion that the court-martial in question was duly convened and organized, and that the questions decided were within its lawful scope of action, it would be out of place for us to express any opinion on the propriety of the action of that court in its proceedings and sentence. If, indeed, as has been strenuously urged, the appellant was harshly dealt with, and a sentence of undue severity was finally imposed, the remedy must be found elsewhere than in the courts of law."

[2] The decisions of the Supreme Court in reference to the power of military tribunals is founded upon the doctrine that the third article of the Constitution has conferred upon Congress the power to create certain federal courts; that another power is conferred upon Congress in the first article of the Constitution, namely, to make rules for the government and regulation of the land and naval forces. These powers are independent of each other. They are derived from different articles of the Constitution. When courts organized under these respective powers are proceeding within the limits of their jurisdiction, it is clear that they must be held free from any interference.

[3, 4] It has been repeatedly held, where the charge against a person, tried in a military court, is within the jurisdiction of the court, and is authorized by army or navy regulations, that the matter of setting out the offense is a matter of pleading rather than of jurisdiction; that it is for the court having such jurisdiction to decide upon the validity of the pleadings necessary to bring that charge before the court; that the only question before the civil court is whether or not the military court had the right to try and determine the cause; that the jurisdiction of the trial court cannot depend upon its decision on the merits of the cause, but upon the court's right to hear and decide it; that where a military or naval tribunal has the right to try the cause, even though a civil court had the concurrent right, the civil court cannot enter upon the consideration of the evidence adduced before the court-martial, or of the question whether the accused was guilty of the offense over which the military court has jurisdiction; that if the military court had jurisdiction to impose sentence authorized by the regulations of the army or navy, the civil court cannot pass upon the severity of such sentence; that errors in law, however numerous, committed by the trial court in a cause within its jurisdiction, can be reviewed only by appeal or writ of error in the court exercising supervisory jurisdiction; that it is only where the trial court is without the jurisdiction of the person or the cause, and the party is subjected to illegal imprisonment, that a writ of habeas corpus may be invoked,

and the party discharged from imprisonment. Civil courts are not courts of error to review the proceedings and sentence of a court-martial, where such court-martial has jurisdiction of the offense and of the person of the accused, has complied with the statutory requirements governing the proceedings of the court, and acts within the scope of its lawful powers. *Mullan v. United States*, 212 U. S. 516, 29 Sup. Ct. 330, 53 L. Ed. 632; *Swaim v. United States*, 165 U. S. 553, 566, 17 Sup. Ct. 448, 41 L. Ed. 823; *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. Ed. 236; *United States v. Maney* (C. C.) 61 Fed. 140; *Ex parte Watkins*, 7 Pet. 572, 8 L. Ed. 786; *Ex parte Ulrich* (C. C.) 43 Fed. 661.

In reference to the punishment of scandalous conduct tending to the destruction of good morals, it will be found that by the amendment of November 9, 1911, to the regulations for the government of the navy of the United States, it was provided that the limitation of the punishment for this offense in the case of an enlisted man should be confinement for 15 years and dishonorable discharge.

The case before me shows that the court-martial under which the petitioner was tried was properly constituted; that the charge and specification were in due form, and authorized under the regulations for the government of the navy; that the trial court had jurisdiction of the case, and of the subject-matter of the charge, and acted within the scope of its lawful authority; that it also acted within its authority in imposing sentence; that such sentence was duly approved by the commander in chief of the Atlantic fleet, by whom the court was convened; that it was also approved by the Secretary of the Navy, the final reviewing authority provided by law to act upon records of courts-martial, in cases which do not extend to the loss of life, or to the dismissal of a commissioned or warrant officer; that the sentence, therefore, cannot be revised by the civil courts.

I am of the opinion that I have no power to review the proceedings of the court-martial, or to set aside its conclusions, or annul the sentence imposed by it. If the petitioner was harshly dealt with, and a sentence of undue severity was imposed, such sentence seems to have been within the powers of the court-martial; and it is held by the Supreme Court of the United States that the remedy must be found elsewhere than in courts of law.

The petition for writ of habeas corpus is dismissed.

In re J. & M. SCHWARTZ.

(District Court, E. D. New York. April 10, 1913.)

1. BANKRUPTCY (§ 15*)—PARTNERSHIP—PARTNERS IN OTHER DISTRICTS—SERVICE.

In bankruptcy proceedings against a partnership, the court may obtain service on a member of the firm, though residing out of the district.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 21; Dec. Dig. § 15.*]

2. BANKRUPTCY (§ 14*)—PROCEEDINGS—EXTRATERRITORIAL JURISDICTION.

The right to extraterritorial jurisdiction in bankruptcy follows the trustee's title to all property of the bankrupt's estate, wherever located, in so far as outside parties submit to or are found within the jurisdiction of the court, or where, in order to share in the administration of the estate, they must at some time submit to the jurisdiction of the court in the district where the proceedings are located; but the court has no jurisdiction to control the action of the parties out of the district who are not claiming the exercise of jurisdiction by the court in the course of the administration of the proceedings, or who have not become parties, and who can never be brought in unless they voluntarily appear.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 14.*]

3. BANKRUPTCY (§ 15*)—PARTNERSHIP—PARTNER WITHOUT DISTRICT—JOINDER.

Where a bankruptcy petition is filed by or against a firm, describing a nonresident of the district as a member, and a subpoena is issued to him, it may be served by publication within the district, and, an adjudication having been had, an ancillary proceeding to obtain assets may be brought within the district where the nonresident partner resides, or another proceeding in bankruptcy may be instituted on the original petition in that district; but he cannot be adjudged a bankrupt as a partner and as an individual, and the trustee take title to and follow his assets wherever located, unless he appears and interposes a petition, or unless he claims to be solvent, and, if not adjudicated a bankrupt, endeavor to act within Bankr. Act July 1, 1898, c. 541, § 5, subd. "h," 30 Stat. 547, 548 (U. S. Comp. St. 1901, p. 3424), providing that in the event one or more of the partners, but not all, are adjudged bankrupt, the partnership property shall not be administered in bankruptcy unless by the consent of the partner or partners not adjudicated, entitled to administer the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 21; Dec. Dig. § 15.*]

4. BANKRUPTCY (§ 15*)—PARTNERSHIP—ADJUDICATION AGAINST PARTNERS—NONRESIDENTS.

Where, in bankruptcy proceedings against a firm, a nonresident of the district, afterwards alleged to be a partner, was not originally joined, there could not be an adjudication against him until provisions of Act July 1, 1898, c. 541, § 5, subd. "h," 30 Stat. 547, 548 (U. S. Comp. St. 1901, p. 3424), and General Order 8 (89 Fed. vi, 32 C. C. A. xi) had been complied with and he had been given a proper opportunity to answer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 21; Dec. Dig. § 15.*]

5. BANKRUPTCY (§ 88*)—PARTNERSHIP—ADDITIONAL PARTIES—AMENDMENT OF SCHEDULES.

Where a nonresident of the district was claimed to be a member of an alleged bankrupt firm, the court had power to grant an application to amend the schedules and proceedings and to bring in such additional person, under authority conferred by Bankr. Act July 1, 1898, c. 541, § 2, subd. 6, 30 Stat. 545, 546 (U. S. Comp. St. 1901, p. 3420), and to adjudicate the firm and its members bankrupt, as authorized by section 2, subd. 1, if proper facts are shown.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 58, 98, 104, 109-112; Dec. Dig. § 88.*]

6. BANKRUPTCY (§ 88*)—PROCEEDINGS—APPEARANCE.

Where a nonresident was claimed to be a partner of a firm alleged to be bankrupt, and he specially appeared to object to the jurisdiction, the court would grant time to present testimony, and in case that was not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

done direct the issuance of a subpoena requiring him to answer the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 58, 98, 104, 109-112; Dec. Dig. § 88.*]

In Bankruptcy. In the matter of the bankruptcy proceedings of J. & M. Schwartz. On petition of the trustee that one Harry Colton, a resident of New Jersey, be declared the partner of the bankrupt firm and adjudged a bankrupt. On objections by Colton to the proceedings and to the jurisdiction. Overruled.

Herman G. Rabinowitz, of New York City, for trustee.

H. & J. J. Lesser, of New York City, for Harry Colton.

CHATFIELD, District Judge. Adjudication upon an involuntary petition was had on the 18th day of November, 1912, against Joseph Schwartz and Morris Schwartz, individually and as members of the firm of J. & M. Schwartz. The papers show that the alleged bankrupts resided in this district, and had places of business at 39-41 East Broadway, and 82 Division street, borough of Manhattan. A receiver was appointed, and attempts were made to secure some of the assets in the store at No. 82 Division street, borough of Manhattan.

The trustee states in his petition that one Harry Colton, a son-in-law of Joseph Schwartz, made certain disposition of the assets of the bankrupt, and sold for cash the goods in the Division street store. It is also alleged that Colton was interested in the business through investments of money, to have had the right to share in the profits, and to have been an actual partner rather than a creditor. Upon this ground the trustee has given a notice of motion to the said Harry Colton, which was served upon him at 50 West street, Newark, N. J., for an order adding the said Harry Colton to the proceedings as a member of the firm.

Upon the argument of the motion, the said Harry Colton appeared specially by attorney and interposed an affidavit, verified upon the 7th day of March, 1913, in the county of New York. He claims that he is a resident and lives in the state of New Jersey, that he has no place of business in the state of New York, and that he is not a partner in the said firm. He objects to this proceeding, on the ground that the court has no jurisdiction to adjudicate him a bankrupt, that the form of the proceeding instituted by the trustee and creditors is without authority in law and is not in accordance with General Order 8 (89 Fed. vi, 32 C. C. A. xi), nor section 5 of the bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 547, 548 [U. S. Comp. St. 1901, p. 3425]).

[1] The creditors have based their proceedings upon the case of *In re Murray et al.* (D. C.) 96 Fed. 600, in which the court upheld the right to obtain service upon a member of the firm petitioned into bankruptcy, even when out of the district.

[2] As has been held in many cases, the right to extraterritorial jurisdiction in bankruptcy follows the trustee's title to all property of the bankrupt estate, wherever located, in so far as outside parties submit to or are found within the jurisdiction of the court as to the property,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

or where, in order to share in the administration of the estate, they must at some time submit to the jurisdiction of the court in the district where the proceedings are located. But as was said in *Re Harris Co.* (D. C.) 173 Fed. 735, the bankruptcy court has no jurisdiction to control the action of parties out of the district, who are not claiming the exercise of jurisdiction by this court in the course of the administration of the proceedings, or who have not become parties therein, and who can never be brought in unless they voluntarily appear.

[3] This case raises, therefore, at the outset, a jurisdictional question. If a voluntary petition had been filed, or if in the involuntary petition the said Harry Colton had been described as a member of the firm and a subpoena had issued to him, it could have been served by publication within this district, adjudication might have been had, and an ancillary proceeding to obtain assets might be brought within the district where the said Colton resides, or another proceeding in bankruptcy might have been instituted upon original petition in that district. But the proceedings here would result in adjudication of the said Colton as a partner and individually, and the trustee would take title to and follow his assets wherever located, unless he appeared and opposed the petition, or unless he claimed to be solvent, and, if not adjudged bankrupt, endeavored to act under the provisions of section 5, subd. "h," in administering the estate.

[4] Under these circumstances no adjudication of the alleged partner, Colton, can be had until the provisions of the statute and of General Order 8 have been complied with and he has been given the proper chance to answer.

[5] But there would seem to be no reason why the court may not entertain the application to amend the schedules and proceedings and to bring in an additional person, under section 2, subd. 6, of the Bankruptcy Law, and to adjudicate the firm and its members bankrupt, under section 2, subd. 1, if the proper facts be shown. If the said Colton desires to attack the right of the court to adjudicate the firm of J. & M. Schwartz bankrupts, or to charge that this court has no jurisdiction over that firm, but that the petition heretofore filed herein should be confined to the individual assets and estates of Joseph and Morris Schwartz, these issues might have some bearing upon whether or not the court had also jurisdiction to adjudicate the said Colton a bankrupt as a partner and individually, if he neither has a domicile nor place of business within this district.

But these questions cannot be disposed of upon the present motion. The preliminary objection to a determination by the court of whether or not Colton should be called upon to answer the proceeding in this district must be decided in favor of the trustee, but such proceedings can only be instituted by a subpoena to answer or its equivalent. Upon the present motion nothing can be determined except the preliminary objection to the sufficiency of the papers and allegations in the record to justify the summoning of the said Harry Colton to answer as if he had been made a party to the proceedings at the outset.

[6] The court will therefore overrule the preliminary objection based upon the special appearance (the said Colton having actually ap-

peared in court for that purpose and having submitted an affidavit verified within the state of New York), and will direct that the said Colton present, within five days, any affidavit or testimony which he desires as to the jurisdiction of the bankruptcy court over the firm of J. & M. Schwartz, as a partnership. If this is not done, the motion to add Harry Colton as a partner to the proceedings will be granted, to the extent of directing a subpoena to issue to him to answer the allegations of the petition, including the allegation that he is a partner, or to show cause why the firm, and he as an individual, should not be adjudged bankrupt, in the usual form provided for by the statute.

BUTCHER v. WERKSMAN et al.

(District Court, E. D. New York. April 19, 1913.)

1. BANKRUPTCY (§ 175*)—REAL ESTATE MORTGAGE—FAILURE TO RECORD—EFFECT.

Failure to record a second real estate mortgage, executed by a bankrupt, until his condition was such as to arouse expectation of trouble, was only relevant as showing the intention of the parties, and was corroborative of fraud in case it appeared that the mortgage was without consideration, or in fraud of the rights of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 175.*]

2. BANKRUPTCY (§ 314*)—REAL ESTATE MORTGAGE—FRAUD—RIGHTS OF ASSIGNEE.

Where an insolvent, in contemplation of bankruptcy, executed a second mortgage for \$1,000 on certain real property to his brother-in-law, which was fraudulent and without consideration, and the mortgagee, after bankruptcy had intervened, assigned the mortgage to L. for \$700, it was not provable as a claim against the bankrupt's estate, under the rule that a purchaser of a mortgage takes only the rights of his assignor, and is not an innocent purchaser for value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469-473, 478, 483-487, 489, 490; Dec. Dig. § 314.*]

In Bankruptcy. Action by Edward Butcher, Jr., as trustee in bankruptcy of one Morris Werksman, against Abel Werksman and others, to set aside a second mortgage on certain property of the bankrupt for fraud. Granted.

Morton Stein, of New York City, for complainant.

Alexander Wolf, of New York City, for defendants.

CHATFIELD, District Judge. Upon the 5th of January, 1910, one Morris Werksman gave a mortgage to his brother-in-law to secure the sum of \$1,000, and subsequent to a first mortgage of \$2,000, upon his property at No. 33 Reid avenue, Brooklyn. This mortgage was not recorded until the 20th of April, 1910, and upon the 25th of May, 1910, a petition in bankruptcy was filed against the said Morris Werksman, resulting in adjudication upon the 9th of June, 1910. The trustee of the estate has brought the present action to have this

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mortgage declared null and void against the bankrupt, the mortgagee, and an assignee, one Louis Lipschitz, of Passaic, N. J., on the ground that it was given to defraud creditors and conceal assets. The three defendants have answered, denying the allegations of fraud, and alleging that the mortgagee, Abel Werksman, transferred, upon the 1st day of October, 1910, the bond and mortgage referred to, to the defendant Lipschitz, by assignment, for the sum of \$700. It appears to be undisputed that Lipschitz paid to Abel Werksman the said sum of \$700 in return for this assignment. The bond had been given for the period of three years, and no default had occurred prior to the time of the transfer to Lipschitz, except as caused by the adjudication in bankruptcy.

The first point to be considered is the charge of fraud in executing and delivering the second bond and mortgage. The house in question has since been sold for \$4,500. The schedules and the assets of the estate, however, show that the bankrupt was actually insolvent at the time of making this mortgage, and it is charged by the trustee that no loan actually was made to be secured thereby. It may be assumed that a bona fide loan of \$1,000 as present consideration for a second mortgage, and with no elements of fraud, would be valid as against the real estate upon which the mortgage was given.

[1] The mortgage in question in this suit was not recorded until April. In the case of a chattel mortgage, this might be sufficient to substantiate a charge of invalidity; but, with respect to real estate, the failure to record a mortgage affects only priority as against persons acquiring liens before the actual date of recording. The failure, therefore, to record it until the condition of the bankrupt was such as to arouse the expectation of trouble, only goes to the matter of proof of the intentions of the parties. If it appear that the bond and mortgage were made without consideration, or in fraud of creditors' rights, then the failure to record would be corroborative of the fraudulent scheme.

[2] We must therefore consider the testimony upon the question of the bona fides of the original transaction. The court has read the testimony, but has not heard the witnesses. It appears that Abel Werksman was a partner in the Heart Jewelry Company, of which company he kept the books. During all the period in question his withdrawals from the firm were as much as he had the right to withdraw, according to his agreement with his partners, and he invested no money for the firm in this mortgage. On the contrary, although he claims that he accumulated the money by use of the firm's funds, he did not make entries thereof in the firm's books, and none of these moneys were deposited in either the firm's bank account or in any bank account for himself. His story of how he obtained these moneys is that he personally discounted notes held by the firm, and subsequently rediscounted or collected these notes for his own benefit in repayment. He kept for himself the proceeds and the profits; but he did not keep in the firm's books any account of these personal discounts, and kept no books himself, so as to show his profit transactions. He testifies that under these conditions the bankrupt noti-

fied him that he was in trouble and needed to borrow money, and that it was agreed between them that the bankrupt would have to have \$1,000 in about three months; that this occurred in October, 1909, and that he therefore began to accumulate funds, which he carried in his pocket until in January he had the necessary \$1,000, and that he then loaned this amount to his brother-in-law. He gives no persuasive explanation of why he accumulated the amount until he could pay it in one sum, at a time when his brother-in-law's needs were so pressing all through the period of accumulation. He differed in his testimony as to the time when he agreed to accumulate this amount—in one place fixing the date as in November or December, instead of October. He evidently knew of the doubtful financial condition of his brother-in-law, the bankrupt, at all times, even when he took the second mortgage and failed to record it.

The bankrupt did not furnish, nor did Abel Werksman produce, any records or vouchers showing the receipt by the bankrupt of the \$1,000, and he deposited in his bank but \$200 which he can identify from the proceeds. He testifies that he paid over \$500 from the alleged loan to another brother-in-law, and that he paid over \$200 to one of the petitioning creditors, named Smith. These two payments, aggregating \$700, correspond to the amount which Abel Werksman, the mortgagee, obtained when he sold the mortgage to Lipschitz, and it might have been charged that the amount involved in the transaction between the two brothers-in-law, if any loan was ever made, was only \$700, and that this was the amount for which a second mortgage of \$1,000 was prepared as security. Such a mortgage would have been preferential, as the record thereof was within four months of adjudication. Section 60a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). The mortgage and bond might also have been attacked for usury.

The second brother-in-law and Smith did not corroborate the testimony of the bankrupt, and the whole transaction depends upon the existence of a mortgage given for alleged cash payments under circumstances which are unworthy of belief. Therefore the trustee has not charged a preference, but has claimed that the entire transaction was void as a fraud on creditors.

The record indicates that Lipschitz paid Abel Werksman \$700 on account of the mortgage in question. This payment is not disputed, and there is no testimony offered to indicate that the source from which Lipschitz secured the funds for the purchase of the mortgage was other than as he claimed; that is, that it was his own money. If so, Abel Werksman has received \$700 on account of a mortgage executed in such a way as to indicate a fraudulent transaction, and has thereby transferred to an apparently innocent party, for value, security of the face value of \$1,000, not as security for the sum paid by Lipschitz, but as an actual sale. This sale was consummated after the adjudication in bankruptcy, and after the title to the equity in the property was in the trustee. No affidavit of title was given by the bankrupt, nor any investigation nor search made of the title to the property, nor as to the validity of the mortgage. The bargain

offered—that is, the possibility of securing a \$1,000 mortgage for \$700—is claimed by the assignee to have been satisfactory to him, and in effect he took the risk of the validity of the mortgage which was assigned to him. As between him and Abel Werksman, he was a purchaser for value. But the purchaser of a mortgage takes by assignment only the rights which his assignor could convey, and is not an innocent purchaser for value, in the sense that the term is used with respect to a chattel or to a piece of negotiable paper. *Schafer et al. v. Reilly*, 50 N. Y. 61; *Bush v. Lathrop*, 22 N. Y. 535; *Davis v. Bechstein*, 69 N. Y. 440, 25 Am. Rep. 218; *Owen v. Evans*, 134 N. Y. 514, 31 N. E. 999.

But if it be claimed that the mortgagor had been estopped in any way from denying validity of the mortgage in the hands of an innocent assignee, this would not protect the purchaser as against the trustee in bankruptcy. At the time of the assignment to Lipschitz, title to the property was vested in the trustee in bankruptcy, and Abel Werksman could not then create a valid lien thereon by transfer of an invalid mortgage. The purchaser of such a mortgage, if his assignment were recorded, would be a valid holder with respect to any subsequent mortgagee—that is, in so far as the recording acts might give him the advantage over subsequent incumbrancers; but he does not thereby get any better title than that which was possessed by his assignor, and the bankruptcy proceeding was notice to him of any possible defect in title as against creditors.

Upon the testimony in the present case, the assignor, Abel Werksman, seems to have obtained nothing except a bond and mortgage, fraudulently made and intended to defraud the creditors of the bankrupt. By this, at a time when the insolvency of the bankrupt was known both to himself and to the mortgagee, concealment of the bankrupt's property would be effected by the giving of a mortgage, unless such enrichment of the estate as to furnish a valid present consideration were shown. This has not been done, and the trustee should have a decree setting aside, as between the bankrupt estate and Abel Werksman, or his assignee, the lien and obligation of the bond and mortgage. Whether or not the transfer of the bond and mortgage to Lipschitz gave the latter a cause of action against Abel Werksman is something with which we have nothing to do; but the admitted receipt of \$700 by Abel Werksman renders him liable to protect the estate from any claim therefor by Lipschitz, and leaves the transaction dependent solely upon whether the making of the original bond and mortgage was fraudulent.

As the court concludes it so to be, the trustee has the right to have it declared null and void, and not an obligation against the bankrupt estate. A decree may be entered accordingly.

In re AUTOMATIC MUSICAL CO.

(District Court, N. D. New York. April 21, 1913.)

1. BANKRUPTCY (§ 95*)—POWERS OF REFEREE—EXAMINATION OF WITNESSES—"COURT OF EQUITY."

A court of bankruptcy is a "court of equity," within new equity rule 62 (Hopkin's New Equity Rules, pp. 127, 128 [198 Fed. xxxvi]), relating to the powers of a master, and providing that he shall have full authority to examine parties to the cause on oath touching all matters contained in the reference, and to examine all witnesses produced by the parties before him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 132, 140, 145; Dec. Dig. § 95.*]

For other definitions, see Words and Phrases, vol. 2, p. 1685.]

2. BANKRUPTCY (§ 95*)—EXAMINATION BEFORE REFEREE—POWERS—ADMISSIBILITY OF EVIDENCE—RULINGS.

Where a witness was ordered to appear for examination before a referee in a bankruptcy proceeding, the referee was not bound to certify an objection taken to proper questions asked of the witness to the court before ruling on the objection and requiring the witness to answer, but was entitled to overrule the objection and require the witness to answer, and, if he still declined, to certify the matter to the court, that the witness might be punished as for a contempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 132, 140, 145; Dec. Dig. § 95.*]

In Bankruptcy. In the matter of the Automatic Musical Company. On return of an order to show cause, and on certificate of a referee in bankruptcy, acting as special master, pursuant to an order to punish a witness, Edwin Link, for contempt in refusing to answer questions during his examination, which he was directed by the special master to answer, after objections taken thereto had been overruled. Order directing the witness to appear before the master and answer the questions.

Rollin W. Meeker, of Binghamton, N. Y., for the motion.
W. J. & F. W. Welsh, of Binghamton, N. Y., opposed.

RAY, District Judge. An involuntary petition in bankruptcy having been filed herein, a receiver of the property of the alleged bankrupt was duly appointed by this court, and thereupon the bankrupt, others interested joining, applied for an order directing a sale of certain of such property, and an order to show cause was duly granted, and the court or judge also made an order directing Edwin Link, an acting director, and others, to appear before the referee, acting as special master, "and be examined concerning the acts, conduct, and the property of the said alleged bankrupt." The clerk was directed to issue a subpoena, etc. Link is one of the directors of the alleged bankrupt corporation.

Pursuant to the order and subpoena, Mr. Link appeared and was sworn and examined. He answered many questions, but on advice of counsel refused to answer others, which were clearly competent, and which related to ownership of stock in the corporation, the busi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ness, and to property which had been owned by such corporation, and the value of the assets. Objections were interposed, but overruled; and, the witness having declined to answer, he was directed to answer, but refused to obey the direction. The referee, acting as special master, has certified the proceedings, questions, etc., and also certifies:

"That the said witness, Edwin Link, after having taken the oath, refused to be examined in the above particulars, and that he is in contempt of court, and therefore recommend that he be punished for contempt, or that such other proceedings may be had as to the judge shall appear proper."

There is no claim that the matters were privileged, or that the answers would have tended to disgrace or incriminate the witness. The questions were proper, and related to relevant matters, and should have been answered.

The question now presented is whether the referee, acting as special master, had power to rule and direct the witness to answer. It is contended that the refusal should have been reported to the court, and its ruling obtained, and that the witness could only be guilty of contempt after refusing to obey the direction or order of the court or judge to answer the questions propounded. I do not understand this to be the law or practice. The referee, as special master, was an officer of the court, and acting pursuant to an order of the court, and was directed and authorized to take the testimony of the witness, who was under an order and direction of the court to appear, which he had done, and give his evidence. It was not for him, or counsel of his own, or of the alleged bankrupt corporation, to decide what was competent and pertinent evidence. Nor was it for the witness, by refusing to answer, to compel the special master at every step, if the witness saw fit, to stop the examination, certify the question and refusal, and compel the parties in interest to go before the judge for an order directing the witness to answer. Establish such a rule of practice and these examinations in bankruptcy cases will be useless and fruitless. They will be indefinitely prolonged and made onerous and ruinously expensive.

[1] It is well settled that a court of bankruptcy is a court of equity, and old equity rule 77—new equity rule 62—(Hopkin's New Equity Rules, pp. 127, 128 [198 Fed. xxxvi]), relating to powers of master, provides:

"The master shall regulate all the proceedings in every hearing before him upon every such reference; and he shall have full authority to examine the parties to the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers and other documents applicable thereto; and also to examine on oath, viva voce, all witnesses produced by the parties before him," etc.

In *Re De Gottardi et al.* (D. C.) 114 Fed. 328, it is held that a hearing before a referee under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418)—

"is in the nature of a hearing in equity and is governed by the rules of equity practice of the federal courts both as to the hearing itself and as to the review by the judge."

Also it is there held that:

"It is the duty of a referee, although he must pass on objections to testimony, to cause all testimony excluded to be taken down and made a part of the record, with the ruling and exception noted; and upon a review the judge is not required to reverse the decision because of the erroneous admission or exclusion of evidence, but it is his duty to determine the issues de novo upon the competent evidence in the record, or he must recommit the case for further hearing as the circumstances may require."

This is the rule laid down in *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521, and also in *Chadeloid Chemical Co. v. Chicago Wood Finishing Co.* (C. C.) 173 Fed. 797. In *Hopkin's New Federal Equity Rules*, at page 128, it is said:

"Where the objection is that the testimony sought to be elicited is irrelevant and immaterial, the question should be answered, and the relevancy and materiality be ruled on at the time of hearing."

In *Loveland on Bankruptcy* (3d Ed.) at page 639, it is said:

"In case the referee is acting as a master or commissioner, the court, which is to decide the matter, is entitled to have all of the evidence for that purpose, and to decide what evidence shall be excluded and what may be considered. The proper practice is for the referee to make his ruling and thereupon require the question to be answered. If his ruling be against the question, and the court shall reverse his finding, it will not be necessary to have a re-examination of the witness. If the court shall affirm his ruling, the answer may be properly disregarded by the court."

In *United States v. Tom Wah* (D. C.) 160 Fed. 207, affirmed by the Circuit Court of Appeals 163 Fed. 1008, 90 C. C. A. 178, this court considered at length the question of contempt. In that case Tom Wah was arrested in deportation proceedings and called as a witness by the government against himself. He refused to testify, and the court made an order directing the witness to be sworn and answer all proper questions.

[2] In the case at bar this court in bankruptcy had made an order directing the witness Link, who was one of the officers of the bankrupt corporation, to appear and give his testimony. He did appear, and the master had power to rule that the questions should be answered, and also had power under the rules to direct the witness to answer. It was contumacious conduct not to answer. In this district, as in others, the rules of the Supreme Court so far as applicable apply to all bankruptcy proceedings and examinations. By rule 22 of the District Court, Northern District of New York, it is expressly provided that referees may pass upon the competency, materiality, and relevancy of evidence, and have all the powers of the judge concerning the admission or rejection thereof, etc. The master appointed by the court to aid it has the same power, and the order of the court directing a party or witness to appear and be examined, when duly subpoenaed, is in effect an order and direction of the court that he answer all questions propounded which the master directs him to answer.

In this case, on the hearing, the attorney who represented Mr. Link made sufficient apology, and satisfied the court that no real contempt was intended. For this reason, and in view of the fact that there has

been no decision on this subject in this district heretofore, I am not inclined to impose any punishment, but direct the witness to appear before the referee, acting as special master, and answer the questions. If this is done, I think the ends of justice will be served, and all parties satisfied.

This action, however, must not be regarded as a precedent governing future cases. It must be understood that witnesses are to answer all questions, when directed by the referee or special master to do so. It is presumed that no referee or master will direct a witness to answer irrelevant or impertinent questions. All parties interested in this proceeding should understand that prompt and efficient action and disposition of cases in the bankruptcy court requires the enforcement of this rule, and that it will be intolerable when such an examination is in progress to compel the examining party to resort to the court itself or to the judge for a ruling and direction to the witness whenever he sees fit to refuse to answer.

There will be an order that Mr. Link appear before the referee, acting as special master, and answer the questions propounded, and such further questions as he may be required to answer. As this proceeding was instituted and has been carried on in behalf of the receiver appointed by the court, reasonable compensation to the attorney can be made on the accounting.

SHEFFEY et al. v. DAVIS COLLIERY CO. et al.

(District Court, N. D. West Virginia. April 25, 1913.)

1. TAXATION (§ 852*)—ENTRY OF LAND—DUTY TO OWNER—EFFECT OF FAILURE—FORFEITURE—VOID SALE.

Under Const. W. Va. art. 13, § 6,† making it the duty of every landowner to have his land entered on the land books of the county and pay taxes thereon, and providing that a failure to have the same so entered and to pay taxes for five successive years shall forfeit the land to the state, such failure works an absolute forfeiture of all the owner's right, title, and interest in and to the land, so that he has no standing to maintain an action to recover the same from a purchaser at a void judicial sale, who has had the land entered in his own name and paid the taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1668, 1669; Dec. Dig. § 852.*]

2. TAXATION (§ 848*)—LAND—DUTY TO ENTER—NONRESIDENTS.

The fact that land in West Virginia is owned by nonresident heirs does not excuse them for failing to see that the land is entered for taxes on the land books of the county in which it is located and the taxes paid by them thereon, under Const. W. Va. art. 13, § 6, providing that an owner's failure to so enter land and pay the taxes for five successive years shall constitute an absolute forfeiture thereof to the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1664; Dec. Dig. § 848.*]

3. TAXATION (§ 852*)—FORFEITURE OF LAND—VOID SALE—RIGHT TO SUE—LACHES.

Proceedings having been instituted in 1892 for the sale of a tract of more than 1,000 acres in West Virginia, which belonged to the heirs of a nonresident owner, to sell the same, the land was duly sold and the sale confirmed, after which the purchaser entered the land for taxes in his name and paid taxes thereon continuously thereafter. Const. W.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
204 F.—22 † Code 1906, p. lxxxv.

Va. art. 13, § 6, provides that, where the owner of a tract consisting of more than 1,000 acres for five successive years fails to enter his land for taxes in the county where it is located and to pay taxes thereon, he shall forfeit the land to the state. *Held*, that the heirs, having failed to enter the land for taxes in their own name subsequent to the judicial sale and having paid no taxes thereon, were barred by laches to recover the land from the purchaser by suit in equity instituted in October, 1910, to cancel such sale for invalidity.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1668, 1669; Dec. Dig. § 852.*]

In Equity. Suit by Maggie Sheffey and others against the Davis Colliery Company and others. Judgment for defendants.

Davis & Davis, E. B. Templeman, and D. E. Swartz, all of Clarksburg, W. Va., and H. G. Kump, of Elkins, W. Va., for plaintiffs.

W. B. & E. L. Maxwell and E. A. Bowers, all of Elkins, W. Va., for defendants.

DAYTON, District Judge. Hugh W. Sheffey, resident of the state of Virginia, died intestate in 1889, seized of a tract of near 5,000 acres of unimproved land in Randolph county, this state. His law partner, James Bumgardner, Jr., qualified in Virginia as his administrator. His brothers, sisters, and children of his deceased brothers and sisters constituted his heirs at law. In June, 1892, Bumgardner, his administrator, and Maggie Sheffey, daughter of one of his heirs, purporting to represent the other heirs, entered into a contract with O. C. Womelsdorf to sell to him this tract of land at the price of \$3 per acre, and, as some of the heirs were infants, to secure a ratification and confirmation of such sale in proper judicial proceedings to be instituted in the circuit court of Randolph county. Such proceedings were instituted in the name of Andrew J. Long, administrator, then sheriff of the county, to whom the estate was committed, and said sale was made, ratified, and confirmed by decrees entered therein, and the land conveyed to Womelsdorf by a commissioner of the court, appointed for the purpose. This suit was, in October, 1910, instituted by the heirs of Sheffey, to set aside, cancel, and annul the decrees, and the deeds of Womelsdorf and his subsequent grantees, as constituting cloud upon plaintiffs' title. The legal proceeding is assailed as void for want of jurisdiction in the court and other reasons. By answer these charges are denied, and forfeiture of title and laches are claimed in defense.

At the threshold of this case we are confronted with the question whether these plaintiffs have any title to the land, cloud upon which, by this bill, they are seeking to remove. It is undisputed that for more than 15 years the land in their names has been off the land books and they have paid no taxes thereon, while, on the other hand, ever since Womelsdorf's purchase under the judicial proceedings in Long, Adm'r, v. Bumgardner et al., here assailed as void, the land has been assessed to and taxes paid by him and his subsequent grantees. The Supreme Court of Appeals of West Virginia, in a number of cases (*Grinnan v. Edwards*, 21 W. Va. 347; *Haymond v. Camden*,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

22 W. Va. 180; *Sturm v. Fleming*, 22 W. Va. 404; *Stephens v. Brown*, 24 W. Va. 234; *Lynch v. Andrews*, 25 W. Va. 751; *Hall v. Hall*, 27 W. Va. 468), has held, where one within the Confederate lines during the Civil War had been proceeded against in the courts of this state within the Federal lines, by order of publication, and his lands sold for purchase money or other debt, such proceedings were absolutely null and void. In the last two of these cases (*Lynch v. Andrews* and *Hall v. Hall*) and in *Sturm v. Fleming*, 26 W. Va. 54, upon a second appeal, the court distinctly held that a purchaser under such void judicial sale did not hold adverse to the original owner, but in privity, and that taxes paid by him or his assignee inured to the benefit of the original owner, and saved his land from forfeiture in case the land in the original owner's name had been omitted from the tax books, and but for such payment by the purchaser in his name would have been forfeited. Subsequently this court, in *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423, and *Mullan's Adm'r v. Carper*, 37 W. Va. 215, 16 S. E. 527, practically overruled these prior cases and held (in *Mullan v. Carper*) that:

"A court of equity, without jurisdiction of the person, pronounces a decree for the sale of a certain parcel of land, and appoints commissioners, with directions to make the sale. They sell the land. The court confirms the sale, and appoints the commissioners to convey the land to the purchaser on payment of the purchase money. The purchase money is paid, and the commissioners make to the purchaser a deed purporting to convey the land in fee. Such deed, being proved, constitutes color of title"

—and, further, that adverse holding under such color of title for the statutory period of ten years would completely bar the right of the original owner to the land. These later cases have been upheld in a number of subsequent decisions of this court. *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395; *McNeely v. Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562; *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959. In this last case the court undertakes, however, to distinguish *Hall v. Hall* and *Lynch v. Andrews* from *Mullan v. Carper*, and would seem to still hold to the proposition that payment of taxes by the purchaser at the void sale would inure to the benefit of the original owner and prevent forfeiture for his nonpayment of taxes.

In *Simpson v. Edmiston*, 23 W. Va. 675, approved in *Stockton v. Craig*, 56 W. Va. 473, 49 S. E. 386, and *State v. Harman*, 57 W. Va. 447, 50 S. E. 828, it was held that, where a tax deed was void, the title of the former owner remained in him, and the colorable title or claim of the tax purchaser under such void deed and the former owner's title were distinct and hostile, so much so that payment of taxes on the same land by the tax purchaser in his name would not prevent the forfeiture of it for omission in the former owner's name for the same years. Under this ruling it was practically established that both the former owner and the claimant under the void deed must keep the land on the tax books in their own names and both pay taxes, or else be subject to the forfeiture of their respective title or "color and claim of title" for an omission of five successive years so to do. Finally, however, this has been all upset by the more recent

decisions of *State v. King*, 64 W. Va. 546, 63 S. E. 468, *State v. Snyder*, 64 W. Va. 659, 63 S. E. 385, and *State v. West Branch Lumber Co.*, 64 W. Va. 673, 63 S. E. 372, where it is held (*King Case*):

"The privilege given by statute to redeem forfeited land is the mere grace of the state, not its duty, and does not constitute a vested property right in the former owner."

And:

"The transfer to other claimants of land made by section 3, article 13, of the Constitution, and also a conveyance under a sale in a suit to sell land as forfeited, constitute grants of the state, and create new and original title."

And further (*Snyder Case*):

"1. The state is estopped by section 29 of chapter 31 of the Code from proceeding to sell, as forfeited for nonentry in the name of the former owner, land conveyed by a sheriff to a purchaser, pursuant to a sale thereof for nonpayment of taxes thereon, though the deed, because of defects in the sale proceeding, is void as to the former owner and fails to vest his title in the grantee therein.

"2. By making such deed conclusive evidence against all persons except the former owner, his heirs and assigns, and those who might have redeemed the land within one year after the date of the sale, the statute works, by estoppel, a release, grant, or transfer of the title of the former owner to the grantee therein, upon the forfeiture of such title for failure of the former owner to keep the land taxed in his name and the taxes paid thereon for five successive years."

And finally (in *West Branch Case*):

"1. Though failure of a former owner of land, conveyed by a fatally defective tax deed, made pursuant to a sale by a sheriff for delinquency, to keep the land taxed in his own name and pay the taxes for a period of five successive years, works a forfeiture of the title, the deed is conclusive evidence against the state that the title of the former owner is in the tax deed grantee, and she cannot maintain a suit to sell the land as forfeited.

"2. Section 29, chapter 31, of the Code, by estopping the state from proceeding against the grantee in a fatally defective tax deed to enforce a forfeiture in the name of the former owner, releases or grants such forfeited title to such grantee in advance of the accrual of the forfeiture."

From all which the anomalous condition would seem to arise that, while five successive years' failure by a landowner to have his land assessed and to pay the taxes thereon forfeits his title to the state, yet the state is estopped from selling or disposing of the land so long as it is assessed in the name of, and taxes are paid by, one having "claim or color of title" to the land under a void deed. However, all the cases agree that under section 6, article 13, of the Constitution of the state (given in the margin¹), a complete forfeiture to the state

¹ "Sec. 6. It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with state tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vest in the state. But if, for any one or more of such five years, the owner shall have been charged with state tax on any part of the land, such part thereof shall not be forfeited for

accrues of every tract of 1,000 acres or more of land, where the owner thereof fails to have it entered upon the land books, charged with taxes, and to pay the same for any successive five years.

How complete and sweeping is this forfeiture is set forth in *McClure v. Maitland*, 24 W. Va. 361, where the court says that, after the forfeiture becomes complete by such failure, "the former owner has no more claim to or lien upon the land than one who never had pretended to own it"; that under sections 4 and 5 of the same article (given in the margin²) the state has a right to grant it to others, sell it when and how she pleases in "the exercise of this perfect dominion over her own property," and the grant to the former owner, in case she does sell, "of any surplus proceeds, is wholly gratuitous, and his claim thereto is confined to the proceeds as such."

This ruling has been approved and followed by the Circuit Court of Appeals for this circuit in *Read v. Dingess*, 60 Fed. 21, 8 C. C. A. 389; the court sitting at the time being Chief Justice Fuller and District Judges Seymour and Simonton. And further, in the recent case of *Fay v. Crozer* (C. C.) 156 Fed. 486, the facts in which are similar to those here, I reviewed the legislation in Virginia and West Virginia touching these forfeitures of lands for nonentry and nonpayment of taxes. I there held that under this section 6, article 13, of the Constitution, it is the absolute duty of one claiming to be the owner to see to it that his land is entered upon the land books for taxation and to pay the taxes assessed, even to the extent of compelling the proper officer to so enter it upon the books by legal proceeding if he refused to do so. I there called attention to the last and ruling cases of *Stockton v. Craig*, 56 W. Va. 464, 49 S. E. 386, and *Webb v. Ritter*, 60 W. Va. 193, 54 S. E. 484, overruling, in part at least, the prior cases of *Sayers v. Burkhardt*, 85 Fed. 246, 29 C. C. A. 137 (C. C. A. 4th

such cause. And any owner of land so forfeited, or of any interest therein at the time of the forfeiture thereof, who shall then be an infant, married woman, or insane person, may, until the expiration of three years after the removal of such disability, have the land, or such interest charged on such books, with all state and other taxes that shall be, and but for the forfeiture would be, chargeable on the land, or interest therein for the year 1863, and every year thereafter with interest at the rate of ten per centum per annum; and pay all taxes and interest thereon for all such years, and thereby redeem the land or interest therein: Provided, such right to redeem shall in no case extend beyond twenty years from the time such land was forfeited."

² "Sec. 4. All lands in this state, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the state of Virginia, or this state, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of, the title whereof shall remain in this state till such sale as is hereinafter mentioned be made, shall by proceedings in the circuit court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder.

"Sec. 5. The former owner of any such land, shall be entitled to receive the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this state, with interest at the rate of twelve per centum per annum, and the costs of the proceedings, if his claim be filed in the circuit court that decrees the sale, within two years thereafter."

Cir.) and *Totten v. Nighbert*, 41 W. Va. 800, 24 S. E. 627, in the first of which (*Stockton v. Craig*) it is distinctly held that one whose land is forfeited for nonpayment of taxes has no such interest as warrants him to maintain suit to cancel alleged fraudulent and void decrees and deeds as cloud upon title. An appeal direct to the Supreme Court was taken in this case of *Fay v. Crozer*, and that court approved of my decision therein and dismissed the appeal. *Fay v. Crozer*, 217 U. S. 455, 30 Sup. Ct. 568, 54 L. Ed. 837. That court based its action on *King v. Mullins*, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214, and *King v. West Virginia*, 216 U. S. 92, 30 Sup. Ct. 225, 54 L. Ed. 396. Subsequently, in *Kentucky Union Co. v. Kentucky*, 219 U. S. 140, 31 Sup. Ct. 171, 55 L. Ed. 137, where similar laws of Kentucky were involved, *Fay v. Crozer* was cited and approved.

[1] It may therefore be regarded as settled in this state that the owner of land must see to the entry of his land upon the land books; that his failure to do so for five successive years works an absolute forfeiture of all his right, title, and interest therein; that notwithstanding the state may, by proceedings absolutely void, sell the land to another, who sees to it that the entries are made in his name and the taxes paid, yet this does not relieve the original owner's obligation in this regard. But, suppose a court at the suit of private parties, wholly without jurisdiction in the premises, enters void decrees of sale and confirmation, purporting to vest this owner's land in a third party, who immediately enters the land on the books in his name, claims title in himself, and pays the taxes; does this warrant the original owner in dropping the land off the books in his name, and some 15 years after, as in this case, coming into a court of equity to assail the judicial proceeding as void and a cloud upon his title, and at the same time claiming relief from the forfeiture by virtue of the purchaser in the void proceeding having paid such taxes? A case might arise where the purchaser has fraudulently secured the institution of such void proceeding, knowing it to be void, for the purpose of corruptly obtaining the owner's title, where this might be justified; but where one in good faith has purchased under decrees of a court of general jurisdiction, and in good faith takes his deed, enters the land for taxation in his own name, a publication to the world of his claim of ownership, it is certainly gross laches, if not bad faith on the part of the original owner not to inform him promptly in some way that he disputes the validity of the sale and still claims to own the land. And under such conditions it seems to me his duty is just as imperative to see that the title in his name is entered upon the books and not subject to forfeiture. He knows, or ought to know, that he runs two risks in the premises—first, that of the forfeiture to the state; and, second, the maturity of a superior title by ten years' adverse holding under the court's deed, conferring at least color of title. In such circumstances the very fact that he finds his lands assessed not to himself, but to another, should at least arouse him to prompt action, to see to it that he has the land assessed in his name, runs no risk of forfeiture, and that the purchaser's right to have it assessed to himself is challenged. There is here absolutely no evidence to indicate that *Womels-*

dorf bought this land under these judicial proceedings in other than good faith and wholly as a stranger to it. It is admitted that there is no evidence of fraud on his part or that of his subsequent grantees.

[2] I have carefully examined the reasons set forth by these plaintiffs for their delay in the premises. I do not think they afford justification. They knew that they were heirs of Sheffey; that under the law his real estate descended direct to them; that it was subject, upon his death, to assessment and taxation in their names as such heirs. They had to recognize the obligation, enforced by the Constitution of the state, upon them as such owners to see that such entry and assessment was made; they had no right to depend upon any one else to do this, it being a personal obligation. The fact that they were nonresidents only required them, if anything, to be more careful to see to it that their legal obligations in this particular were performed.

[3] Under the conditions existing, I am driven to the conclusion that plaintiffs' title if any they had after the judicial sale, has become absolutely forfeited for nonassessment and nonpayment of taxes, and that, if this were not so, their delay and laches in asserting and maintaining it during these many years has estopped them from doing so now. In this discussion it may be assumed that I have assented to the contention that the judicial proceedings assailed and under which the land was sold to Womelsdorf were null and void. I now here expressly disclaim such assumption; on the contrary, I have not, in view of the conclusion reached that plaintiffs have not, under any conditions, the right to relief, regarded it necessary to consider at all the questions raised as to their validity.

The plaintiffs' bill must be dismissed.

In re FARKAS.

(District Court, E. D. New York. April 15, 1913.)

1. BANKRUPTCY (§ 229*)—EXAMINATION OF BANKRUPT AND WITNESSES—CONTEMPT.

Punishment for contempt in bankruptcy proceedings should not be used solely for intimidation, nor in such a way as to prevent or delay the administration of the estate, but should be applied first to compel obedience to proper orders of the court, to secure proper results in administration.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 385; Dec. Dig. § 229.*]

2. BANKRUPTCY (§ 229*)—CONTEMPT—PUNISHMENT.

Where a person is in contempt for failure to perform a duty under the bankruptcy law, he should first be allowed to purge himself of the civil contempt by performing the required duty, and by placing the creditors in the position they would have been if no contempt had occurred, after which a fine or definite imprisonment may be imposed for the criminal contempt, if not excused.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 385; Dec. Dig. § 229.*]

3. BANKRUPTCY (§ 237*)—CONTEMPT—EXAMINATION OF BANKRUPT—PURGING CONTEMPT.

Where a bankrupt and two witnesses were in contempt for failing to appear at an adjourned date for examination, and after proceedings to punish them for contempt had been instituted it was shown that they had appeared, apologized, tried to excuse themselves, and offered to submit to an examination as freely as if they had been present at the first hearing, they thereby purged themselves of the civil contempt, and the only question remaining was the punishment to be imposed to secure respect for the court's authority.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 37, 48, 405; Dec. Dig. § 237.*]

4. BANKRUPTCY (§ 237*)—CONTEMPT—FAILURE TO APPEAR FOR EXAMINATION—PUNISHMENT.

Where contempt proceedings were instituted against a bankrupt and two witnesses for failure to appear at an adjourned date for examination, after which they purged themselves of the civil contempt by appearing and submitting to examination, and it appeared that their failure to appear originally was the result of carelessness and trustfulness in others, the punishment for the criminal contempt would be limited to a fine.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 37, 48, 405; Dec. Dig. § 237.*]

In Bankruptcy. In the matter of bankruptcy proceedings against Louis Farkas. Proceedings to punish the bankrupt and certain witnesses for contempt in refusing to appear at an adjourned date for examination before the referee. Fines imposed.

Joseph A. Arnold, of New York City, for trustee.

CHATFIELD, District Judge. The bankrupt and two witnesses (who were under examination before the referee as to certain property which had been taken from the bankrupt's place of business before adjudication) were brought into court to show cause on certificate of the referee why they should not be punished for contempt in not appearing on an adjourned day, and specifically for disregard of the referee's orders.

The court, after adjournments (made necessary to produce the presence of the three men in the courtroom) and on their denial of intentional acts of contempt, inquired into the purpose of the examination before the referee, and also into the requirements of the proper administration of the bankrupt estate. It appeared that the examination of the bankrupt and the three witnesses as to the property above mentioned had never been concluded. The court therefore ordered the three respondents to return on a later day for the infliction of punishment for any contempt which should be considered to have been merited by their actions, and in the meantime ordered the bankrupt and the two witnesses to appear before the referee and submit to any examination which was desired, or which had been interfered with by their previous failure to appear. In other words, they were given an opportunity to purge themselves of any contempt which could be cured by their subsequent conduct.

The referee has now certified (and has filed the testimony taken) that the men did appear and were examined only upon the question as to whether their previous apparent and admitted contempt was willful and contumacious. As to this he reports that the contempt shown was not from bad faith or intended endeavor to frustrate the purpose of the reference, but was rather a careless or indifferent disregard for the court's order and the requirements of the situation, based upon reliance on the word of other parties whose accuracy and authority should not have been assumed as complete.

[1, 2] This court has power under the bankruptcy statute to compel the proper administration of an estate and also obedience to the court's orders. Punishment for contempt should not be used solely for intimidation, nor in such a way as to prevent or delay the administration of the estate. The first thing to be done is to compel obedience to proper orders and to secure proper results in administration. All contempt that affects merely the authority of the court is in its nature criminal, and should not be acted upon so as to prevent opportunity for reparation. Punishment should include means to secure a proper carrying out of the steps in the bankruptcy proceeding as speedily as possible. So, if a person is in contempt for failure to do what under the bankruptcy law he should do, he should first be allowed to purge himself of the civil contempt by doing what he ought, and by putting the creditors in the position they would have been if no contempt had occurred. The question of punishment for the criminal contempt, however, can be met only by a fine or definite imprisonment, if not excused. The question of compliance with the disregarded order is like restitution of property wrongfully taken, and such a result is the right of the parties, whether or no any sentence for the criminal contempt is imposed. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

[3] In the present case, the parties charged with contempt have appeared, apologized, tried to excuse themselves, and offered themselves for examination as freely as if they had been present at the first hearing. This is like restitution, and leaves only the question of punishment to secure respect for the court's authority. No hearing as to the extent of the criminal contempt was ordered or expected before the referee. The court intended to dispose of that question, if the referee certified that the respondents had purged themselves of their failure to give testimony on the subjects under inquiry.

The certificate of the referee shows that the attorney for the creditors has lost sight of the administration of the estate in an attempt to show that the respondents did not intend to obey the law in that administration. He has given them no chance to repent, and to do what they should have done before. He has also expended considerable time and funds in defense of the court's authority, when no such question was before the referee. Nor was the referee right in allowing the hearings as to the criminal contempt, in the absence of an order sending to him as special commissioner the consideration of that question. The court must now assume that the appearance of the respondents and their willingness to be examined has in effect purged them of the consequences of a continued state of defiance, and can only pun-

ish them for their original carelessness and trustfulness in others, which resulted in the contempt which they admit did occur.

[4] For this they need not be punished by imprisonment, but should be fined a sum equivalent to the trouble which they caused and sufficient to impress the lesson required. A fine of \$15 each, of which \$20 will go to the United States, \$10 to the attorney for the trustee, and \$15 to the bankrupt estate for the expense of the contempt proceedings, will be imposed. In default of payment, the respondents will be committed for a period of 15 days each in the Mineola jail, unless the fine be sooner paid.

BARTHOLOMEW v. BORDEN'S CONDENSED MILK CO.

(District Court, N. D. New York. April 28, 1912.)

MASTER AND SERVANT (§§ 286, 288*)—INJURIES TO SERVANT—NEGLIGENCE—ASSUMPTION OF RISK—QUESTION FOR JURY.

In an action for injuries to a servant, by being caught on the end of a revolving shaft hung from the ceiling of a room, as he was cleaning the ceiling, evidence *held* to require submission of the question of defendant's negligence in operating the shaft without warning while plaintiff was so engaged, and the question of plaintiff's assumed risk, to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050, 1068-1088; Dec. Dig. §§ 286, 288.*]

At Law. Action by Charles M. Bartholomew against Borden's Condensed Milk Company. Verdict for plaintiff. On motion to set aside the verdict and for a new trial, on exceptions that the verdict is contrary to and unsupported by the evidence and the law. Denied.

W. E. Young, of Hudson Falls, N. Y., and Richard O. Bassett, of Albany, N. Y., for plaintiff.

Thomas M. Rowlette, of New York City, for defendant.

RAY, District Judge. At Ft. Ann, N. Y., the defendant corporation, Borden's Condensed Milk Company, has a factory where it receives and bottles milk for transportation and sale. The plaintiff, Charles M. Bartholomew, had been in the employ of said company at this factory for about three years, doing "all-around work" washing cans, helping wash bottles, helping put up milk, and putting caps on bottles. There was an engine room, a bottling and washing room, and then an ice-crushing room, which was about 12 feet by 15 and about 20 or 22 feet from floor to ceiling. This room had but one window, some 18 by 24 inches, located near the ceiling, about 18 feet from the floor. A shaft about 2½ inches in diameter runs from the engine room through the bottling and bottle-washing room into this ice-crushing room and is supported by hangers about 2 feet from the ceiling. It projects some distance into the ice-crushing room, but does not extend across it. In this ice-crushing room was an ice crusher, connected with the shaft by belts and pulleys, and in the bottle-washing room was a machine for washing bottles, connected with the shaft in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

same way. These machines in both rooms were connected with the shaft by throwing the belts off and on, so that the washing machine could be run without setting the crushing machine in motion, and vice versa. The engine and shaft, when in motion, made little or no noise.

There was strong evidence tending to show that every afternoon about 1 p. m. the machinery was started up so as to wash bottles in this washing room. It was contended by the defendant that this made the plaintiff fully acquainted with the fact that at that hour or soon thereafter this shaft would be put in rapid motion, and that he was bound to govern himself accordingly. The plaintiff contended, and gave some evidence tending to show, that this machinery was not started with regularity, but some days at one hour and on other days at another hour.

On the 11th day of November, 1911, the plaintiff was instructed to clean the ceiling in this ice-crushing room. He requested that a staging be put up from which to do the work; but this was refused, and he was told to use a ladder, and the foreman placed one with its foot resting against the crusher, so it would not slip, and its upper end resting against the walls of the room. He was provided with a brush attached to a handle, and also a sponge, with which to do the cleaning. When up on the ladder at the side of the room towards which the end of the shaft projected, his back would be to the end of the shaft. He wore a shirt and sweater, with trousers and shoes. I think the evidence shows Bartholomew had changed the location of the ladder from time to time, as most of the wall and ceiling had been cleaned at the time of the accident. The evidence is not clear or conclusive as to the time when the shaft was put in motion on the afternoon of the day of the accident, or as to the time when the accident happened. It appears with some clearness that neither the starting nor the running of the shaft would cause much noise, if any. The shaft may have been in motion for some time without the fact being noticed by one engaged as Bartholomew was in this ice room.

Frank Morris, a witness for the defendant, the foreman in the factory, testified that he put the plaintiff at work in this ice room a little after 1 o'clock p. m., and told him to wash the sides and ceiling of the room, and that he placed the ladder. He also testified that the shaft was not running when he put plaintiff at work, and that he commenced washing bottles and put the shaft in motion about five minutes thereafter. He puts the accident at about 3 p. m. He says Bartholomew asked for a platform from which to do the work, but was told to use the ladder.

The jury was instructed that, if the shaft was in motion when plaintiff was put to work cleaning the room, the plaintiff could not recover; that to enable him to recover the jury must find the shaft was not in motion at that time, but was put in motion thereafter without notice to the plaintiff; and that they must also find that it was the duty of the defendant company, in the exercise of reasonable care, to have apprehended and foreseen that a person at work in the ice-crushing room, as was Bartholomew, would be liable to come in contact with the shaft after it was put in motion and receive injury, and with that knowledge

to have given him notice that the machinery was to be put in motion. The jury was told:

"If you believe and find from this evidence that the defendant in the exercise of due care should have given notice—that is, that a reasonably prudent and careful man would have apprehended and foreseen that the plaintiff might be or would be in proximity to that shaft, and so be caught and injured when it started up—why, then, of course, it was its duty to give him some notice before starting it up; otherwise, not."

The jury was also instructed:

"The defendant here cannot be held responsible for the injury because it did not warn the plaintiff of the danger, if you find that the plaintiff himself knew and understood that shaft was liable to start up at any time, and appreciated it and had it in mind, because in that event he would be bound to exercise his senses and to avoid coming in contact with the shaft. The plaintiff here assumed the risk of those dangers seen and known and appreciated by him, or which, in the exercise of reasonable care, he should have seen and appreciated, considering his intelligence and experience there in this plant and elsewhere, if any. If the condition was such as to require judgment not possessed by the ordinary observer or servant to realize the danger or hazard, why then, of course, the risk was not assumed—such a risk would not be assumed. The negligence of this defendant cannot be assumed or presumed by you, gentlemen, from the mere happening of the accident and the consequent injury. It must be proved and established from all the facts and circumstances in the case."

I think the plaintiff made a case for the jury; not a very strong one, but one where it would have been error to refuse to submit the question to the jury. I think the charge was as favorable to the defendant as the facts and law warranted. It is not a case where the court can set aside the verdict as contrary to or unsupported by the evidence. I find no error in the admission or rejection of evidence prejudicial to the defendant, or in the charge.

The verdict is not large. There was much to indicate that the injuries were exaggerated; but it was for the jury, on all the evidence, after seeing and hearing the plaintiff and other witnesses who spoke on the subject. The amount of the verdict does not indicate passion, prejudice, or bias.

Both plaintiff and his wife testified to quite serious injuries. The plaintiff claimed he was injured in the back and internally, so he passed blood. He also claims he has suffered pain down to the time of the trial, over a year, and lost weight, etc. Mr. Westcott testified that plaintiff appeared pale and thin and puny along in December, etc.

After a reading of the evidence, I am of the opinion the court is not justified in interfering with the verdict.

The motion for a new trial is therefore denied.

ROSOFF et al. v. GILBERT TRANSP. CO.

(District Court, D. Connecticut. April 24, 1913.)

BANKRUPTCY (§ 282*)—INSOLVENCY OF CORPORATION—UNPAID SUBSCRIPTIONS—ACTION BY TRUSTEE.

Where it did not appear that the debts of an insolvent corporation were such as to exceed the amount of unpaid subscriptions, and the claims of bondholders that they were creditors to the amount of \$250,000 were open to controversy, and the claim of another creditor was also contested, the corporation's trustee in bankruptcy could not maintain a suit against stockholders for the amount of their unpaid subscriptions without a preliminary investigation and assessment of the amount necessary to pay debts and expenses.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 426; Dec. Dig. § 282.*]

At Law. Action by Samuel R. Rosoff and others against the Gilbert Transportation Company to recover unpaid stock subscriptions. Cases suspended pending assessment of the amount necessary to pay debts and expenses.

John S. Pullman, of Bridgeport, Conn., for complainants and receiver.

George D. Watrous and Harrison T. Sheldon, both of New Haven, Conn., for American Surety Co.

Lewis Sperry, of Hartford, Conn., Charles Phelps, of Rockville, Conn., and Charles Welles Gross, Lucius F. Robinson, and Francis W. Cole, all of Hartford, Conn., for intervening stockholders.

Leonard M. Daggett, of New Haven, Conn., for committee of bondholders.

Eliot Watrous, of New Haven, Conn., for John A. Morse, a bondholder.

HOLT, District Judge. I regret to take any course which will cause any further delay in this case, already too protracted. But it is entirely clear, in my opinion, that the practice pursued in this matter of suing for the full amount due on stock subscriptions, without a preliminary assessment, was unauthorized. In the case of a solvent corporation, while a going concern, the directors, in their discretion, can call in all amounts unpaid on stock subscriptions; but in the case of a bankrupt corporation the trustee can only sue the stockholders for such amounts as have been determined by a preliminary investigation and assessment to be necessary to pay the debts and expenses. *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Re Remington Co.*, 153 Fed. 345, 82 C. C. A. 421; *Re Munger Co.*, 168 Fed. 910, 94 C. C. A. 314; *Cumberland Lumber Co. v. Clinton Hill Lumber Manufacturing Co.*, 57 N. J. Eq. 627, 42 Atl. 585; *Lewisohn v. Stoddard*, 78 Conn. 575, 63 Atl. 621. When the debts unquestionably exceed the amount of unpaid subscriptions, possibly a preliminary assessment is unnecessary. But it is at least doubtful in this case whether the valid debts are sufficient to require a call for the entire unpaid subscriptions.

The claim of the bondholders that they are creditors to the amount

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of \$250,000 is certainly open to controversy, in view of the explicit covenant in the mortgage that they shall have no recourse against the stockholders. The claim of the American Surety Company is also contested. While it is a matter of regret, therefore, that a settlement of this estate should be longer delayed, I cannot avoid the conclusion that the rights of the stockholders who have been sued require that there should be a reference to take an account, showing how much the real debts are, and how large an assessment on the stockholders is necessary in order to pay them. A reference will be ordered to a master, to determine the amount of such assessment. Actual notice should be given of the hearing upon such reference to all the stockholders and parties who have appeared. Upon such hearing, any stockholder, creditor, or person interested should be free to contest any claim filed. The reference, when once begun, should proceed substantially from day to day, without adjournment, except for reasonable cause. In the meantime the suits brought by the trustee in the state courts should be stayed until the confirmation of the report fixing the amount of the assessment, with leave to any of the parties to move to vacate the stay, if there is unreasonable delay in proceeding with the hearing of the reference. When the assessment is made, the pending suits can go on to recover the amount of the assessment.

I think that the question whether any stockholder can be assessed who has purchased, for value, without notice, stock issued as full-paid and nonassessable should be determined in the pending suits, and not on the reference. In *re* Munger & Co., 168 Fed. 910, 94 C. C. A. 314. It would seem that all the questions raised by the intervening bill will be determined either in the reference or the pending suits, and that the bill might be dropped; but if the interveners desire to go on with it, I will consider on the settlement of the order whether to direct the bondholders and the American Surety Company to answer.

The order should be settled on notice.

In re PERKINS.

(District Court, S. D. New York. April 16, 1913.)

ALIENS (§ 70*) — NATURALIZATION — JUDGMENT — AMENDMENT — CHANGE OF NAME.

Where an alien was duly naturalized in 1898 as "Frederick Persky," and subsequently in 1912 had his name changed to "Perkins" by an order of the state court, a federal court, in which the naturalization judgment was entered, had no jurisdiction to permit an amendment thereof, so as to change the name of the petitioner from "Persky" to "Perkins."

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 146, 151, 154-160; Dec. Dig. § 70.*]

In the matter of the application of Frederick Perkins to amend his application to become a citizen and the order thereon admitting him to be a citizen of the United States, by changing the name of Frederick Persky to Frederick Perkins. Denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Max M. Katzen, for petitioner.

Henry A. Wise, U. S. Atty., of New York City, and Frank M. Roosa, Asst. U. S. Atty., of New York City.

WARD, Circuit Judge. The petitioner was duly naturalized as Frederick Persky in 1898, and subsequently, in 1912, had his name changed by order of the County Court of Kings county to Perkins. He now asks that the naturalization record be changed throughout by substituting the name "Perkins" for "Persky."

Admitting the general principle that after the term has passed the court cannot alter a judgment, he contends that this application is not to correct or change the record or the judgment in any substantial matter, but simply to make it conform to what is now the fact, viz., that Frederick Persky is now Frederick Perkins. Still it does seek to change the record, which speaks correctly, so as to make it speak incorrectly as of its date. The question is one of identity, and the petitioner will never have any trouble in proving the fact of his naturalization by producing the certificate of the County Court changing his name. This may cause him some annoyance, but that will arise from the fact that the record and judgment of naturalization speak the truth as of their date. I think the court is without power to do what is asked, in the absence of some statutory authority, such as is given, for instance, to courts of the state of New York in section 1251, Code of Civil Procedure.

The prayer of the petition is denied.

In re FOGELMAN.

(District Court, E. D. New York. April 17, 1913.)

BANKRUPTCY (§ 136*)—CONCEALMENT OF ASSETS—ORDERS IN BANKRUPTCY—FAILURE TO PERFORM—CONTEMPT.

A bankrupt and S., his son-in-law, having been examined as to the concealment of property in contemplation of bankruptcy, they were ordered to deliver the property to the trustee, but failed to do so; and in contempt proceedings the bankrupt exonerated S., who really ran the business, and admitted that everything had been sold and the proceeds paid to him. The bankrupt was committed, but was finally released on its being apparent that neither he nor S. had any property and that both were unable to obey the order. In the meantime an indictment for perjury in the bankruptcy proceedings against S. resulted in the dismissal of the indictment, because the statute of limitations had run. Whereupon an order was obtained compelling the bankrupt and S. to show cause why they should not be punished for criminal contempt in disregarding the authority of the bankruptcy court, in disobeying its orders, and in preventing, by false testimony and concealment of assets, the proper administration of the estate. *Held*, that poverty and bad advice, being the only excuses presented, were insufficient, and that both the bankrupt and S. were punishable for contempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Bankruptcy. In the matter of bankruptcy proceedings of Boris Fogelman. On petition to commit the bankrupt and one Daniel Svigals for contempt. Granted.

Amy Wren, of Brooklyn, N. Y., in pro. per.

Jacob L. Holtzmann, of New York City, for respondents.

CHATFIELD, District Judge. The bankrupt was adjudicated on January 13, 1910. He and his son-in-law were examined as to the removal of property in contemplation of bankruptcy. They were ordered to turn over the property concerned, on the 18th day of September, 1911. Nothing was produced, and in contempt proceedings it appeared that the bankrupt, rather than throw the onus of the transfer on his son-in-law, who really ran the business, admitted that everything had been sold and the proceeds paid to him. On this statement, made in court under oath, the son-in-law was released from punishment for contempt, and the bankrupt was committed to the custody of the marshal, on the 16th day of April, 1912. Upon further application by his attorney, he was finally released, as it became apparent that neither he nor the son-in-law had then any property from which they could obey the order. Meanwhile an indictment for perjury against Daniel Svigals, the son-in-law, resulted in a dismissal of the indictment, on motion of the district attorney. The statute of limitations against prosecution had run before this happened. The bankrupt has now been brought in to show cause why he should not be punished as for a criminal contempt, in disregarding the authority of the bankruptcy court, disobeying the court's orders, and generally preventing, by false testimony and concealment of assets, a proper administration of the estate. As to this he has continued his denials, and has pleaded poverty and bad advice, but still insists that the son-in-law was not to blame, and takes the entire burden of the son-in-law's acts upon himself.

For such a course, where it was followed deliberately and even by advice of attorneys (according to the bankrupt),¹ but without giving information as to this advice or the ones furnishing it, the only recourse, as criminal indictment cannot be had, is to impose a definite punishment. *Grant & Burlingame v. U. S.*, 227 U. S. 74, 33 Sup. Ct. 190, 57 L. Ed. — (Jan. 20, 1913); *Merchants' S. & G. Co. v. Board of Trade of Chicago* (C. C. A.) 201 Fed. 20; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

The bankrupt, Boris Fogelman, will be punished for his contempt, and committed to jail for the period of 90 days, and directed to pay a fine of \$200, of which one-half will go to the government and one-half to the bankrupt estate, and stand committed until the fine is paid or he is otherwise released. The son-in-law, Daniel Svigals, will be committed to jail for the period of one day.

¹ The present attorneys for the bankrupt were not connected with the matter in any way at the time.

PITTSBURGH-BUFFALO CO. v. CHEKO.

(Circuit Court of Appeals, Third Circuit. April 21, 1913.)

No. 1,673.

1. COURTS (§ 366*)—FEDERAL COURTS—CONSTRUCTION—STATE COURT DECISIONS.

Federal courts are governed by the decisions of the highest courts of the states in construing and applying state statutes.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank of Memphis v. City of Memphis*, 49 C. C. A. 468; *Converse v. Stewart*, 118 C. C. A. 215.]

2. MASTER AND SERVANT (§ 95½*)—INJURIES TO SERVANT—COAL MINES—SAFETY APPLIANCES—STATUTORY PROVISIONS.

Act Pa. May 15, 1893 (P. L. 52), requiring coal mine operators to employ a mine foreman for each mine, who is given entire charge of the appliances and internal workings of the mine without control of the operator, relieved the latter from liability for injury to a miner resulting from a defective brake on a compressed-air motor used for hauling cars along the ways inside the mine; the motor having been in good order when it was put into service, and a failure to keep it so being mere negligence of the mine foreman to use adequate facilities for repairs furnished him for use inside the mine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 358; Dec. Dig. § 95½.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; Joseph Buffington, Judge.

Action at law by John Cheko against the Pittsburgh-Buffalo Company. From an order denying defendant's motion for judgment (199 Fed. 525), it brings error. Reversed, with instructions to enter judgment for defendant notwithstanding the verdict.

E. O. Golden and Stone & Stone, all of Pittsburgh, Pa., for plaintiff in error.

Brown & Stewart, of Pittsburgh, Pa., for defendant in error.

Before GRAY and McPHERSON, Circuit Judges, and REL-STAB, District Judge.

J. B. McPHERSON, Circuit Judge. [1] On October 4, 1910, John Cheko was hurt in a bituminous coal mine belonging to the Pittsburgh-Buffalo Company. The injury was caused by a defective brake on a compressed-air motor that was in use for hauling cars along the traveling-ways inside the mine. The motor was in good order when it was put into service, but for some unexplained reason the brake had come to need repairs. The verdict establishes the fact that in this matter there was negligence—in what particular it is not important to note—on the part of one or more persons on the company's pay roll. These persons were engaged in the inside operation of the mine, had been employed by the mine foreman, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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were subject to his orders. The Pennsylvania act of 1893 (P. L. 52) was in force when the injury was done, and the question for decision is whether that statute relieves the company from liability. Or, to state the point more specifically, whether the repair in question was a part of the foreman's duty. If the duty was his, the plaintiff concedes that the company is not liable; if the duty was the company's, the judgment should stand. This is the only question raised by the assignments of error, and the answer is to be found in the statute and in the decisions of the Supreme Court of Pennsylvania thereon. We are bound by these decisions, and, while they do not decide the precise point now before us, they indicate sufficiently the conclusion that should be reached.

[2] Let us first summarize the act, so far as it relates to the powers and duties of the mine foreman. Its object is expressed in the title, namely, to provide for "the lives, health, safety, and welfare, of persons employed" in bituminous coal mines. As an important means to this end, article 6 requires that for every mine "a competent and practical inside overseer" shall be employed "to be called mine foreman"; the object of his employment being distinctly stated to be "in order to better secure the proper ventilation of the bituminous coal mines and promote the health and safety of the persons employed therein." He must be an experienced coal miner, with "at least five years' practical experience, after fifteen years of age, as miners' superintendent at or inside of the bituminous mines of Pennsylvania," etc.; and he must have received a certificate of competency from the board of examiners provided by article 15. He, or an assistant chosen by him, must "devote the whole of his time to his duties at the mine when in operation * * * and shall keep a careful watch over the ventilating apparatus and the air-ways, traveling-ways, pump and pump timbers and drainage, and shall often instruct, and as far as possible see, that as the miners advance their excavations all dangerous coal, slate and rock overhead are taken down or carefully secured against falling therein, or on the traveling and hauling ways, and that sufficient props, caps and timbers of suitable size are sent into the mine when required * * * and such props, caps, and timbers shall be delivered in the working places of the mine." Article 6 in its remaining sections has more to say concerning the foreman's duties. He must see that needed timber is promptly furnished, and (in case of immediately threatened danger) if the timbers cannot be supplied when needed he must stop the work until the timber does arrive. He must see that water is removed from the miners' working places, and that proper ventilating passages are cut through and doors are placed. He must provide shelter holes along roads whereon hauling is done by animal power (and no doubt, by other power also); must measure the air currents at specified times and places; must require the workmen to use locked safety lamps under certain conditions; must give "prompt attention to the removal of all dangers reported to him by the fire boss or any other person working in the mine"; and must visit and examine every working place at least once every alternate day while the min-

ers are or should be at work. He must also maintain a record book and enter therein "a report of the condition of the mine, signed by himself, which shall clearly state any danger that may have come under his observation during the day, and shall also state whether he has a proper supply of material on hand for the safe working of the mine, and whether all requirements of the law are strictly complied with." Article 7 requires the superintendent, on behalf and at the expense of the operator, "to keep on hand at the mines at all times, a full supply of all materials and supplies required to preserve the health and safety of the employes as ordered by the mine foreman and required by this act"; and the superintendent must examine the reports entered in the record book, and if he finds a violation of law in any particular he must order the mine foreman to comply with its provisions forthwith.

"If from any cause he cannot procure the necessary supplies or material as aforesaid, he shall notify the mine foreman, whose duty it shall be to withdraw the men from the mine or part of mine until such supplies or material are received."

Section 2 of article 7 then distinctly provides that:

"The superintendent of the mine shall not obstruct the mine foreman or other officials in their fulfillment of any of the duties required by this act. At mines where superintendents are not employed, the duties that are herein prescribed for the superintendent shall devolve upon the mine foreman."

Blasting under certain conditions can only be done in the foreman's presence, or the presence of his representative. Article 8, § 5. He governs so distinct a province of the work that he is allowed to appeal from any decision of a mine inspector (who is a superior official) to the quarter sessions court of the proper county. Article 14. For neglect of duty or incapacity for certain reasons he must be discharged by the operator or superintendent, but a supervision of the discharge to some extent is reserved to the common pleas court of the county. Article 14. When boys under the permitted age are employed, he is to report the employment in order that they may be immediately discharged. Article 17.

The extent and variety of his duties and powers are further shown by other provisions of the act. Section 1 of article 2 provides that:

"It shall not be lawful for the operator, superintendent or mine foreman of any bituminous coal mine to employ more than twenty persons within said coal mine, or permit more than twenty persons to be employed therein at any one time, unless they are in communication with at least two available openings," etc.

Article 4, § 3, defines one of his duties when the ventilating fan shall be stopped; and sections 2, 3, and 4 of article 5 require certain things to be done when dangerous gases are present; and section 7 puts all safety lamps primarily into his care, and requires every defect in a lamp to be reported to him. Article 20 is a very significant portion of the act, and throws much light upon his duties and powers. That article contains seventy-four rules, of which the first is this:

"A mine foreman shall attend personally to his duties in the mine and carry out all the instructions set forth in this act and see that the regula-

tions prescribed for each class of workmen under his charge are carried out in the strictest manner possible and see that any deviations from or infringement of any of them are properly adjusted."

The next seven rules relate to specific matters enjoined upon himself—the building of stoppings along the air-ways, the duty to see that certain entries have a specified width, the duty of properly undermining and blasting the coal and of preserving pillars, the duty of lighting furnace fires, of attention to fans, of fencing and placarding dangerous places, of examining roads and openings, etc. The rest of article 20 lays down rules concerning the duties of fire bosses, miners, drivers, trip riders, engineers, firemen, fan engineers, furnacemen, hookers-on, cagers, and topmen, respectively, with numerous general rules. In this article, rules 1-8, 11, 13, 15, 19, 24, 26, 27, 29, 32, 33, 40, 41, 43, 44, 45, 55, 57, 58, 64, 67, and 71, refer by name to the mine foreman; and, as already stated, he is also charged by rule 1 with the duty of seeing that all the regulations are carried out "in the strictest manner possible."

These details may be wearisome, but they enable us to appreciate the importance of the mine foreman's position, and to understand clearly what the Supreme Court of Pennsylvania has said about it. Similar legislation affects the anthracite mines, and in each instance the court has held that, so far as the statute has committed the operation of the mine to the foreman, the owner has been relieved from liability for his negligence. In *Durkin v. Coal Co.*, 171 Pa. 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801, it was decided that the Legislature could not constitutionally impose liability upon the mine-owner for the negligence of the foreman:

"Under the operation of this statute the mine foreman represents the commonwealth. The state insists upon his employment by the mine owner, and in the name of the police power turns over to him the determination of all questions relating to the comfort and the security of the miners, and invests him with the power to compel compliance with his directions. * * * The duty of the mineowner is to employ competent bosses or foremen to direct his operations. When he does this he discharges the full measure of his duty to his employes, and he is not liable for an injury arising from the negligence of the foreman. *Waddell v. Simoson*, 112 Pa. 567 [4 Atl. 725]."

In *Golden v. Coal Co.*, 225 Pa. 164, 73 Atl. 1103, the foregoing decision was referred to as "a case which has never been questioned," and the court added:

"A common-law duty rests upon the employer to provide a safe place for his employes in which to work; but if he has provided a safe place which has been made unsafe by the act of the mine foreman whose authority may not be questioned, and whose direction must be complied with under penalty, he has met the full measure of his duty, and he is not to be charged with civil responsibility for a condition which he did not bring about, and which he could not control."

In *Wolcutt v. Erie, etc., Co.*, 226 Pa. 210, 75 Atl. 198, the court said:

"When the owner employs a certified mine foreman and puts him in charge of the internal workings of the mine, he has done all that the law requires him to do and he is not required through his superintendent to inspect and

look after the interior of the mine. The law presumes that the certified foreman is fully competent, more so even than the superintendent or the owner, to keep the mine in proper and safe condition, and hence it does not impose the further and additional duty on the owner of requiring the superintendent to look after the interior of the mine, and hold him responsible for the negligence of the superintendent in failing to perform such duty. If therefore the owner had placed Mitchell, a certified mine foreman, in charge of the mine, and if he, as the act enjoined, had devoted 'the whole of his time to his duties at the mine when in operation,' the defendant company would be relieved from liability for the injuries sustained by the plaintiff. But here we have a different state of affairs."

To the same effect is *Dempsey v. Coal Co.*, 227 Pa. 571, 76 Atl. 745:

"As will be observed, the statute requires the owner to place the underground workings of the mine and all that is related to the same in the charge and daily supervision of a mine foreman. It also especially commits to the foreman's charge all matters pertaining to the ventilation of the mine, and prohibits the superintendent from interfering with him in the performance of his duties. In other words, by command of the statute, the interior of the mine is taken out of the possession and control of the owner and placed in charge of a certified foreman, with whom the owner's superintendent is forbidden to interfere, and who has power to compel compliance with his directions so far as they relate to the safety of the employes engaged in the mine. We are therefore of opinion that, as ventilating the defendant's mine was under the control and subject to the direction of the mine foreman, it was his duty to drive such headings as were necessary to ventilate the mine. He is, by statute, expressly given 'charge of all matters pertaining to ventilation' of the mine, and it logically follows that it was his, and not the owner's, duty to determine the necessity for another heading in the breast and to drive the heading if good ventilation of that part of the mine required it. Having placed a competent mine foreman in charge and control of the mine whose duty required him to perform the service and protect the workmen against insufficient or inadequate ventilation, we think the owner has complied with the statutory injunction that he shall use precaution for the safety of the workmen, and is not responsible for the plaintiff's injuries if they resulted from the neglect or failure of the foreman to properly conduct and circulate the air currents to and along the face of the working places throughout the mine. As said in *Waddell v. Simoson*, 112 Pa. 567: 'The owner and operator of the mine having complied strictly with the act of assembly in providing a practical and skillful inside overseer, or mine foreman, and thereby fulfilled the duty imposed upon him by law, it is not for this or any other court to charge them with an additional obligation.'

"The owner or operator having obeyed the command of the statute by providing a constant and adequate supply of pure air for the mine, it was the duty of the mine foreman to see that it was properly circulated through the mine. Anything and everything that affects the health and safety of the workmen while engaged at their work is in the keeping and charge of the mine foreman."

In *Reeder v. Coal Co.*, 231 Pa. 563, 80 Atl. 1121, it was held that the electric hauling system of a mine—including, of course, the trolley wire—should properly be under the supervision of the mine foreman:

"But it is argued it was the duty of the mine foreman to see that the trolley wire was maintained in good repair, and if there was any negligence in this respect it was the negligence of the mine foreman for which appellant is not liable. It has been held in a long line of cases that the mine-owner is not liable for the negligent acts of a mine foreman committed in the discharge of duties imposed upon him by law and in and about those workings over which he exercises supervision. From *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432, and *Durkin v. Kingston Coal Co.*, 171 Pa. 193 [33 Atl.

237, 29 L. R. A. 808, 50 Am. St. Rep. 801], to *Golden v. Mount Jessup Coal Co.*, 225 Pa. 164 [73 Atl. 1103], this rule has remained unbroken. It may therefore be said to be settled law. It is contended for appellee that the appellant company cannot claim the protection of this rule in the present case because the electric haulage system was not under the supervision of the mine foreman and that it was installed, maintained, and kept in repair by the company itself which employed through its superintendent an electrical engineer for this purpose. We see no reason why the electric haulage system like all other underground workings should not be under the supervision of the mine foreman. [Quoting from the act.] * * * Clearly, therefore, the framers of the statute had in contemplation that all of the underground workings should be in charge of the mine foreman, and the wisdom of so providing is not open to doubt. In dangerous work of this character it is a wise precaution to have a competent mine foreman, duly certified by the commonwealth with certain statutory duties to perform as a protection to the health and safety of the men thus employed as well as to the property of the mineowner. But the owner can claim the protection of the law only so far as he complies with its provisions. If the mineowner elect to take certain parts of the machinery and appliances out of the charge of the mine foreman and exercise direct supervision through the superintendent over the same, the law will not give him the protection he would otherwise be entitled to if all of the underground workings had been committed to the care and supervision of a properly certified mine foreman. In other words, the mineowner is only relieved from responsibility for the acts of the mine foreman in connection with the underground workings committed to his care. If all of the underground workings are committed to the care of the mine foreman as the law clearly contemplates they should be, it then becomes the duty of the mine foreman to see that all of the safeguards required to protect the men are provided, and negligence in the performance of these statutory duties by the mine foreman cannot be imputed to the owner. We think it would be safer and wiser for all parties concerned if all the underground workings should be committed to the care and supervision of the mine foreman and then there would be no division of authority. When, however, this is not done, and accidents occur, courts must accept the facts as presented and apply the law accordingly. The exception to the general rule is pointed out in *Wolcott v. Erie Coal & Coke Co.*, 226 Pa. 204 [75 Atl. 197]."

The same volume (231 Pa. 647, 81 Atl. 56) contains the case of *Hood v. Connell, etc., Co.*, which decides that there is no essential difference between the acts relating to the two classes of mines:

"A careful examination of the two acts has satisfied us that there is no substantial basis for the distinction attempted to be made. It is a distinction without a difference when the purpose to be served by the statutory requirements of each act is taken into consideration. Protection to the health and lives of those employed in mining operations is the primary purpose of both statutes. Indeed, the phraseology and provisions of both acts in many of their essential and important features are almost identical. Difference in mining conditions in the two fields required the legislation to be adapted to the necessities of mining operations existing in each field. Aside from the provisions relating to these different conditions, there is but little, if any, real distinction between the anthracite and bituminous acts. As to the protection intended to be afforded to the health and safety of the men so employed, the duties of the mine foreman are practically the same under both statutes. Certainly there are no such distinguishing features as to justify a court in laying down one rule for a mine foreman in the bituminous field, and an entirely different rule for a mine foreman in the anthracite region. After all, this is more a question of fact than of law. Both statutes clearly contemplate that the underground workings shall be under the exclusive charge and supervision of a mine foreman, and when the mine foreman has the exclusive supervision of the inside workings, the owner is relieved from

responsibility for anything that may occur in the mines. In other words, the mine foreman with a certificate of competency from the commonwealth, and a knowledge of the statutory duties imposed upon him, is answerable for the safe conduct of the mining operations. He should be, and in contemplation of law is, the absolute master of the interior workings of the mine over which he has charge as mine foreman. The character of his duties as mine foreman is not necessarily changed because he may hire or discharge men working under him, or suggest where and in what capacity the men shall work, or how the entries shall be driven, or the mines be developed. He may do all of these things and still be acting in his capacity as mine foreman. Indeed, if he is a competent mine foreman, which the law presumes him to be, he is better qualified to do all of these things than any one else. The test is not the particular acts he may do in connection with the underground workings, but whether he has the charge, control, and supervision of these workings to the exclusion of any other authority. When he has this exclusive supervision, no one can dispute his authority as mine foreman, and even the owner cannot interfere with the performance of his duties. It is the duty of the mine foreman to see that all the statutory requirements intended to safeguard the health and lives of the men are properly enforced. What the law contemplates is not always done, and for this reason confusion sometimes arises on account of divided authority. It sometimes happens that the mineowner does not commit the exclusive charge of the interior workings to the mine foreman, but acting through his superintendent undertakes to exercise authority over certain parts of the interior workings without reference to the duties of the mine foreman. When this is done the owner may be held liable for the negligent acts of his superintendent or those acting under his direct authority. Again, mineowners in some instances, presumably to avoid expense, make use of the same person in the dual capacity of superintendent and mine foreman. This results in a divided responsibility and may affect the question of liability in negligence cases. It has already led to an exception to the general rule pointed out by this court in *Wolcott v. Coal & Coke Co.*, supra. It is always safer and wiser for all concerned to follow the statutory rule which requires the underground workings to be in charge of the mine foreman."

And in *D'Jorko v. Mining Co.*, 231 Pa. 164, 80 Atl. 77, the court says:

"The act of May 15, 1893 (P. L. 52, 61), takes the management of mining operations in bituminous coal mines out of the control of the owner and places it in the charge and control of a certified mine foreman, with whom the owner or his superintendent may not interfere. The employment of a mine foreman is made compulsory, and his control of the underground workings of the mine is as full and absolute as that given to the foreman in anthracite mines by the act of June 2, 1891 (P. L. 176), and nothing is left to the judgment and control of the owner"—citing cases.

The latest decision on this subject is *Rafferty v. Mining Co.*, 234 Pa. 66, 82 Atl. 1089, where the court refers to the foregoing line of cases, and says:

"These cases alike hold that for any failure of the mine foreman to discharge the duties imposed by the mining act of May 15, 1893 (P. L. 52), the mineowner cannot be held liable, inasmuch as the state makes the mine foreman its representative, and vests in him the determination of all questions relating to the security of the mines, with power to compel compliance with his directions."

The underlying principle in these cases is that an employer cannot be held responsible for the negligence of a person whom he cannot control, and to whom he is subordinated in all matters of judgment

and direction in the management of his own property. Of course, a federal court is bound to interpret the statute of a state if the rights of suitors require it, but its duty is equally clear to act with caution when the highest court of the state has not yet spoken. In the present controversy, however, we feel reasonably confident that the decisions referred to justify us in holding that the defendant company was not liable. It was bound to furnish in the first instance a machine in good order, and this was done. Thereafter the motor took its place as a factor in the interior operation of the mine, and came thereby as much under the control of the mine foreman as the rails upon which it ran, or the traveling-ways along which it was to proceed. The foreman was provided with a fully equipped repair shop within easy reach inside the mine, and competent repairmen were under his control whose duty it was to set right such defects as might appear. As he was a certified foreman in charge of the interior operation of the mine, and as these repairs were a necessary part of the operation and had been put under his charge, it is difficult to see upon what ground the owner's liability can be properly rested, consistent with the Pennsylvania decisions. If the owner (or his superintendent) is bound to repair under such conditions, then he must have the right to inspect and to interfere with the foreman's custody and use, and such a situation would probably furnish soon another example of the undesirableness of divided control. Neither had the company taken this matter out of the foreman's hands—which would present a different question. On the contrary, the duty of repair had been left in his charge, and he had been provided with all that was needed to keep the machinery in order—a shop, tools, material, and workmen—so that we see nothing to bring the situation now before us within any of the exceptions referred to in the Pennsylvania decisions.

It only remains to say that the Pennsylvania act of 1907 (P. L. 523), relating to employers' liability, does not apply in this controversy. In *Toward v. Coal Co.*, 229 Pa. 553, 79 Atl. 129, the question was not presented; the court saying:

"The negligence of a mine foreman is not involved in this action, and the case referred to has no application. It will be time enough to decide whether the act of 1907 is applicable to the neglect of a mine foreman when such a case arises."

But in *D'Jorko v. Mining Co.*, *supra*, the question did arise and was decided:

"The employer's liability act of June 10, 1907 (P. L. 523), does not effect a change in the law as before announced. If the words 'foreman or any other person in charge or control of the works' for whose negligence the employer is made liable, and who in any action for death or injury is made the agent of the employer, apply to a representative of the state, certified by it to be competent, employed by its direction and placed in charge of the works to carry out its instructions, the act would be unconstitutional. In view of the decisions upon the subject before the passage of the act, it should be assumed that it was not the legislative intent to include a class for whose negligence this court had held an employer cannot be made liable. The act should therefore be so construed as to limit its application to persons over whom an employer has control and who in fact represent him. This is as far as legislation can go."

And this ruling was reaffirmed in *Rafferty v. Mining Co.*, supra.

In conclusion we desire to repeat that we have simply followed what we understand to be the construction placed upon these statutes by the Supreme Court of the state, as of course we are bound to do.

In our opinion, the binding instructions asked for by the company should have been given. Accordingly, the judgment is reversed, with instructions to enter judgment in favor of the defendant notwithstanding the verdict.

NOTE.—Since the foregoing opinion was prepared, two additional decisions on this subject have been rendered by the appellate courts of Pennsylvania. The first is *Mingak v. Coal Co.*, 51 Pa. Super. Ct. 584, and the second is *Bogdanovicz v. Coal Co.*, 87 Atl. 295, a case in the Supreme Court not yet officially reported. In *Mingak v. Coal Co.*, the owner was held liable for a miner's injuries, but on the express ground that the foreman had been relieved of his duty of supervising certain work and had become the mere representative of the mineowner. And in the second case the plaintiff (who was an inexperienced youth) was allowed to recover because he had not been instructed concerning the danger of certain duties that he was called upon to perform; the ground of the decision being that the duty to instruct is still the duty of the owner and has not been committed to the mine foreman.

EVANS v. VICTOR, U. S. Marshal, et al.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1913.)

No. 3,863.

(Syllabus by the Court.)

1. INDIANS (§ 32*)—"INDIAN COUNTRY"—CRITERION.

The criterion to determine what is "Indian country" is that all the country which was declared to be Indian country by the Act of June 30, 1834, c. 161, 4 Stat. 729, remains Indian country as long as the Indians retain their original title, and in the absence of a different provision by treaty or by act of Congress ceases to be Indian country whenever that title is extinguished.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 4, 52, 53, 57, 58; Dec. Dig. § 32.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3545-3549.]

2. INDIANS (§ 32*)—INDIAN COUNTRY—LANDS IN CITIES IN OKLAHOMA—INTOXICATING LIQUORS—AUTHORITY OF OFFICERS TO SEARCH.

The lands within the original corporate limits of the city of Muskogee, and of other cities in the state of Oklahoma, the original Indian title to which has been extinguished and the unrestricted title to which has been vested in purchasers and their grantees under the Act of June 28, 1898, c. 517, § 14, 30 Stat. 499, and the Act of March 1, 1901, c. 676, §§ 10, 24, 31 Stat. 864, 868, are not Indian country.

No special officer of the Indian service, no Indian superintendent, agent or subagent, or his deputy, has authority, without a search warrant or other process, to search such lands, or the stores, houses, or other improvements thereon, owned or occupied by citizens of the United

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

States, for intoxicating liquors, under sections 2139 and 2140, Revised Statutes, or any other act of Congress.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 4, 52, 53, 57, 58; Dec. Dig. § 32.*]

3. COURTS (§ 89*)—OPINIONS—NOT AUTHORITATIVE BEYOND QUESTIONS DECIDED.

An opinion in a particular case, founded on special circumstances, is not applicable to cases under circumstances essentially different.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.*]

4. INJUNCTION (§ 48*)—UNAUTHORIZED SEARCH AND THREAT TO REPEAT WARRANTS.

A trespass, consisting of an unlawful search of the plaintiff's premises and the threat, under a claim of right, to repeat it at will, presents a compelling equity which gives jurisdiction to issue an injunction to prevent its repetition.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 101; Dec. Dig. § 48.*]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Bill by W. E. Evans against S. G. Victor, United States Marshal, for the Eastern District of Oklahoma, and Henry A. Larsen, Special Officer of the Indian Service. Judgment (199 Fed. 504) for defendants, and complainant appeals. Reversed and remanded.

J. C. Denton, of Muskogee, Okl. (W. S. Cochran, of Muskogee, Okl., on the brief), for appellant.

William J. Gregg, U. S. Atty., of Muskogee, Okl., for appellees.

Before SANBORN, Circuit Judge, and WILLIAM H. MUNGER and JACOB TRIEBER, District Judges.

SANBORN, Circuit Judge. Are the lands within the original corporate limits of the city of Muskogee and of other cities in the state of Oklahoma, the original Indian title to which has been extinguished and the unrestricted title to which has been vested in purchasers and their grantees under the Act of June 28, 1898, c. 517, 30 Stat. 495, and the Act of March 1, 1901, c. 676, 31 Stat. 864, 868, §§ 10 and 24, still Indian country, so that a special officer of the Interior Department, or an Indian agent, or the United States marshal, or the deputy of either of them, has authority to enter upon and search them, and the buildings and improvements upon them, without warrant or process, under sections 2139 and 2140, Revised Statutes, or any other act of Congress? This is the question which this case presents, and it is raised in this way: The plaintiff, W. E. Evans, exhibited his bill in equity in the court below against S. G. Victor, the United States marshal, and Henry A. Larsen, the chief special officer of the Indian service, to suppress the sale of intoxicating liquors among the Indian tribes, in which he alleged that the marshal by one Hubbard, his deputy, and Larsen, without any search warrant or other process, unlawfully entered and searched for intoxicating liquor the Fountain Drug Store, of which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

he was and is the owner and proprietor; that this drug store was and is located on land within the original corporate limits of the city of Muskogee to which the Indian title had long prior thereto been extinguished; that the unrestricted title to this land had long before the search passed to and vested in purchasers thereof and their grantees under the Act of June 28, 1898, c. 517, 30 Stat. 495, § 14, and the Act of March 1, 1901, c. 676, 31 Stat. 861; that the defendants threaten to make further forcible searches of the plaintiff's drug store, and of his person, houses, papers, and effects, solely by virtue of their offices; that their search disturbed and demoralized his business and exposed him to shame, contempt, ridicule, and unjust suspicion, to his damage in the sum of \$3,100; that if the defendants are permitted to carry out their threat and to repeat the search at will his business will be destroyed, he will continue to be exposed to suspicion, shame, and ridicule, and will suffer irreparable injury; that he is a citizen of the state of Oklahoma and resides in the city of Muskogee; and that the acts of the defendants infringe upon his personal and property rights in violation of the fourth and fifth amendments to the Constitution of the United States, and he prayed for a permanent and moved for a temporary injunction against the threatened searches. In response to the motion for the injunction the United States attorney filed a statement on behalf of the defendants to the effect, so far as it is now material, that Larsen was the chief special officer of the United States Indian service appointed by the Secretary of the Interior to suppress the sale of intoxicating liquors among the Indian tribes; that Hubbard was his deputy and the deputy marshal; that if Hubbard made the search alleged he did it under the general direction of Larsen to enter and search any premises in the Indian country where he had reasonable ground to believe intoxicating liquors were unlawfully stored or kept; that the plaintiff's drug store in the city of Muskogee is situated in the Indian country; and that Larsen and his deputy had lawful authority to search it by virtue of sections 2139 and 2140, Revised Statutes, the Act of March 1, 1907, c. 2285, 34 Stat. 1017 (U. S. Comp. St. Supp. 1911, p. 1036), and the Act of March 1, 1895, c. 145, 28 Stat. 697. Upon the bill and this statement of the United States attorney the court below heard and denied the motion for the temporary injunction, on the ground that the complainant's drug store was situated in the Indian country, and the plaintiff appealed.

Sections 2139 and 2140 of the Revised Statutes are modified remnants of section 20 of the Act of June 30, 1834, c. 161, 4 Stat. 732. The first part of that section declared that if any person should sell or dispose of spirituous liquor or wine to an Indian in the Indian country, or if any person should introduce, or attempt to introduce, such liquor or wine into the Indian country, except supplies for the army, he should forfeit and pay a fine. The second part of the section provided that if any superintendent of Indian affairs, Indian agent or sub-agent, or commanding officer of a military post, had reason to suspect that any white person or Indian was about to introduce, or had introduced, any spirituous liquor or wine into the Indian country, it should be lawful for him to cause the boats, stores, packages, and places of deposit of such person to be searched, the liquor or wine to be seized,

proceeded against by libel, and any ardent spirits or wine found in the Indian country to be destroyed. The first part of this section, with changes here immaterial, has descended into section 2139, and the second part into section 2140, of the Revised Statutes. Section 2139 prohibits the introduction of ardent spirits into the Indian country. Section 2140 authorizes a superintendent of Indian affairs, Indian agent or subagent, to cause the boats, stores, wagons, sleds, and places of deposit of any person who he suspects or is informed has introduced, or is about to introduce, spirituous liquor or wine into the Indian country to be searched, and the spirits, if found, to be libeled or destroyed. It is conceded by counsel for the defendants, and is settled by repeated decisions of the Supreme Court, that the power of the officers of the Interior Department, and of the officers of the army, to cause such searches and seizures is limited by the terms and the true construction of section 20 of the act of 1834, and of sections 2139 and 2140 of the Revised Statutes, to searches and seizures in the Indian country, and that they are without authority to cause such searches and seizures outside the Indian country. *Bates v. Clark*, 95 U. S. 204, 209, 24 L. Ed. 471; *Clairmont v. United States*, 225 U. S. 551, 556, 560, 32 Sup. Ct. 787, 56 L. Ed. 1201.

The Act of March 1, 1907, c. 2285, 34 Stat. 1017, and the Act of March 1, 1895, c. 145, 28 Stat. 697, which the defendants cite in justification of their acts, contain nothing which either expressly or by reasonable implication extends the power of these officers to make searches and seizures, without warrant or process, to places outside the Indian country. The act of 1907 merely confers upon the special agent of the Indian bureau for the suppression of the liquor traffic among Indians and in the Indian country, and his deputies, the same authority which is conferred by section 2140 on the Indian superintendents, the Indian agents, subagents, and the commanding officers of military posts, but no greater or more extended authority. The Act of March 1, 1895, c. 145, 28 Stat. 697, simply provided that any person who should carry any intoxicating drinks into the Indian Territory, or cause such drinks to be so carried, or should in that territory manufacture, sell, or furnish to any one any intoxicating drinks, should be subject to fine and imprisonment (section 8), and that none of the laws in force in that territory that were not in conflict with that act were repealed, or in any manner affected thereby (section 13). As section 2140 was then in force in the Indian Territory, as there was no treatment or mention of it, or of its subject, the power to search or seize, and as there was nothing in that section, or in the limitation of the power of the officers therein named to the Indian country, which was in conflict with any of the provisions of the act of 1895, that section and the limitation of the power of the officers therein mentioned to the Indian country was not "in any manner affected" by that act, and the result is that the defendants had no authority to make the search which they made and those they threaten to make, unless the land in the city of Muskogee on which the plaintiff's drug store was located was in the Indian country.

[1] What, then, is the Indian country? Congress, by the Act of 1834, c. 161, 4 Stat. 729, declared that:

"All that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state, to which the Indian title shall not have been extinguished, for the purposes of this act be taken and deemed to be the Indian country."

And it has been settled by repeated and uniform decisions of the Supreme Court, from *Bates v. Clark*, 95 U. S. 204, 208, 24 L. Ed. 471, wherein the rule was first clearly announced in 1877, to *Clairmont v. United States*, 225 U. S. 551, 558, 32 Sup. Ct. 787, 56 L. Ed. 1201, wherein it was reaffirmed in 1912, and it is conceded by counsel for the defendants that the criterion by which to determine whether a specified tract of land or location is in the Indian country, is that all the country described by the act of 1834 as Indian country remains Indian country as long as the Indians retain their original title, and, in the absence of a different provision by treaty, or by act of Congress, ceases to be Indian country whenever that title is extinguished. *Dick v. United States*, 208 U. S. 340, 359, 28 Sup. Ct. 399, 52 L. Ed. 520. The legislation and adjudications and their history, from which this criterion has been deduced, are recited in the opinions in the cases which have just been cited, and it would be a futile task to repeat them here.

Was the Indian title to the lands upon which the plaintiff's drug store stood and to the store upon it extinguished before the challenged search? The plaintiff alleges in his bill, the defendants do not deny in their statement, and their counsel concedes in his brief, that it was. How, then, may he escape the logical conclusion that the premises searched had ceased to be Indian country?

He argues that the land on which the drug store was situated is still Indian country, because there was a provision in the Creek Agreement (Act of March 1, 1901, 31 Stat. 861, 872, § 43) that:

"The United States agrees to maintain strict laws in said nation against the introduction, sale, barter, or giving away of liquors or intoxicants of any kind."

But the question here is not whether strict laws against the introduction into or the sale of liquors in the Creek Nation were to be or were maintained, but whether or not, by treaty or by act of Congress, the land on which this drug store was located, which tested by the criterion fixed by the Supreme Court was not Indian country, was made Indian country. The stipulation cited did not do so, or purport to do so, did not treat or mention the subject, and in any event it was nothing but a promise. It enacted nothing. Counsel maintains that this land is Indian country, because Congress has continued in force the tribal organization and government of the Creek Nation and maintained an Indian agent for the conduct of the business of that tribe, because many members of the tribe remain under the general guardianship of the government, and the latter holds \$3,000,000 in trust for that tribe. But it would be flying in the face of a long line of uniform decisions of the Supreme Court to make these facts the criterion of Indian country and to hold this land to be Indian country which by the criterion established by the Supreme Court, the extinction of the original Indian title, is not Indian country, and this court declines so to do.

Counsel contends that this land should be held to be Indian country, and the owners and occupants of it to be subject to searches and seizures, without warrant or process, on account of the decisions and opinions in *United States Express Co. v. Friedman*, 191 Fed. 673, 112 C. C. A. 219; *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248; *Mosier v. United States*, 198 Fed. 54, 117 C. C. A. 162; *United States v. Holliday*, 3 Wall. 407, 18 L. Ed. 182; *United States v. Forty-Three Gallons of Whisky*, 93 U. S. 188, 23 L. Ed. 846; *Dick v. United States*, 208 U. S. 340, 352, 353, 28 Sup. Ct. 399, 52 L. Ed. 520. Before entering upon a review of these decisions, it may be well to call to mind a few salient facts which ought not to be disregarded, and the exact question at issue.

[2] The Act of June 28, 1898, c. 517, 30 Stat. 495, § 14, and the Creek Agreement (Act of March 1, 1901, 31 Stat. 861, 866, 867) §§ 11, 12, 13, 14, and 23, authorized the platting, appraisal, and sale of this land, and of all other land within the original corporate limits of the city of Muskogee and the conveyance of the title of the Creek Tribe, and of the United States thereto, to the respective purchasers thereof under these acts, free from every restriction, by deeds executed by the Principal Chief of the Creek Nation and approved by the Secretary of the Interior. The lands were platted, the lots were thus sold and so conveyed to the purchasers under these acts, a decade ago. Thereby the Indian title to them was extinguished, and under the rule that had then been established for more than 20 years they ceased to be Indian country, and their owners and occupants became exempt from searches and seizures under sections 2139 and 2140. In reliance upon these facts and this state of the law the purchasers bought these lands; they and their grantees have built upon them business blocks, stores, warehouses, residences, and public buildings, and have become a prosperous mercantile community of more than 25,000 inhabitants, of whom not 5 per cent. are Indians.

Now the question in this case is not whether the United States had or has the power to prohibit the introduction into or the sale upon these lands, or in the Indian Territory, or in Oklahoma or elsewhere, of intoxicating liquors; nor is it whether or not the United States has done so. It is not whether or not the United States had the power to continue these lands Indian country, or now has the power to make them such, and no discussion of these questions will be indulged in until it clearly appears that by treaty or act of Congress an attempt has been made so to do. The question now at issue is very narrow. It is simply: Has the United States, by treaty or by act of Congress, abrogated the established criterion of Indian country, or so modified it that these lands have continued or have again been made Indian country, and their owners and occupants subject to searches and seizures without warrant or process? They are citizens of the United States, and the fourth amendment to the Constitution reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Nothing less than a treaty or an act of Congress, which by express provision or plain implication has made the lands in this city of Muskogee Indian country, ought to be held to withdraw its citizens from the guaranty of this amendment.

[3] Counsel for the defendants claims that the judgment of this court in *United States Express Co. v. Friedman*, 191 Fed. 673, 112 C. C. A. 219, has conclusively answered the question before us. Let us see. That was an action for a writ of mandamus to compel the express company to transfer intoxicating liquors out of the state of Arkansas into that part of the state of Oklahoma which was formerly the Indian Territory, and this court held (1) that section 2139, Revised Statutes, was not rendered inapplicable to that territory by the formation of the Constitution and the admission of Oklahoma as a state (191 Fed. 679, 112 C. C. A. 219); (2) that an Indian allotment in that territory, while the title is held in trust by the government, is still Indian country by virtue of the provisions of the Act of January 30, 1897, 29 Stat. 506, c. 109 (191 Fed. 680, 112 C. C. A. 219); and (3) that the express company was not required to carry, but was prohibited from transporting, intoxicating liquors from other states into the part of the state of Oklahoma, which was formerly Indian Territory. At the time that decision was rendered, there were in that part of Oklahoma at least three classes of lands: (a) Lands to which the original Indian title had been extinguished by sales and conveyances of unrestricted titles to the purchasers; (b) lands to which the original Indian title had been extinguished by their allotment to members of the tribes in severalty, and the title to which was held in trust for the allottees by the United States; and (c) lands to which the Indian title had not been extinguished. There were therefore at that time lands that were Indian country in the part of Oklahoma which had formerly been the Indian Territory, and the question whether or not the lands there situated to which the Indian title had been extinguished by sales, and the title to which was not held in trust by the government, were Indian country was immaterial to the decision of the question in that case, because the introduction of liquor from another state into that part of Oklahoma was expressly prohibited by acts of Congress, whether the lands upon which it was introduced were or were not Indian country. Act of March 1, 1895, c. 145, 28 Stat. 693; Act of January 30, 1897, c. 109, 29 Stat. 506; *Ex parte Webb*, 225 U. S. 663, 681, 691, 32 Sup. Ct. 769, 56 L. Ed. 1248. Not only was that question immaterial in the *Friedman* Case, but it was neither mentioned, discussed, nor decided therein. Hence, whatever was said in the opinion in that case falls under the rules announced by Chief Justice Marshall that:

"An opinion in a particular case, founded on its special circumstances, is not applicable to cases under circumstances essentially different," *Brooks v. Marbury*, 24 U. S. (11 Wheat.) 78, 80 (6 L. Ed. 423), and "General expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." *Cohens v. Virginia*, 6 Wheat. 264, 393, 5 L. Ed. 257; *King v. Pomeroy*, 121 Fed. 287, 294, 58 C. C. A.

209, 216; *Traer v. Fowler*, 144 Fed. 810, 817, 75 C. C. A. 540, 547; *Mason City & Ft. Dodge Ry. Co. v. Wolf*, 148 Fed. 961, 968, 78 C. C. A. 589, 596.

But while there is no decision in the Friedman Case of the question whether or not lands formerly in the Indian country, to which the unrestricted title has vested in the grantees under authorized sales, are Indian country, yet the Act of 1897, 29 Stat. 506, cited in the opinion in that case, and the opinion itself, are very persuasive that they are not. The general rule was that lands to which the original Indian title was extinguished ceased to be Indian country. When the act of 1897 was passed, sales of lands in the Indian country and the conveyance to white purchasers of unrestricted titles to them and allotments of other lands in the Indian country to the members of the tribes in severalty were contemplated and progressing. Such sales and such allotments alike extinguished the original title. The Congress provided in the act of 1897, and the court held in the Friedman Case, that Indian country should "include any Indian allotment while the title to the same shall be held in trust by the government," but the Congress did not provide, nor did the court hold, that Indian country should include lands to which the Indian title had been or should be extinguished by sales and the vesting of the unrestricted title in the purchasers and their grantees. The express inclusion of the former is the exclusion of the latter under a familiar rule, and the natural and rational deduction from the act and the decision is that the latter lands are not Indian country.

In *Ex parte Webb*, 225 U. S. 663, 681, 691, 32 Sup. Ct. 769, 56 L. Ed. 1248, Webb was indicted and convicted of introducing intoxicating liquors into the Indian country, and he made an application to the Supreme Court for a writ of habeas corpus. The parties admitted that the liquors were shipped by the petitioner from Joplin, Mo., to and received by Webb within the city of Vinita, in Oklahoma, and that the place where the liquor was received was a part of the original town of Vinita, in the Indian Territory. As the case arose on a petition for a writ of habeas corpus, the only question before the Supreme Court, and the only question which it considered or decided, was the jurisdiction of the court below; and it held that that court had jurisdiction, because the shipment of the liquor from one state into another was in violation of that part of the Act of March 1, 1895, 28 Stat. 693, which, under the commerce clause of the Constitution, prohibited the introduction of intoxicating liquors from another state into that part of the state of Oklahoma which was formerly the Indian Territory. 225 U. S. 681, 691, 32 Sup. Ct. 769, 56 L. Ed. 1248. That court expressly decided that it was unnecessary for it to decide (225 U. S. 676, 32 Sup. Ct. 769, 56 L. Ed. 1248), and it neither considered nor decided, whether or not the place where the liquor was received was Indian country, so that the decision and opinion in that case fall under the same rules that govern the opinion and decision in the Friedman Case, and are neither decisive nor persuasive upon the question at issue.

In *Mosier v. United States*, 198 Fed. 54, 117 C. C. A. 162, this court sustained the conviction of the defendant of the offense of selling liq-

uor to an Indian who was "a ward of the government under charge of an Indian superintendent or agent," in violation of the prohibition of such sales to such an Indian, found in the Act of January 30, 1907, 29 Stat. 506; but there is nothing in the decision or opinion of that case concerning the limits of the Indian country.

In *United States v. Holliday* and *United States v. Haas*, 3 Wall. 407, 416, 18 L. Ed. 182, the defendants were indicted for selling intoxicating liquor to Indians in charge of Indian agents appointed by the United States, in violation of the Act of February 13, 1862, c. 24, 12 Stat. 339, which declared that if any person shall sell any spirituous liquor "to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States," he shall, "on conviction thereof," be fined and imprisoned, and it was conceded that the liquor was sold outside the Indian country. The court sustained the conviction, on the ground that the denunciation of the statute was not limited to sales in the Indian country, but by its express terms extended to sales to Indians in charge of an Indian agent, whether within or without that country. No phase of the question what was or is Indian country arose, was discussed, or determined therein.

The case of *United States v. Forty-Three Gallons of Whisky*, 93 U. S. 188, 193, 197, 198 (23 L. Ed. 846), was founded on a libel of information, which charged that the whisky was introduced into territory ceded to the United States by the treaty with the Red Lake and Pembina bands of Chippewa Indians, concluded October 6, 1863, and proclaimed May 5, 1864. Article 7 of that treaty read in this way:

"The laws of the United States now in force, or that may hereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded, until otherwise directed by Congress or the President of the United States." Oct. 2, 1863, 13 Stat. 667.

The court held that by virtue of this article of the treaty the prohibition of the introduction of liquor into the Indian country and the provisions authorizing the search for and the seizure of it in the Indian country, found in section 20 of the act of 1834, as amended by Act March 15, 1864, c. 33, 13 Stat. 29, had been extended over and made applicable to the ceded territory. 93 U. S. 193, 197, 198, 23 L. Ed. 846. But the decision and opinion have no relevancy here, because no treaty or act of Congress has been discovered which provides that the laws in force in the Indian country within what was the Indian Territory shall be extended over and in force on the lands outside the Indian country, the original Indian title to which has been extinguished and the unrestricted title to which has been vested in grantees of the Indian nations by authorized sales and conveyances.

The case of *Dick v. United States*, 208 U. S. 340, 351, 352, 353, 28 Sup. Ct. 399, 52 L. Ed. 520, is of the same nature. In that case Dick was indicted for introducing liquor into the village of Culdesac, which was located on the land which had been ceded to the United States by an agreement with the Nez Perces Tribe of Indians, set forth in the Act of August 15, 1894, c. 290, 28 Stat. 286, 326, 327,

and the original Indian title to which had been extinguished. Article 9 of that agreement provided:

"It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perces Indians shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into Indian country."

The court held that by virtue of that stipulation "the lands ceded by the Nez Perces Indians and those retained, as well as those allotted to the Indians (which embraced all the lands in the original reservation), were subject, for the limited period of 25 years, to all federal laws prohibiting the introduction of intoxicants into Indian country," and on that ground it sustained the conviction. But it also declared that, in the absence of that or some equivalent treaty or act of Congress, the extinguishment of the original Indian title would have taken the land out of the Indian country, and would have exempted it from the provisions of sections 2139 and 2140, Revised Statutes.

"If this case," said the court, "depended alone upon the federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words 'Indian country' to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the state, for all purposes of government, was full and complete. *Bates v. Clark*, 95 U. S. 204 [24 L. Ed. 471]; *Ex parte Crow Dog*, 109 U. S. 556, 561 [3 Sup. Ct. 396, 27 L. Ed. 1030]."

The acts of Congress and authorities cited in justification of the search made and the searches threatened by the defendants have now been reviewed. The acts of Congress and treaties referred to in the opinions in the cases cited have been carefully examined and this is the state of this case:

The defendants have no authority, under sections 2139 and 2140, to search premises outside the Indian country without warrant or process. Lands once Indian country remain such as long as the Indians retain their original title, and, in the absence of a different provision by treaty, or by act of Congress, cease to be Indian country whenever that title is extinguished. The original Indian title to the land on which the plaintiff's drug store stands had been extinguished many years before the search made by the defendants. No provision of any treaty or act of Congress to the effect that the land on which this drug store stands, or the lands within the original corporate limits of the city of Muskogee, should not cease to be Indian country on the extinguishment of the Indian title thereto, or to the effect that the provisions of section 2140, relative to searches for intoxicating liquor in the Indian country, should continue or be in force on these lands after the unrestricted title thereto had vested in purchasers and grantees under authorized sales and conveyances, has been cited, nor has a diligent search disclosed any. In 1897 (29 Stat. 506) the Congress expressly declared that Indian country should include any Indian allotment while the title to the same should be

held by the government, but it did not provide that Indian country should include lands formerly within it to which the unrestricted title had been vested in purchasers and their grantees by authorized sales and conveyances, and it thereby impliedly declared that it should not include them. In 1898 the Attorney General of the United States was of the opinion that the lands in town sites authorized by the acts of Congress which have been cited were not Indian country, and that the federal liquor laws relative to the introduction of liquor into the Indian country and the search for it therein were not longer applicable to such lands. 22 Opinions of the Attorneys General, 232, 234. In *Dick v. United States*, 208 U. S. 353, 28 Sup. Ct. 399, 52 L. Ed. 520, the Supreme Court, as we have already seen, declared that in such a case as this in hand those laws were inapplicable. And in *Clairmont v. United States*, 225 U. S. 551, 558, 559, 32 Sup. Ct. 787, 56 L. Ed. 1201, the last decision on the question which has been found, the Supreme Court decided that lands, the original Indian title to which had been extinguished without any provision of a treaty or act of Congress limiting the effect of that extinguishment, were not longer Indian country, were withdrawn from the effect of the federal liquor laws relative to the introduction of liquor into the Indian country, the search for and seizure thereof, and that one who brought liquor upon such lands could not be lawfully convicted of introducing it into the Indian country. And the unavoidable conclusion is that the drug store of the plaintiff and the lands within the original corporate limits of the city of Muskogee, the original Indian titles to which have been extinguished by authorized sales and conveyances, are not Indian country; that neither the chief special officer of the Indian service nor any Indian superintendent, or Indian agent or subagent, or any of his deputies, has any authority, without warrant or process, to search the stores, shops, residences, or other public buildings thereon, owned or occupied by citizens of the United States, for intoxicating liquors, either under sections 2139 and 2140 of the Revised Statutes, or under any other act of Congress; and that the search and the threats charged in the bill in this suit were without justification.

[4] Counsel for the defendants suggest that the bill fails to disclose such irreparable injury to the plaintiff as will sustain the jurisdiction of a court of equity to issue an injunction. But continuing trespasses upon real estate and threats to continue and repeat them invoke the jurisdiction of the chancellor, because the only remedy at law, constantly recurring actions for damages, are more vexatious and expensive than effective, and they furnish no adequate remedy (*United States Freehold, Land & Emigration Co. v. Gallegos*, 89 Fed. 769, 773, 32 C. C. A. 470, 474; *Miller & Lux v. Rickey* [C. C.] 127 Fed. 573, 586; *Stearns-Roger Mfg. Co. v. Brown*, 114 Fed. 939, 945, 52 C. C. A. 559, 565; *The Salton Sea Cases*, 172 Fed. 792, 800, 97 C. C. A. 214, 222), and the search, the threat to repeat it at will, and the insistent claim of the right to do so, which the bill and the statement for the defendants present, disclose a compelling equity which gives ample jurisdiction to the court below to grant the

injunction sought. *Deere & Webber Co. v. Dowagiac Mfg. Co.*, 153 Fed. 177, 181, 82 C. C. A. 351, 353, and cases there cited.

The order denying the motion for the preliminary injunction is accordingly reversed, and the case is remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.

LUMPKIN v. FOLEY.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1913.)

No. 2,435.

1. BANKRUPTCY (§ 453*)—APPEAL—JURISDICTION—SUPREME COURT.

Under the express provisions of Bankr. Act July 1, 1898, c. 541, § 25b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), an appeal lies to the Supreme Court of the United States from an order allowing or rejecting a claim against the estate of a bankrupt involving more than \$2,000.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 914; Dec. Dig. § 453.*]

2. BANKRUPTCY (§ 466*)—APPEAL TO SUPREME COURT—EXERCISE.

Where, on appeal from an order rejecting a claim against a bankrupt's estate as secured, the claimant was entitled to a further appeal to the Supreme Court, which would necessitate the making of separate findings of fact and conclusions of law as provided by General Bankruptcy Order No. 36 (89 Fed. xiv, 32 C. C. A. xxxvi), but there was no suggestion at the argument that either side intended to avail itself of the right to a further appeal, the court would determine the same without making such findings, as though it was the court of final jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 928; Dec. Dig. § 466.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

3. BANKRUPTCY (§ 467*)—REFEREE'S FINDING—PRESUMPTIONS.

The presumption of the correctness of the finding of a referee in bankruptcy that a mortgage of all the bankrupt's assets was given to hinder, delay, and defraud creditors is materially strengthened by the concurrence therein of the District Court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 467.*]

4. BANKRUPTCY (§ 182*)—FRAUDULENT CONVEYANCES—PURCHASER IN GOOD FAITH—MORTGAGE.

Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564, 565 (U. S. Comp. St. 1901, p. 3449), declares that all conveyances, transfers, assignments, or incumbrances given within four months prior to the filing of a bankruptcy petition, with intent to hinder, delay, or defraud creditors, except as to purchasers in good faith for a present fair consideration, shall be void. *Held* that, where an insolvent corporation applied to claimant for a loan to be secured by a mortgage on all its assets, the effect of which would be to deprive creditors whose claims were not paid with the proceeds of the loan of the ability to enforce payment, and claimant by making any investigation could have learned that the corporation was insolvent, he was not a bona fide purchaser within such section, and the mortgage was therefore void, though a present consideration was paid therefor, and the proceeds applied to the payment of the bankrupt's debts to local creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 255-258; Dec. Dig. § 182.*]

5. FRAUD (§ 58*)—PROOF OF FRAUD.

That fraud is not to be presumed does not imply that it may not be proved by circumstances as well as by direct evidence, as it may arise from facts and circumstances of imposition, and may be apparent from the intrinsic nature and subject of the bargain itself.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

Pardee, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge.

Claim of Frank G. Lumpkin against the bankrupt estate of the Walden Bros. Clothing Company. From an order (199 Fed. 315) sustaining objections of Frank D. Foley, as trustee, to the claim as secured on the ground that the mortgage securing the same had been made to hinder, delay, and defraud creditors of the bankrupt, claimant appeals. Affirmed.

Alex C. King, of Atlanta, Ga. (Henry R. Goetchius and T. Leslie Bowden, both of Columbus, Ga., and King, Spalding & Underwood, of Atlanta, Ga., on the brief), for appellant.

Slade & Swift, Love & Fort, and R. E. Dismukes, all of Columbus, Ga., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and SHEPPARD, District Judge.

SHEPPARD, District Judge. [1] This is an appeal in bankruptcy brought here under section 25b of the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) from the District Court of the Northern District of Georgia; and, as the controversy arose from a judgment allowing or rejecting a debt or claim involving more than \$2,000, an appeal lies to the Supreme Court of the United States from the decision of this court.

[2] There has been no intimation of any purpose by counsel on either side to avail themselves of the right to appeal from the decision of this court which would render necessary separate findings of fact and conclusions of law thereon, as contemplated in General Order No. 36 (89 Fed. xiv, 32 C. C. A. xxxvi). In the absence of such suggestion, which appears should have been made at the argument (*Knapp v. Milwaukee Trust Co.*, 162 Fed. 675, 89 C. C. A. 467), we proceed to consider and determine the questions raised by assignments on the record. An involuntary petition in bankruptcy was filed by creditors, statutory in number and amount of claims, against the Walden Bros. Clothing Company, a corporation of Georgia, and among other acts of bankruptcy charged substantially that:

"The said company while insolvent did on the 15th day of January, 1912, assign and transfer its entire assets of every kind and character to Frank G. Lumpkin of Columbus, Ga., or other persons unknown to petitioners with intent to hinder, delay, and defraud its creditors."

On January 31, 1912, the bankrupt filed its answer, denying insolvency, and denying specifically the acts of bankruptcy charged, but,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

further answering, admitted that it did on the 15th day of January mortgage its stock of merchandise to Frank G. Lumpkin in the sum of \$9,250, and that the money thus derived went to pay the National Bank of Columbus and other creditors, and "to be used in its business"; further admitting that it transferred its accounts to said Lumpkin as an "additional security" to him for money advanced, but without intent to hinder, delay, or defraud its said creditors. The answer further states that George F. Walden, president of said corporation, the only officer giving his attention to the business of the company, had been for a considerable time unable by illness to attend to the business, and for that reason expressed a willingness that the corporation be adjudged a bankrupt. Attached to the answer were schedules of bankrupts' indebtedness, showing assets consisting of the stock of merchandise included in the mortgage, valued at \$5,327.29; also open accounts of the estimated value of \$2,103.75, which comprised practically all the assets of the bankrupt.

In due course of administration the case was referred to a referee, and on March 16, 1912, Lumpkin filed his claim to the stock of merchandise and accounts of the said company, averring that the debt of the company to him was evidenced by a note dated January 15, 1912, with interest at 8 per cent. per annum, payable on demand and secured by a mortgage of the same date on the goods and stock of merchandise, furniture and fixtures, etc., in the store of said company. In due course, March 16th, the trustee, F. D. Foley, filed objections to the claim of Lumpkin, mortgagee, on the ground that the mortgage was intended to hinder, delay, and defraud the creditors of the bankrupt, and that the mortgagee had reasonable grounds to believe the intent and purposes of the bankrupt in making the transfer.

The referee's finding May 29, 1912, on the facts was adverse to the claimant, and the main facts on which he predicated his report may be here stated to advantage: The Walden Bros. Clothing Company had been in business at Columbus about six years. That George F. Walden and Chas. L. Walden, brothers, were president and secretary respectively of the corporation. That the two brothers owned the stock of the corporation, and that George F. Walden, president, had for five years practically the entire management and supervision of the business. Chas. L. Walden resided at Troy, Ala., where he was engaged in business. The stock of merchandise in the store at Columbus comprised practically all of the assets of the company. Lumpkin, the claimant, was a business man residing in Columbus, and was secretary of a building and loan company, and made personal loans occasionally when the security was satisfactory. Two months preceding the transaction Walden had been confined to his house with typhoid fever; during this time the business had been run by "Mr. Chancellor." That about the 12th of January Walden from his house called up one Reich, president of the loan company of which Lumpkin was secretary (Reich was also a director of the National Bank of Columbus), and requested him (Reich) to obtain a loan for Walden Bros. Clothing Company of \$9,000 with which to pay his creditors and continue in business. Shortly afterwards Reich met Lumpkin, and made known Walden's request for a loan, and delivered to the latter an unsigned

statement of Walden Bros. Clothing Company's business, including assets and liabilities, as of September 1, 1911, which showed:

Assets		Liabilities	
Accounts Receivable.....	\$ 8,000 00	Capital stock.....	\$17,000 00
Merchandise on hand.....	23,000 00	Borrowed money.....	10,000 00
Furniture and fixtures.....	1,300 00	Open accts. not due.....	900 00
		Open accts. past due.....	1,400 00
		Surplus in business.....	2,800 00
<hr/> Total assets.....		<hr/> Total liabilities.....	
\$32,300 00		\$32,100 00	

This statement was apparently satisfactory to Lumpkin, and he agreed to loan, and did loan three days thereafter, \$9,250 to Walden. At the suggestion of Walden, Bowden, an attorney, in the absence of Lumpkin's regular attorney, was engaged to prepare the papers. The corporation had failed to keep any record of its meetings for several years; Bowden procured the minute book of the corporation and the books of account of the company, and in his office prepared and supplied the minutes of the proceedings of the corporation up to date. Walden in the meantime had procured Baird of the firm of Power & Baird, creditors of Walden Bros. Clothing Company to the extent of \$645, to telegraph Chas. L. Walden, secretary, at Troy to come immediately to Columbus. Bowden, the attorney, was requested by George F. Walden to meet Chas. L. Walden at the station upon his arrival, 12 o'clock m., Monday, January 15, 1912, and to explain the proposed transaction with Lumpkin, and the necessity of the presence of the secretary to verify the minutes and complete the transfer to Lumpkin. On the same day, January 15, 1912, the transaction was consummated by the execution and delivery of the note and mortgage to Lumpkin for \$9,250, payable on demand. At this moment the liabilities of the bankrupt were approximately \$20,000, and assets approximately \$9,181.04, as shown by appraisal filed March 20, 1912, none of which indebtedness was secured, except the notes to the National Bank of Columbus, aggregating \$7,875, which bore the individual indorsement of the two Waldens, president and secretary, respectively, of the corporation. This indebtedness to the bank was evidenced by several notes; only two of \$250 each were past due, the others fell due at sundry dates from one to three months thereafter.

At this time the bankrupt owed C. E. Westbrook of Columbus \$675, Power & Baird of the same place, "all friends" of the Waldens, \$645.-39. Upon receipt of the loan from Lumpkin, January 15th, the bankrupt proceeded to pay off on the same day the indebtedness to the bank, matured and unmatured, and to pay Westbrook, Power & Baird, and other local creditors. These payments consumed practically the money obtained on the mortgage to Lumpkin on bankrupts' stock of merchandise, furniture and fixtures, and open accounts. At that time the corporation owed other creditors accounts past due for merchandise of \$1,400, and open accounts not due of \$900, none of which was paid out of the proceeds of the mortgage. Power & Baird, of the local creditors paid, were also directors in the National Bank of Columbus, and with the latter there had been conferences with Walden at his house relative to Walden's need of money to continue his busi-

ness. In one of the conferences over the phone between George F. Walden and Lumpkin when Lumpkin desired the note to read on demand Walden demurred, saying that "he could not pay it right away," to which Lumpkin replied "that he was not expected to pay it right away, but pay as you can." This testimony is contradicted by Lumpkin. Lumpkin it appears was satisfied with the unsigned or unidentified statement of the corporation's assets in the business as represented by the statement of September 1, 1911, furnished him by Reich, the intermediary between Walden and Lumpkin. He made no investigation of the value of bankrupts' stock, of bankrupts' financial condition, or the indebtedness due for goods at the time of the transaction, January 15, 1912. Lumpkin in his testimony disclaimed any knowledge of the purpose of the Waldens to apply the money loaned to debts due the bank, Westbrook, or Power & Baird, and that he regarded the company as "solvent as any merchant on Broad street." That it was his opinion that giving a mortgage on the stock as the Walden Bros. Clothing Company had done would "kill their credit." He apparently left all details for the preparation of the minutes, showing the regularity and authority for the corporation's action, and of the execution of the note and mortgage to Bowden, the attorney suggested by Walden, all of which seems to have been delegated by Bowden to his stenographer, and Bowden, the attorney, who testified as to his connection with the transaction, says: "When I saw the book, it showed a regular meeting." The testimony of the parties connected with the transaction leaves the judicial mind in a state of anxiety, and a desire for facts not revealed by the record. The witnesses seem to have been cautious and guarded, divulging only what they were willing to disclose, which may, or may not have been, influenced by the financial condition of the Waldens, and a disposition to take care of local friends in the present crisis, and the bank which had the personal indorsement of the president and secretary of the corporation, which corporation was turning over its entire assets and business resources to secure the loan, which enabled it to pay these particular creditors.

As an outcome of the transaction, one fact is manifest—that, when the mortgage was delivered, the bankrupt had the same assets and the same amount of liabilities, but \$9,250 of its liabilities were secured, and all of the bankrupts' assets were beyond the reach of its unsecured creditors, and the president and secretary of the corporation with the proceeds of the mortgage had absolved their personal liability on certain notes of the corporation. The testimony was both oral and documentary and quite voluminous, but what precedes we think is a fair but abbreviated statement of the evidence and reasonable inferences drawn therefrom. The referee who had the witnesses before him, including the documentary evidence, and heard every syllable of the testimony, with the aid of all the "side lights" so helpful in such an investigation, reported his finding that the company had consented to the bankruptcy proceedings which followed immediately the mortgage transaction, and that at the time of executing the mortgage and prior thereto the Walden Bros. Clothing Company was insolvent; that the

Waldens at the time in question knew that the corporation was insolvent; that the execution of the mortgage to claimant (Lumpkin) was done to hinder, delay, or defraud its creditors, and to prefer those creditors to whom the mortgage proceeds were paid; that these three precedent acts were in his judgment clearly established by a preponderance of the evidence.

The finding of the referee as to the status of the claimant, Lumpkin, in the transaction, we quote literally from the report:

"The evidence as a whole convinces me that the transaction from its inception to its completion was for the purpose, first, of paying said large debt to the said bank and thereby relieve said George F. Walden and C. L. Walden from individual liability on the same, and next to pay in full said Westbrook and Power & Baird, home creditors, and that the said bank directors had arranged beforehand with Mr. Lumpkin to furnish the money, and to have him protect himself by said mortgage and transfer, which being executed and delivered to secure a present consideration it was thought would pass muster in a court of bankruptcy. I therefore find that the evidence shows that said money was borrowed and said mortgage and transfer were made on the part of Walden Bros. Clothing Company, to defraud, hinder, or delay the creditors of said company, and that said company was insolvent, and that said F. G. Lumpkin knew or had reasonable grounds for knowing of said fraudulent intent on the part of said Walden Bros. Clothing Company. If he did not know it, he was ignorant by reason of his inexcusable ignorance and carelessness. I therefore find and hold that said mortgage and transfer are illegal, null, and void, and that the debt secured thereby should not be proven as a preferred claim."

The findings of the referee on many assignments of error challenging the correctness of his conclusions were reviewed, and after due consideration were affirmed by the District Judge, who recognized the rule that the findings of the referee upon questions of fact are presumptively correct, and should be sustained unless some obvious error of law or serious mistake of fact entered into the consideration of the case.

The learned District Judge, expressing his own opinion of the mortgage transaction in so far as it relates to the conduct of Walden Bros. Clothing Company, says:

"There is no doubt whatever from the evidence that he (referee) was fully justified in this finding; any fair view of the evidence as to the value of the stock of merchandise on hand, and the notes and accounts due the company contrasted with the admitted indebtedness, makes it clearly insolvent. At the time the mortgage was executed, was it made on the part of the bankrupt company with intent to hinder, delay, or defraud creditors? It must be conceded that there was a clear intent to delay the creditors, to say no more of it. Mortgaging its entire stock of merchandise and pledging its choses in action, and then using the money received from the mortgagee to pay three creditors, leaving a considerable number of its creditors wholly unprotected, could only have been with the knowledge that the latter class of creditors would be hindered and delayed, at least, in the collection of their debts. It must have intended that which it knew would occur. This is sufficient to bring the case within the statute (section 67e, Bank. Act 1898)."

So far there is no point to be made against the ruling of the court quoted above. We would not be disposed to disturb it in any event unless it was manifestly shown to be wrong. Since the finding of the judge on the facts has the same presumption in its favor that accompanies the judgment of the referee, we conclude that the views

expressed by the court are abundantly sustained by all the evidence in the case. We have seen, therefore, that the District Judge approved the findings of the referee in so far as the Walden Bros. Clothing Company is concerned that the transaction was in effect to hinder, delay, and defraud its creditors.

[3] The presumption of the correctness of the referee's finding is materially strengthened when the reviewing court concurs therein. In *re Schulman*, 177 Fed. 191, 101 C. C. A. 361; In *re Noyes*, 127 Fed. 286, 62 C. C. A. 218; *Boswell v. Simmons*, 190 Fed. 735, 111 C. C. A. 463; *Buckingham v. Estes*, 128 Fed. 584, 63 C. C. A. 20.

It is more particularly what follows in the opinion of the Judge that invites the earnest protest of appellant's counsel and calls for judicial scrutiny. The opinion proceeds:

"Really, the only question in the case is whether or not Mr. Lumpkin had reasonable grounds for suspicion that by the execution of this mortgage the bankrupt company intended to hinder, delay, or defraud its creditors. Were the facts and circumstances of the case and surrounding the transaction, such as to put him on notice that such was the purpose of the Walden Bros. Clothing Company? Section 3224 of the Code of Georgia 1910 provides: 'The following acts by debtors shall be fraudulent in law, against creditors and others and as to them, null and void, viz.: (1) Every assignment or transfer by a debtor, insolvent at the time, of real or personal property, or choses in action of any description, to any person, either in trust or for the benefit of, or in behalf of, creditors, where any trust or benefit is reserved to the assignor, or any person for him. (2) Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution, or contract of any description, had or made with intention to delay or defraud creditors, and such intention known to the party taking. A bona fide transaction on a valuable consideration, and without notice or ground for reasonable suspicion, shall be valid.'"

The District Judge after reciting the decision of the Supreme Court of Georgia (*Nicol v. Crittenden*, 55 Ga. 497), which holds in effect that under section 1952, Georgia Code, that to uphold a transfer from a fraudulent vendor, the purchaser should be without grounds of a reasonable suspicion, and whether there was in a given case reasonable ground, was a question for the jury, again refers to the attitude of claimant in the transaction and continues:

"I would be unwilling to sustain the action of the referee, if in so doing it was necessary to hold that Mr. Lumpkin was guilty of any actual fraud or intentional wrong, because I do not believe that is shown by the proof. But the referee correctly applied the law of Georgia, and had sufficient evidence to justify him in holding as he did, I do believe; and it is wholly unnecessary to hold that there was actual fraud or any intentional wrong on the part of Mr. Lumpkin in this case. All that is necessary to determine, and all that is determined, is that the facts are such as to justify the referee in finding them such as to put Mr. Lumpkin upon inquiry, and that such reasonable inquiry would have informed him of the intention of the bankrupt company, at least, to delay its creditors, and that in failing to make such inquiry he was guilty of such negligence as to make this conveyance void. In other words, the facts surrounding this transaction at the time Mr. Lumpkin took the mortgage gave grounds for reasonable suspicion of the bankrupt company's intent. He must have known that this company by conveying all its property of every kind to him to secure a note payable on demand put themselves out of business, so far as the mercantile world was concerned; and, having this knowledge, I think the referee was justified in

finding that he should have gone further and inquired as to what was the purpose of the company in making this large loan and incumbering all its property. Certainly no court would be justified in holding that there was clear and manifest error on the part of the referee in so doing."

The numerous assignments of error which challenge this ruling may be grouped and disposed of under the more definite and pertinent objection, that it is contrary to law and the evidence. And this brings us to consider the correctness of the judge's holding predicating his ruling on the view that the transaction as regards claimant was void entirely upon that section of the Georgia Code, *supra*, which provides that:

"A bona fide transaction on a valuable consideration, and without notice, or ground for reasonable suspicion shall be valid."

Obviously, the judge did adopt the view of the referee, "that said company was insolvent, and that said Lumpkin knew or had reasonable grounds for knowing of said fraudulent intent on the part of said Walden Bros. Clothing Company," and that, "if he did not know it, he was ignorant by reason of his inexcusable ignorance and carelessness." The judge could not sustain the referee, however, if it meant to impute fraud to appellant. The referee was first-hand with the witnesses, his opportunity for observing their manner of testifying, and the many visible but intangible tests of truth afforded him, renders his judgment the better criterion for determining the crucial fact, whether Lumpkin took this mortgage in good faith for a fair present consideration.

[4] In view of all the evidence disclosed by the record, we are reluctantly constrained to entertain a different conclusion from that reached by the district judge as to the good faith of Mr. Lumpkin in this transaction. Section 67e denounces as null and void all conveyances, transfers, assignments, or incumbrances made or given within four months prior to the filing of the petition with intent and purpose to hinder, delay, or defraud creditors, except as to purchasers in good faith for a present fair consideration. Both the referee and judge, we have seen, found that the purpose of the Walden Bros. Clothing Company was to hinder, delay, or defraud their creditors, in which we have concurred. There is no question that there was a fair consideration for the transfer. That the transaction so far as the purchaser is concerned must be impugned, if at all, by actual fraud, as distinguished from constructive fraud, is well settled by the leading case on the subject—*Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008. Unless, therefore, the mortgagee knew of the purpose of the Waldens, or was in such atmosphere as would lead a reasonably prudent man to inquire, or that good conscience would impel him to investigate, he would be protected as a bona fide purchaser.

Without reviewing all the evidence, we think there were more than suspicious circumstances confronting the purchaser of this stock of merchandise and open accounts. The *res ipsa* of the transaction refutes the statement of the claimant, that he thought "they were as

good as any merchants on Broad street." Covering a stock of merchandise in a going concern with no other assets and taking simultaneously a transfer of every visible resource for "keeping it on its feet" cannot be regarded, to say the least, a healthy sign of prosperity. The claimant, a business man engaged in loaning money with every opportunity at hand for investigation of the financial situation of the borrower of such sum of money, who had been ill and out of touch with his business for two months, was content to act upon an unidentified statement of the assets and liabilities of the borrower made four months before. Again, whom do we find so solicitous for the welfare of the company; those interested in securing the payment of their debts. Reich it is true was not paid anything personally, but out of the loan which he was active in procuring the bank of which he was a director was paid unmatured debts equaling almost the amount of the loan. Was it not apparent to any business man, even to the proverbial wayfaring man, that inevitable disaster must follow? The statement showed in round numbers \$10,000 indebtedness. Lumpkin evidently preferred not to know to whom it was owed.

It is unnecessary, if we were so inclined, to set out all the facts and circumstances which may have been considered by the referee. He had, as already noted, the advantage of the presence of the witnesses, and in reaching his conclusions was entitled as much to what may have been evaded as to that volunteered. Suffice it to say, that we cannot from the record impeach his conclusions on the question of Lumpkin's good faith in taking this mortgage.

We do not understand that *Coder v. Arts*, supra, undertakes to set up any hard and fast rule by which is to be tested the good faith of a purchaser under subdivision "e," § 67. In that case the court distinguishes between a preferential transfer and a fraudulent conveyance, and was dealing with the particular facts of a case which had been assailed as a preferential transfer under subdivision "b," § 60. The case of *Coder v. Arts*, supra, involved renewals of notes secured by mortgages on real estate covering long antecedent indebtedness, and it was claimed by the trustee at the time of giving the mortgage that Armstrong was insolvent, and that the mortgage was given with intent to prefer, and that claimant had reason to believe a preference was intended. The court decided this question adversely to the trustee upon the particular facts of that case, submitted to it by the finding of the Court of Appeals. The Supreme Court does hold that to avoid conveyances under section 60c it is essential to show actual fraud, but in that connection says also:

"We do not agree, if such is to be held the effect of the third conclusion of law in the finding of the Circuit Court of Appeals, that the giving of the mortgage and its effect upon other creditors could not be considered as an item of evidence in determining the question of fraud. What we hold is that, to constitute a conveyance voidable under 67e, actual fraud must be shown. * * * As we have already said, we must decide this case upon the facts found in the Circuit Court of Appeals, and it is therein found that in making the mortgage in question Armstrong had no intention to hinder, delay, or defraud his creditors."

It is sufficient to say that the decision turned on the particular facts of that case.

[5] Fraud is not to be presumed, but that does not imply that fraud may not be proved by circumstances as well as by direct evidence. Fraud may be actual arising from facts and circumstances of imposition. It may be apparent from the intrinsic nature and subject of the bargain itself. *Hume v. U. S.*, 132 U. S. 406, 10 Sup. Ct. 134, 33 L. Ed. 393. The testimony of the witnesses considered by the referee in connection with all the circumstances, taken with Lumpkin's testimony, satisfied the referee that the claimant shut his eyes to the situation, and we cannot say that the referee is wrong in his contention that Lumpkin tacitly acquiesced in a subtle scheme between the bankrupt and the favored few of its creditors.

As was said by Mr. Justice Day in *Wecker v. National Enameling Co.*, 204 U. S. 182, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757:

"In cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within reach."

There seems to be no dearth of authority that a purchaser is not in good faith who makes no effort to determine whether one may make a transfer which will not be in violation of the act. *Houck v. Christy*, 152 Fed. 615, 81 C. C. A. 602; *Dokken v. Page*, 147 Fed. 439, 77 C. C. A. 674; *Shauer v. Alterton*, 155 U. S. 607, 14 Sup. Ct. 442, 38 L. Ed. 286; *Harrell v. Beall*, 17 Wall. 590, 21 L. Ed. 692. If *Coder v. Arts* by any stretch of construction is to be taken as requiring a different or greater degree of proof of fraud when the transfer is assailed because of bad faith, then this useful statute which was intended to secure impartial distribution of the estates of insolvents and to preserve the integrity of business intercourse might as well be stricken from the act. There can be no reason for any different rule of evidence to show bad faith than any other condition or fact. Artful subterfuges would in that event defeat the very purpose of the act. It would only be necessary for local creditors to find a speculative purchaser willing to "chloroform" himself in order that he might become a purchaser in good faith. We prefer, therefore, to rest our conclusion on the findings of the referee, that claimant was not a purchaser in good faith, and that the transfer is condemned by subdivision "e" of section 67 of the Bankruptcy Act.

There was no error in affirming the finding of the referee, and the decree appealed from should be affirmed, and it is so ordered.

PARDEE, Circuit Judge. I dissent on both the facts as found by the majority of the court and the law applicable to the facts as I read the record, and I reserve the right to file opinion as time may permit.

JOHNSON v. DISMUKES.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1913.)

No. 2,436.

BANKRUPTCY (§ 178*)—PREFERRED CLAIMS—MORTGAGE—FRAUD AS TO CREDITORS.

Bankrupt, while insolvent, applied to claimant, who was an entire stranger, for a loan of \$6,000 secured by mortgage on his stock of merchandise in two stores in the same city. Claimant glanced at the stock, and, ascertaining that there were no liens of record made the loan, accepted the mortgage and paid over the money, the proceeds of which the bankrupt used to pay his bank and kinsmen matured debts due them, the effect of which was to prevent payment of other creditors and precipitate bankruptcy, which immediately followed. *Held*, that the claimant was not a bona fide purchaser, and that the mortgage was fraudulent and void as against creditors under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.*]

Pardee, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge.

Claim of Cliff R. Johnson against the estate in bankruptcy of one Thweatt. From an order (199 Fed. 319) affirming a referee's order disallowing the claim as preferred on objections filed by R. E. Dismukes, trustee, plaintiff appeals. Affirmed.

Before PARDEE and SHELBY, Circuit Judges, and SHEPPARD, District Judge.

Hatcher & Hatcher, of Columbus, Ga., and Atkinson & Born, of Atlanta, Ga., for appellant.

Slade & Swift and Love & Fort, all of Columbus, Ga., for appellee.

SHEPPARD, District Judge. This is an appeal from the District Court of the Northern District of Georgia affirming the finding of the referee on a state of facts very similar to that considered in the case of Lumpkin v. Foley, Trustee, 204 Fed. 372, at this term. About the only difference is stated in the opinion of the District Judge, and consists in the fact that in the Lumpkin Case the bankrupt, in addition to mortgaging its stock of goods in trade, transferred to the claimant, Lumpkin, all its choses in action, notes and accounts due it. In the instant case the bankrupt mortgaged to Johnson his stock of merchandise in trade, kept in different stores in the same city. Thweatt, the bankrupt, used all the proceeds of the loan from Johnson, \$6,000, to pay his bank and kinsmen debts due them, which, however, had all matured.

Both the referee and judge below found from the evidence: That Thweatt, the bankrupt, was on the date of the transfer "clearly insolvent," and that the act of the transfer was to hinder, delay, and de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fraud his creditors. That the transaction was hastily consummated after Bowden, Johnson's attorney, made known Thweatt's present need for "money in his business," which appears from the testimony not to have been applied to the business. That Johnson, the claimant, was an entire stranger to Thweatt, and made no investigation of the value of the assets, except to take a glance look at the stocks in the two stores. He was not concerned as to whether the goods had been paid for—it was "none of his business"—except to see that there were no liens of record. The referee and District Judge both say that the circumstances of the transaction were sufficient to put Johnson on inquiry, and investigation, if made, would have disclosed these "undisputed facts": First, that it was Thweatt's purpose to use the money to pay two creditors only and "to leave the others wholly unprovided for"; second, that Johnson's idea was that, if he did not know anything, he would be responsible for nothing. The judge approved the findings of the referee: First, that Thweatt was insolvent; second, that the mortgage was intended to hinder and delay, if not to defraud; third, that the facts and circumstances accompanying the transaction were calculated to put Johnson on inquiry. The judge, however, could not discover any actual fraud on the part of Johnson, and puts his approval on the findings of the referee on paragraph 2 of section 3224 of the Georgia Civil Code 1910, holding that there was sufficient in the facts and circumstances in the transaction to have excited Johnson's suspicion.

We are of the opinion that the findings of fact by the referee, and approved by the judge, based upon the evidence, avoids the title of Johnson under subdivision "e" of section 67 of the Bankruptcy Act of 1898, viz.:

"e. That all conveyances, transfers, assignments, or incumbrances of his property or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors."

Our reasons for this view of the questions involved are expressed in the analogous case of Lumpkin v. Foley, Trustee, and this case is decided on the authority of that case.

We find no reversible error in the decree of the District Court, and it should be affirmed.

It is so ordered.

PARDEE, Circuit Judge. I dissent both on the facts as found and the law of the case, and I reserve the right to file an opinion on both as time may permit.

HARRISON v. GILLESPIE et al.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1913.)

No. 1,111.

1. ACKNOWLEDGMENT (§ 47*)—TAKING IN FOREIGN STATE—OMISSION OF SEAL—STATUTE—CURATIVE ACT.

Code W. Va. 1906, c. 73, § 4, provides that, if an acknowledgment is taken before a notary without the state, he shall certify the same under his official seal. Act Feb. 22, 1895 (Laws 1895, c. 10; Code 1906, c. 73, § 11), declares that when acknowledgment of any deed of a married woman has been previously taken by a notary, whether he used his official seal or not, the same shall nevertheless be sufficient, unless there are other lawful objections. *Held*, that chapter 73, § 11, is not limited to acknowledgments taken in a foreign state where the certificate contains no reference to a seal, but is effective to cure the failure of a notary taking the acknowledgment of a married woman in Virginia to a deed of real property located in West Virginia which he failed to certify under his official seal.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 235-240; Dec. Dig. § 47.*]

2. JUDGMENT (§ 747*)—PARTITION—CONCLUSIVENESS—STATUTE.

Code W. Va. 1906, c. 79, § 1, provides that tenants in common shall be compellable to make partition, and that the circuit court, in the exercise of its jurisdiction in cases of partition, may take cognizance of all questions of law affecting the legal title that may arise in such proceeding. Code W. Va. 1906, c. 117, § 8, declares that every such record shall be as effectual in cases of partition to convey the legal title of the lands in controversy to the persons to whom the same is assigned as deeds of partition would be if duly made by the parties. *Held*, that where a married woman, owning an undivided interest in certain land with her husband, conveyed her interest to P., and while sui juris suit was brought against her, her husband, P., and others for partition, and her interest, conveyed to P. by the deed, was set off to him by the decree, she and those claiming under her were estopped thereby to thereafter claim any interest in such land by virtue of a defect in the acknowledgment of her deed to P., which was not made an issue in the partition suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1053, 1284-1296; Dec. Dig. § 747;* Partition, Cent. Dig. § 314.]

3. JUDGMENT (§ 486*)—PARTITION DECREE—COLLATERAL ATTACK.

Where a partition decree awarding an interest in the property to a cotenant's grantee had not been reversed or set aside by some proper method, it could not be collaterally attacked by a suit in equity to set aside certain conveyances, on the ground that the cotenant's deed was invalid for want of sufficient acknowledgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 919, 920-923; Dec. Dig. § 486;* Partition, Cent. Dig. § 421.]

Appeal from the District Court of the United States for the Southern District of West Virginia; Benjamin F. Keller, Judge.

Suit by J. B. Harrison against J. S. Gillespie and others. Decree for defendants, and plaintiff appeals. Affirmed.

Ritz & Ritz, of Bluefield, W. Va., and Cook, Litz & Howard, of Welch, W. Va., for appellant.

J. W. Chapman, of Tazewell, Va. (Chapman & Gillespie, of Tazewell, Va., on the brief), for appellees.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before PRITCHARD, Circuit Judge, and McDOWELL and ROSE, District Judges.

PRITCHARD, Circuit Judge. This is a suit in equity instituted in the District Court of the United States for the Southern District of West Virginia by J. H. Harrison against J. S. Gillespie et al. for the purpose of setting aside certain conveyances hereinafter mentioned. It appears that J. T. Myers died intestate seized of a tract of land, a portion of which is involved in this controversy. The land owned by Myers at his death passed by descent to his eight children, his heirs at law. Minnie J. Moore, one of his heirs, intermarried with John W. Moore, and on the 17th day of December, 1893, she, together with her husband, conveyed to W. P. Payne an undivided one-third of her interest in the lands of her father, situated in McDowell county, W. Va., on the waters of the Dry fork of Sandy river.

This deed was acknowledged by the grantors in the state of Virginia before a notary public of that state, and was duly recorded in McDowell county, W. Va., but it appears that the notary failed to attach his official seal to the certificate of acknowledgment. Subsequent thereto Henry Beavers and Jesse Beavers, his wife (also a daughter of J. T. Myers, deceased), instituted a chancery suit in the circuit court of McDowell county for a partition of the land of which the said J. T. Myers died seized. All of the heirs at law of the said J. T. Myers, as well as the persons to whom some of them had aliened their interests, were made defendants; among them being John W. Moore and Minnie J. Moore and W. P. Payne. In that suit the circuit court of McDowell county ordered a partition of said lands, and 19.6 acres thereof (being the land involved herein) were assigned to Payne under said deed of December 7, 1893, from Minnie J. Moore and her husband, John W. Moore.

It also appears that on the 16th day of March, 1902, the said W. P. Payne and wife conveyed this tract of land to J. S. Gillespie, who leased the same to Thomas W. Fisher, and he, in turn, transferred his lease to the New River & Pocahontas Consolidated Coal Company, and this company is now in possession of this tract of land. Minnie J. Moore died in the year 1898 intestate, leaving an infant son, Francis Moore, as her heir at law. The appellant claims as purchaser of the interest of the infant at a judicial sale. As shown by the allegations of the bill, this suit was instituted for the purpose of setting aside the deed from Minnie J. Moore and her husband, John W. Moore, to W. P. Payne; also, the deed from Payne and wife to Gillespie; the lease from Gillespie to Thomas Fisher, and the transfer of said lease by Thomas Fisher to the New River & Pocahontas Consolidated Coal Company, in so far as these deeds undertake to pass any greater interest than the curtesy initiate of the said John W. Moore.

At the July rules, 1911, the appellee the New River & Pocahontas Consolidated Coal Company filed its demurrer to the bill, and on the 18th day of October, 1911, J. S. Gillespie demurred to the bill by leave of court upon the same grounds relied upon by the New River & Pocahontas Consolidated Coal Company. On the 18th day of October, 1911, a hearing was had. The court sustained the demurrers and dis-

missed the bill, and judgment was entered accordingly. From this judgment the plaintiff appealed.

[1] Inasmuch as the appellant claims title under Minnie J. Moore, the first question to be determined is as to whether Minnie J. Moore was seised and possessed of these lands at the time of her death. If we should reach the conclusion that she was at that time the owner of the same, it would necessarily follow that she had not been divested of the title by the deed of conveyance which she made to W. P. Payne prior thereto, or the partition proceeding, and the appellant would be entitled to recover. Therefore, did Payne acquire the title to the premises by virtue of such deed or partition proceeding? It is contended by counsel for appellant that this deed was inoperative to pass title, and that its only effect was to vest in Payne the curtesy initiate of the said John W. Moore in the lands in controversy, because the notary public who took the acknowledgment of the said Minnie J. Moore and John W. Moore failed to certify the same under his official seal. This acknowledgment was taken before a notary residing in the state of Virginia, and the appellant insists that, under the West Virginia statute, the acknowledgment of a married woman taken before a notary in another state is required to be certified under his official seal. The last paragraph of section 3077 of the Code of West Virginia (1906) is in the following language:

"If the acknowledgment be before a notary without this state he shall certify the same under his official seal."

The appellant insists that this statute is mandatory, but the appellees insist that it is merely directory; and, further, that even if the certificate were defective on account of the fact that the notary failed to certify the same under his official seal this defect was cured by a statute passed subsequent to the date of the deed. It is not contended that the deed from Minnie J. Moore and husband was improperly executed, nor that it was improperly acknowledged; but it is insisted that, inasmuch as the notary before whom it was acknowledged failed to attach his official seal, the certificate of acknowledgment was fatally defective. It is unnecessary to decide this question. If the deed was invalid, it was cured by the act of February 22, 1895 (Laws 1895, c. 10; section 3086, Code 1906), which reads as follows:

"Where the acknowledgment of any deed or other writing, or the privy examination of a married woman respecting the same, has been heretofore taken by a notary public or justice of the peace, whether he used his official seal or not, or by two justices of the peace in any county in the state of Virginia, prior to the reorganization of the state government thereof, or by any justice out of his district or township, or it does not appear by the certificate of the justice that such acknowledgment or privy examination was taken within his district or township, or county, the same shall be, nevertheless, sufficient, unless there be other lawful objections."

While this statute is broad and comprehensive in its terms, nevertheless, it is argued by counsel for appellant that it was not intended to apply to acknowledgments taken in another state where the certificate contains no reference to the seal and that it only attempts to cure one defect, to wit, the absence of the notary's seal, and refer to the case of *Wetmore v. Laird*, 5 Biss. (U. S.) 160, Fed. Cas. No. 17,467,

to support such contention. In using the language, " * * * whether he uses his official seal or not," the Legislature obviously had reference to certificates of acknowledgment under his official seal; and, where such certificates were not made and no official seal attached thereto, it was evidently the purpose of this statute to validate the same. From its provisions it may be inferred that at the time of its enactment the Legislature was of the opinion that certain conveyances of land in that state were invalid owing to the fact that the notaries taking the acknowledgments had failed to certify the same under their official seal. Therefore, it must be assumed that the chief object of this enactment was to validate conveyances of this character. In other words, it was the purpose of the act to deal with certain defective conveyances as a class, and under the circumstances it would be absurd to say that the Legislature intended to validate only conveyances that were acknowledged before an officer within the state, and that the act did not apply to a deed where the acknowledgment was taken in another state. In our opinion it was the purpose of the Legislature to cure any defects in conveyances falling within this class, and that it was intended especially to apply to those conveyances that had been acknowledged before a notary in another state. This is the more reasonable construction to place upon this statute in view of the fact that there was no statute in the state requiring certificates of acknowledgment before notaries taken within the state to be certified under their official seals.

[2] But the foregoing is not the only reason for our conclusion that the decree below was right. Among other things, it is alleged in the bill that:

" * * * On the 19th day of November, 1894, Henry Beavers and Jesse Beavers, his wife, who was a daughter of the said J. T. Myers, brought their chancery suit in the circuit court of McDowell county for the partition of the lands of which J. T. Myers died seised, and in the partition had in said chancery suit the said 19.6 acres, now owned by plaintiff, were assigned and allotted as part of the share of Minnie J. Moore, a daughter, and one of the eight children of the said J. T. Myers, who had intermarried with one John W. Moore, to W. P. Payne, on account of the deed made to the said W. P. Payne by John W. Moore and wife of December 17, 1893."

Minnie J. Moore and her husband were parties to that suit, and neither of them objected to the allotment of these particular lands to Payne in accordance with the deed which they had executed and delivered to him. Section 3180 of the Code of West Virginia (1906) is in the following language:

"Tenants in common, joint tenants, coparceners, shall be compellable to make partition, and the circuit court of the county wherein the estate, or any part thereof, may be, shall have jurisdiction in cases of partition, and in the exercise of such jurisdiction, may take cognizance of all questions of law affecting the legal title that may arise in any proceeding."

Also section 3740 of the Code of West Virginia is in the following language:

"And every such record shall be as effectual, in cases of partition to convey the legal title of such lands to the persons to whom the same is assigned by the report of the commissioners, as deeds of partition would be if duly made by the parties."

The partition in this case was duly certified to the clerk of the county court, and he, in turn, recorded the same, and it thereby became notice to the world of the ownership by Payne of this land. In the suit for partition, as we have stated, Minnie J. Moore and Payne were both parties defendant, Payne claiming (under the deed from Minnie J. Moore and her husband) that he was the owner of one-third of the interest of Minnie J. Moore in the lands which she had inherited from her father, J. T. Myers, deceased. They both claimed under a common source, and it was necessary for the court to determine the respective interests of all the parties before a partition could properly be had. That this was done is evidenced by the fact that the appellant in his bill, among other things, alleges that this particular tract in that proceeding was allotted to Payne " * * * on account of deed made to W. P. Payne by John W. Moore and wife December 7, 1893." Under the circumstances of this case, it must be assumed that the court determined as to the exact interest Minnie J. Moore had in these lands in view of the fact that it allotted to Payne every foot of land contained in the deed which had been made to him by her anterior to that date.

The Supreme Court of West Virginia in the case of *Smith v. Vineyard*, 58 W. Va. 98, 51 S. E. 871, held that, under the provision of the statute relating to partition, the circuit court had the power to pass upon all conflicting claims to title in suits where parties are required to make partition. Judge Coxe, who delivered the opinion of the court, discussed this phase of the question, and, among other things, said:

"This enabling provision of our statute has many times been passed upon by this court. At first glance there seems to be an apparent conflict in our decisions, as to the extent of the power of a court of equity to pass upon conflicting claims to real estate in a partition suit, which upon closer examination disappears. Our earlier cases appear to give a very broad interpretation to the statute in this regard. In *Hudson v. Putney*, 14 W. Va. 561, it was said that under this section, when the title is doubtful, a court of equity should decide it, observing the general rules of practice in equity for ascertaining facts, either by a jury or otherwise, as may be most proper. In *Moore v. Harper*, 27 W. Va. 362, it was said that, under this section, a court of equity in a suit for the partition of lands may take cognizance of all questions of law affecting the legal title that may arise in the proceedings, such as removing a cloud from the title or passing upon an adverse claim to the land. These cases seem broad enough to enable a court of equity to pass on and determine the claim of a stranger holding a wholly adverse and hostile title, but our later cases, reviewing the former decisions, have not so construed them. *Carberry et al. v. W. Va. & P. R. Co.*, 44 W. Va. 260 [28 S. E. 694]; *Cecil et al. v. Clark et al.*, 44 W. Va. 659 [30 S. E. 216]. In the latter case Judge Brannon, delivering the opinion of the court, said, in relation to the construction given the statute by the cases of *Hudson v. Putney* and *Moore v. Harper*, that 'this is broad enough in words to allow a stranger's title to be tried, but it does not mean that an adverse claim to the same title may be passed upon.' In the opinion in *Carberry et al. v. W. Va. & P. R. Co.*, it was said: 'It is needless to expand here upon the proposition that equity will not entertain a bill which is but an action of ejectment, and thus try adverse title, unless it be incidental to relief under a known head of equity jurisdiction.' Under this provision of the statute, and under our decisions, as we understand them, the circuit court has the power to pass upon questions of law affecting the legal title only in the exercise of its jurisdiction of partition. If it appears, as a jurisdictional fact, in a suit of equity for

partition, that the party or parties asking for partition and the party or parties against whom partition is asked are tenants in common, joint tenants, or coparceners in the real estate sought to be partitioned, and as such compellable under the statute to make partition, the circuit court has power incident to its jurisdiction to pass upon all conflicting claims to the title to such real estate of the parties so compellable to make partition arising in the suit. If the jurisdictional fact, viz., the existence of one of the forms of cotenancy mentioned appears, the jurisdiction of the court is not defeated by the claim of one or more of the defendants that the fact does not exist. One of the defendants may claim the whole of the real estate sought to be partitioned, and may claim to have ousted the other and to be in sole possession, yet, if the fact appears that one of the forms of cotenancy mentioned actually exists, the court may pass upon the conflicting claims to title of the cotenants as long as the plaintiff's right of entry is not barred by the statute of limitations. *Cecil et al. v. Clark et al.*, supra; *Hudson v. Putney*, supra; *Carberry et al. v. W. Va. & P. R. Co.*, supra; *Davis v. Settle*, 43 W. Va. 17 [26 S. E. 557]; *Pillow v. Southwest Improvement Co.*, 92 Va. 144, 23 S. E. 32 [53 Am. St. Rep. 804]; Code, c. 79, section 1."

Also in the case of *Croston v. Male*, 56 W. Va. 214, 49 S. E. 139, 107 Am. St. Rep. 918, the Supreme Court of West Virginia, in passing upon this question quoted with approval *Childers v. Loudin*, 51 W. Va. 559, 42 S. E. 637, and said:

"It is the duty of the court before decreeing a partition of lands to judicially determine the rights of the parties and failure to do so is ordinarily error. Manifestly it is more important in the case of a sale than in that of a division in kind for the parties interested ought to know their rights, so as to be able to protect them at the sale, as in the case of creditors interested in property about to be sold. But even where partition is to be made it ought to be done. *Freem. on Coten. & Par.* § 518, says the interlocutory decree, determining the interests of the parties, furnishes the basis upon which the commissioners are to proceed."

Although the proceedings in the partition suit and the decree authorizing the partition of the estate of J. T. Myers, deceased, were not filed as exhibit with the bill in this case, yet we have before us the allegation in the bill to which we have referred in which it is stated that "these lands were allotted to Payne in that proceeding."

Section 2962 of the Code of W. Va. (1906) was in force at the time of the partition suit, and contains the following provisions:

"A married woman may be sued without joining her husband in the following cases:

"(1) Where the action concerns her separate property.

"(2) Where the action is between herself and her husband.

"(3) Where she is living separate and apart from her husband.

"And in no case need she prosecute or defend by guardian or next friend."

Minnie J. Moore was sui juris at the time the suit was instituted, and, being a party thereto, she was thus afforded an opportunity to assert any claim of title she may have had in this tract of land against Payne. However, it does not appear whether at that time she asserted title to the lands in controversy but this is immaterial.

Under the decisions of the Supreme Court of West Virginia, construing the statute relating to partition, W. P. Payne, by virtue of the allotment in the partition proceeding, acquired the legal title to the lands in controversy; and the title thus acquired was as good as if all the parties to the partition suit had joined in executing the same. Mr. Washburn thus states the doctrine:

"Where partition has been made by law, each partitioner becomes a warrantor to all the others, to the extent of his share, so long as the privity of estate continues between them. And, inasmuch as a warrantor cannot claim against his own warranty, no tenant after partition made can set up an adverse title to the portion of another for the purpose of ousting him from the part which has been parted off to him. When partition has been made, the tenant, to whom a part has been set out, is regarded in law as a purchaser for value of the same." Washburn, R. P. 723.

Also the case of *Carter v. White*, 134 N. C. 466, 46 S. E. 983, 101 Am. St. Rep. 853, is very much in point, the second syllabus being in the following language:

"A judgment in a partition proceeding determining the respective interests of the parties thereto is binding on said parties as against an after-acquired title."

[3] Further, this title is good until the decree in that suit is set aside or reversed by some proper method. The circuit court being a court of general jurisdiction, its decrees import verity, and cannot be attacked collaterally. If the decree complained of was erroneous, it could have been reversed on a bill of review or by appeal taken within the time allowed by law. This was not done, and we are therefore of the opinion that the proceeding in that case is not open to attack or impeachment in this suit.

In the case of *Gillespie v. Pocahontas Coal & Coke Co.*, 91 C. C. A. 494, 163 Fed. 992, this question was discussed at some length. While the facts in that case differ from those in the case at bar, a careful re-examination of the West Virginia decisions constrains us to say that we do not feel bound by anything that may have been said in that case that is in conflict with the views herein expressed.

For the reasons stated, the decree of the lower court is affirmed.
Affirmed.

BAKER CONTRACT CO. et al. v. UNITED STATES, for Use of PENNOCK
et al.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1913.)

No. 1,120.

1. COURTS (§ 269*)—PUBLIC WORK—CONTRACTOR'S BOND—FEDERAL JURISDICTION—DISTRICT.

Act Cong. Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1905, p. 493), amending Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), authorizing a suit in the name of the United States by laborers and materialmen on the bond of the public contractor, and providing that the action shall be brought in the district in which the contract was to be performed, "and not elsewhere," superseded as to such action the provision of General Jurisdiction Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), requiring actions in which jurisdiction depends on diversity of citizenship to be brought in the district in which the plaintiff or defendant resides, so that, in an action on such a bond, the court of the district where the contract was to be performed had jurisdiction to issue process for the service in another district or districts on nonresident defendants.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. § 269.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

2. APPEAL AND ERROR (§ 257*)—EXCEPTIONS—ASSIGNMENT OF ERROR—NECESSITY.

An objection that the summons was fatally defective for failure to specify a return day could not be reviewed on appeal, in the absence of an exception to the court's overruling the same and an assignment of error based thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1494-1497; Dec. Dig. § 257.*]

3. UNITED STATES (§ 67*)—PUBLIC IMPROVEMENT—CONTRACTOR'S BOND—ACTION—CONDITION PRECEDENT—LIMITATIONS.

Act Cong. Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1905, p. 493), amending Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), provides that, if no suit is brought by the United States within six months after the completion and final settlement of a contract for a public improvement, the laborers or materialmen on application shall be authorized to sue on the contractor's bond in the name of the United States at any time thereafter, and within one year after the performance and final settlement of the contract, and not later. *Held*, that the provision requiring the materialmen's action to be brought within a year was not a limitation of the remedy, but was a condition of the right to sue; and hence a failure to comply therewith, could be availed of as a defense, though not specially pleaded.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

In Error to the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Action by the United States of America, for the use of Joseph W. Pennock and others, against the Baker Contract Company and sureties on the bond, pursuant to a contract for the construction of public works. Judgment for plaintiffs, and defendants bring error. Affirmed in part, and reversed in part.

This is an action of debt, instituted in the United States District Court for the Northern District of West Virginia by the United States of America, in behalf of and for the use of Joseph W. Pennock, against the Baker Contract Company, a corporation, Philip M. Pfiel, and Geo. E. Lorch. The action is based upon a contractor's bond given by the Baker Contract Company, with the said Pfiel and Lorch as sureties, in the penal sum of \$75,000, payable to the United States of America. In said bond it appears that the Baker Contract Company had entered into a contract of May 18, 1905, for building dam No. 18 on the Ohio river, which contained the usual conditions as to the carrying out of said contract, and was also conditioned for the prompt and full payment to all persons supplying the said Baker Contract Company with labor or materials in the prosecution of the work provided for in said contract. The said bond was given under the terms of the act of Congress passed February 24, 1905 (33 Stat. 811, c. 778), amending the act of August 13, 1894 (28 Stat. 278, c. 280 [U. S. Comp. St. 1901, p. 2523]), providing for bond of contractors for public buildings or works, and defining the rights of persons furnishing labor and material, and the remedies on bonds and proceedings in actions thereon, as found in the Supplement of 1905, U. S. Compiled Statutes, page 493. The declaration alleges the execution of the bond, that the Baker Contract Company entered upon the building of the dam mentioned in said contract, and that the relator, Joseph W. Pennock, sold and delivered to the said Baker Contract Company certain lumber for use in the prosecution of said work and filed an itemized statement for the same. The declaration contains the usual allegations common in suits upon bond with conditions, and alleges the full performance of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said contract by the receiver of the Baker Contract Company and the final settlement with the United States February 11, 1910, and that six months had elapsed since the completion and final settlement of said contract, and that no suit had been brought by the United States within said six months against the said Baker Contract Company and the sureties on said bond. These allegations are made pursuant to the requirements of the act of Congress of February 24, 1905, as giving the right of action to the plaintiff as a person who had furnished material for the prosecution of said work. The action was brought in the Northern district of West Virginia, because the act provides that such suit shall be brought in the district in which the contract was to be performed and executed, and not elsewhere. The contract was to be performed in the district in which the suit was brought. The process, as appears by the returns of the officers, was served in the Western district of Pennsylvania.

On November 7, 1910, the defendant Joseph M. Pfiel filed his demurrer to the declaration, and at the same time filed his pleas Nos. 1 and 2, being the plea of *nil debet* and plea of performance. From time to time other firms and persons who had furnished material or rendered services to the Baker Contract Company for the prosecution of such work were permitted to file their petitions and present their claims in the action, under the terms of the act of Congress of February 24, 1905, which provides that only one action shall be brought, and any creditor may file his claim in said action and be made a party thereto. On the 13th day of January, 1911, the defendant George E. Lorch appeared by attorney, and appeared specially for the purpose of moving to quash the summons, for the reason, as claimed by the defendant, that said summons was illegally and irregularly issued and directed to the marshal of the Western district of Pennsylvania, and illegally served and returned by said marshal. The motion, being heard, was overruled. Lorch then demurred to the declaration, and the demurrer of Lorch and the demurrers previously entered by Pfiel, being argued, were overruled.

One of the objections raised by the demurrer was that the Colonial Trust Company, receiver of Baker Contract Company, had been made a defendant to the action. On the overruling of the demurrers, counsel appeared for the Colonial Trust Company, and moved to dismiss the action as to it, claiming misjoinder of parties defendant. The court sustained this motion, and dismissed the Colonial Trust Company from further appearance in the cause.

On the 14th day of June, 1911, an order was entered referring the case to Abijah Hayes as master commissioner, to state an account between the relator and the defendants, and between the intervening petitioners and the defendants. This order was entered in the action under a special provision relating to actions at law, found in Code W. Va. 1906, c. 129, § 10: "At law in any case in which it may be deemed necessary, the court may direct any such commissioner or other competent person, either before or at the time of trial, to take and state an account between the parties, which account, when thus stated, shall be deemed *prima facie* correct, and may be given in evidence to the court or jury trying the case, and the commissioner or other person shall be allowed for such services the same fees that would be allowed a commissioner for similar services, to be taxed in the bill of costs."

After entering said order of the 14th of June, 1911, and being at the same term of court at which said order of reference was entered, and before the execution of said order of reference, the Parkersburg & Marietta Sand Company filed its petition asking the permission to intervene and file its claim in the said action, and the order allowing it to do so was entered on said 21st day of June, 1911.

There was the taking of evidence on various claims by the said Abijah Hayes, master commissioner, and on the 5th day of January, 1912, he filed his report. It is unnecessary for us to refer to the action of the commissioner as to other claims, but as to the claim of Parkersburg & Marietta Sand Company the said commissioner found against the claim of the said company and refused to allow said claim.

On the 10th day of January, 1912, the exception of the Parkersburg & Marietta Sand Company to the master's report was filed. Upon a hearing

of them the court sustained said exceptions as to that portion of said report which found against the right of Parkersburg & Marietta Sand Company to file its petition and prove its claim in said action, and permission was given to the Parkersburg & Marietta Sand Company to offer the necessary proof and evidence to sustain its claim set up in its petition.

On the 20th day of January, 1912, there was a trial of the action and of the several claims which had been filed in the action, under the said act of Congress, before a jury, and a verdict rendered, and the jury brought in their verdict, making a finding as to said several claims, and as to the Parkersburg & Marietta Sand Company the jury found in its favor the sum of \$4,422.22, the debt in the petition of intervention mentioned, and the court rendered its judgment in accordance with said verdict, and as to the claim of the Parkersburg & Marietta Sand Company it was that the United States of America, for the use of the Parkersburg & Marietta Sand Company, a corporation, do have and recover of and from the defendants, the Baker Contract Company, a corporation, Philip M. Pfel, and George E. Lorch, the sum of \$4,422.22 with interest and costs, and provided that separate executions might issue on said judgments for the benefit of the respective plaintiffs. The case comes here on writ of error.

William Beard, of Parkersburg, W. Va., for plaintiffs in error.

Thomas Coleman, of Parkersburg, W. Va. (Ralph L. Smith, of Pittsburgh, Pa., and Geo. P. Chase, Dorr Casto, C. D. Forrer, H. P. Camden, and C. D. Merrick, all of Parkersburg, W. Va., on the briefs), for defendants in error.

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). The assignments of error filed by counsel for the defendants below are numerous. However, those relied upon are grouped under No. 1, as follows:

"The said summons, being directed to the marshal of the Western district of Pennsylvania and served and returned by said marshal, was without warrant of law for the issuance and service of said writ.

"The clerk of the then Circuit Court of the United States for the Northern District of West Virginia was without authority of law to issue process of summons to commence said action and to direct the same to the marshal of the Western district of Pennsylvania.

"The marshal of the Western district of Pennsylvania was without authority of law to serve and make return of process issuing from the Circuit Court of the United States for the Northern District of West Virginia."

[1] Counsel for defendants insist that the summons was illegal and irregular, inasmuch as it was issued and directed to the marshal of the Western district of Pennsylvania, and, being served and returned by the marshal of that district, such service was without warrant of law.

The act of Congress of February 24, 1905, being amendatory of the Act of August 13, 1894, among other things, provides:

"* * * If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified

copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution. * * *

It will be observed that jurisdiction is conferred upon the Circuit Court of the district where the work is to be performed "*and not elsewhere.*" It was the obvious purpose of this act to afford an effective remedy, and thus save harmless laborers and materialmen engaged in work of this character. Its first provision is that a suit may not be brought by any creditors upon the bonds of the contractor until after there is a complete performance of the contract, and such suit must be instituted within one year after the complete performance and settlement of the same. The second proviso is to the effect that, where any one of such creditors brings a suit, only one suit shall be brought, and that other creditors may file their claims and be made parties to such suit within one year from the completion of the contract. The third proviso is that personal notice shall be given of the pendency of such suit to all creditors, notifying them of their right to intervene, and also, in addition thereto, notice by publication, etc.

The act plainly provides that actions of this character shall be brought in the district in which the contract was performed and executed "*and (as we have stated) not elsewhere.*" If it were otherwise, it would be a physical impossibility to adjust and settle differences arising out of the performance of contracts of this nature. It not infrequently occurs that contracts of this kind are awarded to those residing in states other than the one in which the work is to be performed, and, under the law as it existed prior to this enactment, parties performing labor and furnishing materials were greatly embarrassed in cases where they were forced to rely upon the settlement and adjustment of their differences by a trial of the same in the courts. It is obvious that it was to remedy this defect in the enforcement of the rights of individuals that Congress passed the statute upon which this suit was based.

The Supreme Court of the United States has recently passed upon this question in the case of *United States v. Congress Construction Co.*, 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163. In that case suit was brought in the Circuit Court of the district whereof the defendants were inhabitants, which, as appeared on the face of the declaration, was not the district in which the contract was to be performed. The subcontractors intervened, and asked to have their claims adjudicated and judgment rendered thereon. The principal in the bond did not appear, but the sureties appeared specially, and interposed pleas to the jurisdiction, upon the ground that under the statute, conformably to which the bond was given, power to entertain the action was vested exclusively in the Circuit Court of the district wherein the contract was to be performed. The pleas were sustained, and the action dismissed for want of jurisdiction. The Supreme Court, in reversing the judgment below, said:

"Whether or not, under the act of 1894, as amended in 1905, power to entertain the action was vested exclusively in the Circuit Court of the district wherein the contract was to be performed, is the question which was presented to the court below and answered in the affirmative; and the correctness of that answer turns upon the nature of the action and the provisions of the statute. According to the declaration, the contract for the construction of the building had been satisfactorily performed, full payment therefor had been made to the contractor, the conditions of the bond had been breached only by his failure to pay designated subcontractors for labor and materials used in the construction of the building, and the object sought to be attained was the adjudication and enforcement of those demands, unaccompanied by any pecuniary demand of the United States. Manifestly, therefore, the action, although brought by the United States, was essentially one in behalf of the subcontractors, and the respective interests of the United States and the subcontractors therein were in no wise different from what they would have been, had the action been brought in the name of the United States by the subcontractors for the use and benefit of the latter. The statute, whilst authorizing persons holding unpaid demands for labor or materials to bring such an action in the name of the United States, expressly requires that it be brought in the Circuit Court of the United States in the district in which said contract is to be performed and executed, irrespective of the amount in controversy, *and not elsewhere*, and also provides that only one such action shall be brought, and that it shall be so instituted and conducted, in point of notice and otherwise, that all demands of that class may be adjudicated therein and included in a single recovery. Considering the purpose of the statute, as manifested in these provisions, we think the restriction respecting the place of suit was intended to apply, and does apply, to all actions brought in the name of the United States for the purpose only of securing an adjudication and enforcement of demands for labor and materials, whether instituted by the United States or the creditors themselves. The reasons for the restriction are as applicable in the one instance as in the other, and it is difficult to believe that it was intended that it should be less potent when the United States acts for the creditors than when they act for themselves. The contention to the contrary is rested largely upon the supposition that, in instances like the present, where the defendants, or some of them, are inhabitants of another district, there is an insuperable barrier to the maintenance of the action in the district wherein the contract was to be performed. But this supposition is a mistaken one, for the provision restricting the place of suit operates pro tanto to displace the provision upon that subject in the General Jurisdictional Act (25 Stat. 433, c. 866, § 1 [U. S. Comp. St. 1901, p. 508]), and amply authorizes the Circuit Court in the district wherein the action is required to be brought to obtain jurisdiction of the persons of the defendants through the service upon them of its process in whatever district they may be found."

This decision removes all doubts as to the true meaning and intent of this statute. Such being the case, we deem it unnecessary to discuss this point further than to say that the ruling of the lower court as respects this question was eminently proper.

[2] It is insisted by counsel that a motion was made in the court below to quash the summons in this case for the reason that:

"The summons commencing the action was defective, in that it had no return day; the defendants were summoned to appear at rules to be held in the clerk's office of said court on the first Monday in ——— next, to answer," etc.

We fail to find anything in the assignments of error to justify this contention. We find no exception in the record to the ruling of the court as respects this point; nor do we find any assignment of error upon which to base the contention of counsel for the defendant.

[3] There is another assignment of error which relates solely to the judgment of the Parkersburg & Marietta Sand Company. The defendant says that the fact that the Sand Company's petition—

"* * * was not filed until after the year allowed by the act of Congress upon which the right to sue on the bond is given is certainly fatal to its right to have judgment, and the court erred in sustaining its exception to the special master's report, holding that it was not for this reason entitled to have a judgment for its claim."

That this claim was not filed within the time required by the statute is not controverted, but it is insisted by counsel for the Sand Company that, inasmuch as the statute of limitation was not specially pleaded, the defendants cannot avail themselves of this defense. However, the special master refused to allow this claim, and assigned the following reason for his failure so to do:

"That the limitation must be specially pleaded is undoubtedly the law as applied to general statutes of limitation, but your commissioner's interpretation of the law applying to such statutes as the one authorizing this action, wherein the right of action is created and the limitation fixed therefor, is that the limitation is a condition attached to the right to sue at all, and the action must be pursued within the limitation, or the right of action and the remedy are both lost, and such limitation need not be pleaded specially."

This conclusion of the master was on exception reversed, and to this action of the court below our attention is called.

The Circuit Court of Appeals for the Eighth Circuit, in the case of *United States, to the Use of Gibson Lumber Co., v. Boomer*, 183 Fed. 726, 106 C. C. A. 164, held that the limitation is of the liability itself, and not of the remedy; that it is a condition attached to the right to sue at all; and that time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitation of the remedy is therefore to be treated as a limitation to the right. It has also been held by the Circuit Court of Appeals for the Third Circuit that the defense that the suit was prematurely brought need not be specially pleaded. It is available under the general issue. *Stitzer v. United States*, 182 Fed. 513, 105 C. C. A. 51.

There are two district court decisions to the contrary. One, *United States, to the Use of Vaughan, v. Stitzer*, 179 Fed. 567, was the case which was reversed in *Stitzer v. United States*, 182 Fed. 513, 105 C. C. A. 51, above cited. The other was *United States v. United Surety Co.*, 192 Fed. 992, in which the decision was by Judge Van Fleet in the Northern district of California. He does not appear to have had his attention called to the Circuit Court of Appeals decisions to the contrary.

In the case of *Stitzer et al. v. United States, to the Use of Vaughan*, 182 Fed. 513, 105 C. C. A. 51, the Circuit Court of Appeals for the Third Circuit said:

"The learned judge below, in his opinion in denying the motion for judgment non obstante veredicto, said: 'And for the purpose of this case it may also be assumed—but without deciding the point—that an independent action by the subcontractor should have been deferred until six months had elapsed from July 20th, the date of final settlement. But it still remains to inquire whether the defendants are in a position to take advantage of this

defect in procedure, and in my opinion their objection should not be allowed to prevail. The defendants are setting up what is essentially a statute of limitation. It differs only from the ordinary statutes in the unessential particular that by it a time is fixed before which suit may not be brought, while by their provisions a time is fixed after which such action may not be entertained. But it is well settled that the defendant cannot take advantage of a statute of limitations unless in some way it is formally set up as a defense.' In this we think he erred. He treated the statute in question as a statute of limitation, and concluded that because it had not been pleaded it had been waived. He cites authorities to show, what is undoubtedly the law, that a failure to plead such a statute constitutes a waiver thereof, but none to show that a statute, like the one in question, is in any sense a statute of limitation, or one which like that statute must be pleaded. To call the statute in question a limitation is not only a misnomer, but an absolute misconception of the purpose of the act, which was to give any person or persons, supplying labor and materials to a contractor with the government, a right of action where before none existed. The act was not intended to, and does not, bar any cause of action, but rather creates one. The lapse of six months was a condition precedent to the plaintiff's right to sue. In other words, a conditional cause of action only was conferred. Such cause of action was created by the statute, and must be instituted pursuant to the terms and conditions of the statute, and not otherwise. No party prior to the expiration of six months from the completion and final settlement of a contract, except the United States, was thereby authorized to sue upon the bond. Whether during that period the United States does or does not institute a suit is a matter of entire indifference, in so far as the proper construction of the statute is concerned. It is sufficient for our purpose to say that during that period, and all of it, the only right of action on a bond given under that statute is vested exclusively in the United States. The statute has received substantially the same construction that we have given it, in the following cases: *United States v. Winkler* (C. C.) 162 Fed. 397; *Title Guaranty & Trust Co. v. Puget Sound Engine Works*, 163 Fed. 169, 89 C. C. A. 618; *United States v. McGee et al.* (C. C.) 171 Fed. 209."

After a careful consideration of this statute, creating—as it does—a right of action, and at the same time fixing a limitation as to the time within which suit shall be instituted, we are of the opinion that such limitation is a condition precedent to the right to institute such action, which must be complied with in order to enable one to institute an action pursuant thereto. In other words, a right of action is granted provided suit is instituted within one year "after the performance and final settlement of said contract and not later." It appearing that the Parkersburg & Marietta Sand Company has failed to comply with this requirement, we are of the opinion that the right of action and the remedy are both lost, and that the defendant is not required to plead such limitation specially as a defense in order to defeat the complainant's right to recover. It follows that the court erred in sustaining the exception to the master's report as respects this question.

The Sand Company urged below, and here urges, that it was not barred by the limitation, because the notice required to be given to other creditors, informing them of the pendency of such suit, had not been given in the precise manner required by the statute. The purpose of this proviso is evidently to prevent a creditor or creditors instituting suit from securing to themselves an unfair preference over other creditors in cases where the penalty of the bond is not sufficient to satisfy all claims against the contractor. What rights a creditor, who had lost by failure of the parties instituting suit to give notice, would

have as against those responsible for such failure, need not be here considered. It is sufficient to say that in our judgment the proviso does not extend the time during which a creditor can make claim against the surety.

It follows from what has been said that the judgment in favor of all the creditors, except the Parkersburg & Marietta Sand Company, should be affirmed, and the judgment in its favor should be reversed.

ATLAS MFG. CO. et al. v. STREET & SMITH.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1913.)

No. 3,826.

1. TRADE-MARKS AND TRADE-NAMES (§ 61*)—REGISTRATION—EFFECT.

Act Feb. 20, 1905, c. 592, 33 Stat. 724 (U. S. Comp. St. Supp. 1911, p. 1459), authorizing registration of trade-marks, provides that the applicant shall specify the class of merchandise and the particular description of goods comprised in such class to which the trade-mark is appropriated, a description of the trade-mark itself, and a statement of the mode in which it is applied. *Held* that, where complainant registered the words "Nick Carter" as a trade-mark and described the goods to which it was attached as "a weekly periodical devoted to fiction," the only property entitled to protection under such trade-mark was a periodical; and hence complainants were not entitled to restrain the use of the term "Nick Carter" as the name of a personage shown in moving pictures.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 76; Dec. Dig. § 61.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 24*)—LITERARY PROPERTY.

Literary property in a book cannot be protected by a trade-mark, nor otherwise than by copyright.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 27; Dec. Dig. § 24.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 68*)—UNLAWFUL COMPETITION—SIMILARITY OF GOODS.

That complainants for many years had published detective stories embodying the character "Nick Carter" did not entitle them to an injunction restraining the use of such name to designate a character represented on moving-picture films depicting a detective story, on the theory of unlawful competition and trade; there being no similarity in the "class of goods" offered for sale.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. § 68.*]

4. COPYRIGHTS (§ 16*)—LITERATURE—CHARACTER.

That complainants' "Nick Carter" detective stories were not of the highest class of literature did not bar complainants from relief in the courts against piracy; the stories being proper subjects of copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 17; Dec. Dig. § 16.*]

5. LITERARY PROPERTY (§ 4*)—RIGHTS OF AUTHOR.

The author of a literary work, at common law, has the exclusive right to the first publication only, but has no exclusive right to multiply or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

control subsequent copies by others; this right being entirely a creature of statute, secured by the copyright laws of different governments.

[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 3; Dec. Dig. § 4.*]

6. LITERARY PROPERTY (§ 3*)—LITERARY WORKS.

Neither the author nor proprietor of a literary work has any property in its name; that being a term of description which serves only to identify the work, and may be adopted and applied to any other book or trade commodity, provided the person does not use it as a false token to induce the public to believe that the thing to which he has applied it is the identical thing which it originally designated.

[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 2; Dec. Dig. § 3.*]

7. COPYRIGHTS (§ 37*)—BOOKS—TITLE.

The copyright of a book does not prevent others from taking the same title for another book, though the copyright has not expired.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 38; Dec. Dig. § 37.*]

8. COPYRIGHTS (§ 36*)—EXPIRATION—RIGHTS OF PUBLIC.

On the expiration of the copyright of a novel, any person may use the plot for a play, copy or publish it, or make any use of it he sees fit; so where one writes and copyrights a play based on a novel, and bearing the same title as the novel, he cannot prevent another from giving the same name to an entirely different play which has been constructed from that novel.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 37; Dec. Dig. § 36.*]

9. COPYRIGHTS (§ 33*)—EXPIRATION—COPYRIGHTED NAME.

The right to use a copyrighted name on the expiration of the copyright becomes public property, subject to the limitation that the right be so exercised as not to deceive the public and lead them to believe that they are buying the particular thing which was produced under the copyright.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 33.*]

10. COPYRIGHTS (§ 36*)—TRANSLATION—DRAMATIZATION—STATUTES.

Rev. St. § 4952, as amended by Act Cong. March 3, 1891, c. 565, 26 Stat. 1107 (U. S. Comp. St. 1901, p. 3406), providing that authors or their assigns shall have the exclusive right to dramatize and translate any of their works for which copyright shall have been obtained, makes such exclusive right an integral part of the copyright itself.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 37; Dec. Dig. § 36.*]

11. TRADE-MARKS AND TRADE-NAMES (§ 67*)—UNLAWFUL COMPETITION—PROTECTION.

The law of unfair trade is to protect the honest trader in the business which fairly belongs to him; to punish the dishonest trader, who is taking his competitor's business by unfair means, and to protect the public from deception.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 78; Dec. Dig. § 67.*]

Unfair competition in use of trade-mark or trade-name, see notes to *Scheuer v. Miller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

12. TRADE-MARKS AND TRADE-NAMES (§ 61*)—INFRINGEMENT—RIGHT TO RELIEF.

To sustain a charge of infringement of a trade-mark, the owner must have used it on the same class of goods put out by the alleged infringer, but not necessarily on the same species of goods.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 76; Dec. Dig. § 61.*]

13. TRADE-MARKS AND TRADE-NAMES (§ 24*)—NATURE OF RIGHT—CHARACTER OF PROTECTION.

Neither trade-mark nor trade-name can afford protection to detective stories, as such, whether published or still unpublished, and much less where neither title nor composition is pirated, and but a single common character is used by the alleged infringer.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 27; Dec. Dig. § 24.*]

14. LITERARY PROPERTY (§ 4*)—FORMS OF PRODUCTION—MOVING PICTURES—DRAMATIZATION—BOOKS.

Moving pictures and dramatization being cognate forms of production, when the latter is copyrighted, it necessarily includes the former; but in the absence of copyright no such relation exists between either moving pictures or dramatization and a written book relating the same story.

[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 3; Dec. Dig. § 4.*]

Hook, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by Street & Smith, a copartnership, against the Atlas Manufacturing Company and another. Decree for complainants, and defendants appeal. Reversed, and bill dismissed.

James Love Hopkins and Nelson Thomas, both of St. Louis, Mo., for appellants.

Hugh K. Wagner, of St. Louis, Mo. (Leonard J. Langbein, of New York City, on the brief), for appellees.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. Appellees, complainants below, are citizens of the state of New York, and are the members of a copartnership known and styled as Street & Smith. This firm is engaged in the business of publishing detective stories characterized by the general name of "Nick Carter." Its publications are issued weekly and consist, exclusive of cover, of 32 pages 11 by 8 inches in size. Of these pages, 26 are devoted to a detective story complete in itself; 5 pages to space-filling items under the heading "News of All Nations"; and 1 page to advertising other publications issued by the same firm. The cover is in colors and presents in order the serial number, date, price, general title "Nick Carter," the specific title of the detective story, as "The Red Button," contained in that issue, and an illustration characteristic of the story, or depicting some incident in it. Slight modifications of inferior make-up have since been made, but this description applies to complainants' exhibit, filed with their bill

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

July 1, 1912. The function of the weekly issue is the publication of the single detective story contained therein. A different story under a distinct title is published each week. These stories are complete in themselves. The only connection between them is that the detective character, Nick Carter, is the central figure in each. April 19, 1910, complainants registered the name "Nick Carter" as a trade-mark for "a weekly publication devoted to fiction," alleging that it had been used in their business and that of their predecessors since March 30, 1885.

The appellant Atlas Manufacturing Company is a Missouri corporation domiciled in the city of St. Louis. Its business includes the manufacture and sale of moving-picture films. Appellant Crawford is its president. In January or February, 1912, said Atlas Manufacturing Company employed certain persons, named, respectively, Wolcott and Hamilton, to write a scenario or memorandum of the series of events in a detective story. This story was then acted with appropriate stage setting and the performance photographed in sequence. From these photographs a film was prepared, and it is the purpose of appellants to sell, rent, or lease this film to such persons as may desire to display it in moving-picture theaters. As advertised the story presents "Nick Carter, the Great American Detective, Solving the \$100,000.00 Jewel Mystery." It appropriates neither title, plot, nor situations of any story published by complainants. The name Nick Carter is used, and a detective story is portrayed. The name of the appellant corporation, as manufacturer, is displayed upon the screen. Complainants, claiming the "exclusive right to make, sell, print, publish, and display to the public detective stories marked with the name and trade-mark 'Nick Carter' and called and known by the trade-name 'Nick Carter,'" filed their bill of complaint July 1, 1912, to restrain defendants from using this name in any connection or form. A preliminary injunction was granted, and defendants appealed. Complainants have taken out no copyright upon any of their publications. Therefore no rights arising under the copyright law are presented for determination. The property rights asserted are based (1) upon registered trade-mark; (2) upon long-established trade-name.

[1] The trade-mark registered is "Nick Carter." The law authorizing such registration provides that the applicant shall specify "the class of merchandise and the particular description of goods comprised in such class to which the trade-mark is appropriated, * * * a description of the trade-mark itself," and "a statement of the mode in which same is applied and affixed to goods. * * *" Act Feb. 20, 1905, 33 Statutes at Large, pt. 1, c. 592, p. 724 (U. S. Comp. St. Supp. 1911, p. 1459). In compliance with this requirement complainants particularly describe their so-called goods as "a weekly periodical devoted to fiction." To entitle this publication to protection under the trade-mark granted, it must conform to the description filed; it must be a periodical. In *Smith et al. v. Hitchcock*, 226 U. S. 53, 33 Sup. Ct. 6, 57 L. Ed. —, decided November 18, 1912, the Supreme Court held that the "Tip Top Weekly," issued by these same complainants, and

practically identical in structure with the "Nick Carter" publication, is not a periodical, but a book.

[2] Literary property in a book cannot be protected by trade-mark, nor otherwise than by copyright. *Black v. Ehrich* (C. C.) 44 Fed. 793; *Brown on Trade-Marks*, §§ 116, 117. This is conceded by complainants' counsel in brief and argument; but it is claimed that whether the publication be regarded as a periodical or a book the trade-mark protects it in its character as goods or merchandise. It is therefore well to determine the exact nature of the "merchandise" to which the trade-mark applies. This must be the publication, as such, whether book or periodical. It is the form, not the contents. "Nick Carter" is not the name of the specific story, as, in this case, "The Red Button." None of the individual stories, as such, are covered by the mark. To publish a little booklet entitled "The Red Button," distinct in size, form, and dress, not bearing the imprint "Nick Carter," would not infringe this technical trade-mark. Conceding to this registered mark its broadest application, it can at most protect only against something in the nature of a periodical publication—of the same class.

No exercise of imagination, however fertile, can transform defendants' film or its intermittent exhibitions into anything resembling a periodical publication.

[3] Complainants' chief reliance would seem to be upon the claim asserted in their bill that they have possessed for many years, and still possess, the exclusive right to make, sell, print, publish, and display to the public detective stories called and known by the trade-name "Nick Carter." This is a direct appeal to the law affecting unfair competition in trade. Because they have long published detective stories associated with this name and character, they now assert the exclusive right to construct and make public in any manner whatsoever all detective stories involving the name and character of Nick Carter. It is the individual story as an article of merchandise, and not the form of publication, for which protection is thus invoked. In the language of the brief, "the sole question in this case for the court to decide is whether or not a moving-picture film is of the same class of goods as a printed *book*." The claim advanced is ingenious and decidedly comprehensive in its scope.

[4, 5] We agree with counsel that "the fact that appellees' [complainants'] stories are not the highest class of literature does not bar complainants from relief by the courts." In other words, this fact does not take from the stories their essential character as literature in the eyes of the law. They are subjects of copyright. And this leads us to inquire what complainants' standing would be under the law of copyrights? The author of a literary work or composition has, by common law, the exclusive right to the first publication of it. He has no exclusive right to multiply or control the subsequent issues of copies by others. The right of an author or proprietor of a literary work to multiply copies of it to the exclusion of others is the creature of statute. This is the right secured by the copyright laws of the different governments. *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480.

[6] "Neither the author nor proprietor of a literary work has any property in its name. It is a term of description, which serves to identify the work; but any other person can, with impunity, adopt it and apply it to any other book, or to any trade commodity, provided he does not use it as a false token to induce the public to believe that the thing to which it is applied is the identical thing which it originally designated. If literary property could be protected under the theory that the name by which it is christened is equivalent to a trade-mark, there would be no necessity for copyright laws." *Black v. Ehrich* (C. C.) 44 Fed. 793.

[7-9] So the copyright of a book does not prevent others from taking the same title for another book, though the copyright has not expired; and on the expiration of the copyright of a novel any person may use the plot for a play, copy or publish it, or make any other use of it he sees fit. In such case, where one writes and copyrights a play based on a novel, and bearing the same title as the novel, he cannot prevent another from giving the same name to an entirely different play which has been constructed from that novel. *Glaser v. St. Elmo Co.* (C. C.) 175 Fed. 276. The right to use a copyrighted name upon the expiration of the copyright becomes public property, subject to the limitation that the right be so exercised as not to deceive members of the public and lead them to believe that they are buying the particular thing which was produced under the copyright. *G. & C. Merriam Co. v. Ogilvie* (C. C. A.) 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. (N. S.) 549, 14 Ann. Cas. 796.

[10] Original section 4952, R. S. U. S., provided that "authors may reserve the right to dramatize or to translate their own works." Unless this reservation was made, the public was free to make such use of them. By act of March 3, 1891, c. 565, 26 Stat. 1107 (U. S. Comp. St. 1901, p. 3406), it was provided that "authors or their assigns shall have exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States." This made such exclusive right an integral part of the copyright itself. Under this section, so amended, the Supreme Court has held that an exhibition of a series of photographs of persons and things, arranged on films as moving pictures and so depicting the principal scenes of an author's work as to tell the story, is a dramatization of such work, and the person producing the films and offering them for sale for exhibitions, even if not himself exhibiting them, infringes the copyright of the author. *Kalem Co. v. Harper Bros.*, 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285. Nevertheless, it is held that the owner of the copyright of a novel is not entitled to protection against the use of that name in connection with a dramatic composition which does not present any scenes, plot, or dialogue imitated or adapted from the novel; it being the name in connection with the novel, and not the name alone, which the copyright protects. *Harper et al. v. Ranous* (C. C.) 67 Fed. 904. If the copyright has expired, or none has been taken out, neither the rights and privileges conferred, nor the limitations and obligations imposed, by that law are present, because, apart from the statute, none exist.

Complainants do not rely upon copyright. The name "Nick Carter" is not the title of any story, nor the name of author or publisher. But complainants insist that we shall consider their books, not from the literary standpoint, but as merchandise, and cite numerous cases recognizing that the principles of trade-mark law, and the law forbidding unfair competition in business, may, under certain conditions, apply to books, magazines, periodicals, and newspapers. That they may and do apply to magazines, periodicals, and newspapers, as such, we have already seen; to books the application is more limited. The cases cited reveal that protection is accorded in connection with specific kinds of books, such as Bibles, dictionaries, and works of a like nature, where the name has so long been used to designate the production as to have become identified with such particular publications as denoting their origin, and where the use of such name by another publisher, having no connection with the place or name, can have no purpose except to deceive purchasers. *Chancellor, etc., of Oxford University v. Wilmore-Andrews Pub. Co.* (C. C.) 101 Fed. 443; *Merriam Co. v. Straus et al.* (C. C.) 136 Fed. 477; *Ogilvie v. Merriam Co.* (C. C.) 149 Fed. 858; *Merriam v. Holloway Pub. Co.* (C. C.) 43 Fed. 450; *Merriam et al. v. Texas Siftings Pub. Co.* (C. C.) 49 Fed. 944; *Merriam v. Famous Shoe & Clothing Co.* (C. C.) 47 Fed. 411. In instances where the same method of selection, illustration, and style of binding, as well as name on the cover, have been taken, the form of publication is the feature of critical importance. *Estes et al. v. Williams et al.* (C. C.) 21 Fed. 189; *Estes et al. v. Leslie et al.* (C. C.) 27 Fed. 22; *Estes et al. v. Worthington* (C. C.) 31 Fed. 154. In all cases the courts have been careful to limit the doctrine announced to the special circumstances, and have coupled it with a restatement of well-known principles. Thus in *Merriam v. Straus et al.*, supra, Judge Wallace said:

"It is proper, however, to say that the bill is in part an attempt to protect the literary property in the dictionaries, which became publici juris upon the expiration of the copyrights. This attempt must prove futile."

In *Ogilvie v. Merriam Co.* (C. C.) 149 Fed. 858, it is pointed out that this public right cannot be taken away or abridged on any theory of trade-mark or unfair competition, which is only another way of seeking to perpetuate the monopoly secured by the copyright. Similar views are expressed in *Merriam v. Texas Siftings Pub. Co.* (C. C.) 49 Fed. 944, and *Merriam v. Famous Shoe & Clothing Co.* (C. C.) 47 Fed. 411. In *G. & C. Merriam v. Ogilvie* (C. C. A.) 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. (N. S.) 549, 14 Ann. Cas. 796, the Court of Appeals for the First Circuit used language still more explicit:

"The name 'Webster' having been copyrighted by the Merriams, they were protected in its use under a statutory right during an expressed term of years. The protection, therefore, in that respect, came by virtue of the copyright, rather than by virtue of its use in publication and trade. The statutory monopoly having expired under statutory limitation, the word 'Webster,' used in connection with a dictionary, became public property, and any relief granted upon the idea of title or proprietorship in the trade-name of 'Webster' would necessarily involve an unwarrantable continuance of the statutory monopoly secured by the copyright."

The important principle involved is, perhaps, most pointedly stated by Mr. Justice Miller in *Merriam et al. v. Holloway Pub. Co.*, supra. He says:

"I want to say, however, with reference to the main issue in the case, that it occurs to me that this proceeding is an attempt to establish the doctrine that a party who has had the copyright of a book until it has expired may continue that monopoly indefinitely, under the pretense that it is protected by a trade-mark, or something of that sort. I do not believe in any such doctrine, nor do my Associates. When a man takes out a copyright for any of his writings or works, he impliedly agrees that at the expiration of that copyright such writings or works shall go to the public and become public property. I may be the first to announce that doctrine, but I announce it without any hesitation. If a man is entitled to an extension of his copyright, he may obtain it by the mode pointed out by law. The law provides a method of obtaining such extension. The copyright law gives an author or proprietor a monopoly of the sale of his writings for a definite period, but the grant of a monopoly implies that after the monopoly has expired the public shall be entitled ever afterwards to the unrestricted use of the book. * * * I will say this, however: That the contention that complainants have any special property in 'Webster's Dictionary' is all nonsense, since the copyright has expired. What do they mean by the expression 'their book,' when they speak of Webster's Dictionary? It may be their book if they have bought it, as a copy of Webster's Dictionary is my book if I have bought it. But in no other sense than that last indicated can the complainants say of Webster's Dictionary that it is their book."

In the *Chatterbox Cases* (*Estes v. Williams*, supra, *Estes v. Leslie*, supra, and *Estes v. Worthington*, supra) emphasis is laid chiefly upon similarity of form. In *Estes et al. v. Williams et al.*, supra, it was said:

"There is no question but that the defendants have the right to reprint the compositions and illustrations contained in these books, including the titles of the several pieces and pictures. That does not settle the question as to the right claimed here. There is work in these publications aside from the ideas and conceptions. Johnston was not the writer of the articles nor the designer of the pictures composing the books, but he brought them out in this form. The name indicates this work. The defendants, by putting this name to their work in bringing out the same style of book, indicate that their work is his. This renders his book less remunerative, and while continued is a continuing injury which it is the peculiar province of a court of equity to prevent."

In *Kalem Co. v. Harper Bros.*, 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285, it was suggested by counsel that to extend the copyright to a case of reproducing scenes from *Ben Hur* by means of moving pictures was to extend it to the ideas as distinguished from the words in which those ideas are clothed. Mr. Justice Holmes said:

"But there is no attempt to make a monopoly of the ideas expressed. The law confines itself to a particular, cognate, and well-known form of production."

[11, 12] It may be conceded: That the law relating to unfair trade has a threefold object: First, to protect the honest trader in the business which fairly belongs to him; second, to punish the dishonest trader, who is taking his competitor's business away by unfair means; third, to protect the public from deception. *Gulden v. Chance* (C. C. A.) 182 Fed. 303, 105 C. C. A. 16. That to sustain a charge of

infringement the owner of a trade-mark must have used it on the same class, but not necessarily on the same species, of goods as the alleged infringer. *Layton Pure Food Co. v. Church & Dwight Co.* (C. C. A.) 182 Fed. 35, 104 C. C. A. 475, 32 L. R. A. (N. S.) 274. Of course, defendants' film bears no resemblance to complainants' books. No one would buy the one in the belief that he was getting the other. It is the display that constitutes the infringement, if there is one; and in such case the producer of the film is responsible equally with the exhibitor. *Kalem Co. v. Harper Bros.*, *supra*. We do not think a moving-picture show is of the same class as a written book. One belongs to the field of literature; the other to the domain of theatricals. Originally there was no legal connection between the written novel and a dramatization based upon its characters and incidents. The connection was made by statute in derogation of the common law. In the absence of copyright, the situation is as if no such connection had ever been made. We are unwilling, indirectly, to extend to writings a protection beyond that conferred by statute. Congress created a specific form of monopoly for literary property in this country, and made it subject to express limitations. It is for Congress to say whether these limitations should be relaxed.

[13] Neither trade-mark nor trade-name can afford protection to detective stories, as such, whether published or still unborn, and much less where neither title nor composition is pirated, and but a single common character is used. The suggestion involves an attempt to make a monopoly of ideas, instead of confining the application of the law to "a particular cognate and well-known form of production."

[14] Moving pictures and dramatizations are cognate forms of production. When copyright was extended to the latter, it necessarily included the former; but in the absence of copyright no such relation exists between either of these forms and the written book. It is not thought that the public will be deceived into belief that it is seeing a reproduction of one of complainants' stories when it witnesses that displayed from defendants' film. But if so it is no more deceived than when it reads a book of the same name as one theretofore published, but unprotected. It may be that the defendants are profiting by the use of a name made distinctive by complainants, but this is true of one who sells a brand of cigars named after a famous book or a famous personage. In the absence of some positive legal right in complainants, these are conditions for which equity cannot undertake to create a remedy. The decree below must therefore be reversed and the case remanded, with directions that the preliminary injunction be dissolved and the bill dismissed for want of equity. *Mast, Foos & Co. v. Stover Manufacturing Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856; *Castner v. Coffman*, 178 U. S. 168, 20 Sup. Ct. 842, 44 L. Ed. 1021.

It is so ordered.

HOOK, Circuit Judge (dissenting). My objection to the above conclusion can be expressed in a sentence: The defendants are engaged in appropriating the fruits of complainants' current endeavors, and are deceiving the public.

TRIMBLE et al. v. RICE et al

(Circuit Court of Appeals, Fourth Circuit. February 12, 1913.)

No. 1,108.

1. EXECUTORS AND ADMINISTRATORS (§ 386*)—SALE OF LAND TO PAY DEBTS—PARTIES—REMAINDERMEN.

Testator, having charged his debts on other property, devised certain real estate to his two sons for life, and for the life of the survivor, with remainder to their legitimate issue, or the legitimate issue of the one having issue, and on failure of issue over to surviving brothers and sisters of the whole blood in fee, but provided that, if the property charged with the payment of debts should be insufficient, the proceeds of the land devised to his sons should be used therefor. *Held*, that a sale of the land devised to the sons to pay debts, after possession had been delivered to them in proceedings in which the court acquired no jurisdiction of the remaindermen, some of which were then in being, did not bar their rights in the property.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1570; Dec. Dig. § 386.*]

2. EXECUTORS AND ADMINISTRATORS (§ 332*)—LAND SPECIFICALLY DEVISED—SALE TO PAY DEBTS—STATUTES.

Section 4 of the statute of George II, providing for the sale of lands of a deceased person to pay debts, does not make the descended or devised lands in possession of the heirs or devisees liable for the debts of the ancestor, except where the cause of action has been established against them in a suit to which they are parties; they being not bound by a judgment against the executors or administrators to which they are neither parties nor privies.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1369-1371; Dec. Dig. § 332.*]

3. WILLS (§ 608*)—DEVISES—RULE IN SHELLEY'S CASE.

A devise of certain land to testator's two sons during their natural lives, or the survivor of them, then to their legitimate issue, or to the legitimate issue of the son having such issue, whether the son be living or deceased, and on failure of issue then to testator's surviving brother or sister of the whole blood, did not vest in the sons a fee under the rule in Shelley's Case.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.*]

In Error to the District Court of the United States for the District of South Carolina, at Greenville; Henry A. M. Smith, Judge.

Ejectment by Mary R. Trimble and others against W. G. Rice, Jr., and another. Judgment for defendants, and plaintiffs bring error. Reversed.

Two ejectment suits were instituted in the United States District Court for the District of South Carolina by Mary Trimble and others, children of Willis Boyd and William Downs Calhoun, late of that state, against one W. G. Rice and the Coronaca Oil Mill. These suits, being in all respects identical, except as to the defendants and the particular land sued for, were heard together by order of the court and consent of parties, the judgment in one to abide that of the other. The facts are as follows:

Downs Calhoun was a planter, living in Abbeville district, of South Carolina, and in 1842 he made his will, by the seventh clause of which he gave his two sons, Willis Boyd and William Downs Calhoun, above named, certain land for life and for the life of the survivor, with remainder to their legitimate issue or the legitimate issue of the one having issue, and, on fail-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

ure of such issue, over to the surviving brothers and sisters of the whole blood in fee simple forever. The life tenants died, one of them in February, 1872, the other on the 30th of April, 1901, both leaving children who were the plaintiffs below. This suit was commenced April 22, 1907, and is for parts of the land so devised.

The testator, Downs Calhoun, died in 1850, and his will was duly probated prior to the 9th day of July of that year, and his executor, Nathan Calhoun, a brother of the deceased and an uncle of the life tenants, was nominated as executor, and at once qualified and took upon himself the duties of his office. The deceased had when he died but one farm, on which there were two dwellings, in one of which he resided. At the death of the testator the said sons "were placed and went into the exclusive possession" of said lands devised to them, which they divided between themselves, and continued in exclusive possession of the same until they sold out and emigrated to Alabama and Mississippi, respectively, in 1855 and 1857. The title of the defendants was derived through mesne conveyances made by Willis B. and William Downs Calhoun between 1855 and 1857, at or about which time the Calhouns removed from the land and from the state of South Carolina. By clause 10 of the will the testator charged his debts, if any, against property not devised, and in the eleventh clause of the will, in case there should be any deficiency in the proceeds of the property specially charged with debts, he said: "I then charge the estate of my two sons, Willis Boyd Calhoun and William Downs Calhoun, herein devised to them, with the payment of all my just debts, or such balance of my debts which remain unpaid after exhausting the residuary real and personal estate herein set apart for that and other purposes herein expressed."

To show the character of the possession of the life tenants of the identical lands devised and sued for, the complainants introduced a deed the life tenants had procured to be made to themselves, as alleged, through invalid proceedings wherein the lands are described in the words of the will itself, as "the Long tract, the Davis tract, the Busby tract, the Bartrum tract, the Caldwell tract, and the Steward tract." The complainants also introduced the proceedings of the court under which the deed was made, for the purpose of showing that it was founded on an *ex parte* petition by the executor in the court of equity, on which an order was made to inquire "if the statements of the petition are true, and if the devisees of the land described in the petition consent to a sale thereof," dated June 13, 1853. The next and only other entry was dated June 16, 1853, reciting a reference to inquire and report if these lands be required to be sold for the payment of debts (which order of reference is nowhere shown), and reciting a report that such sale is necessary, and directing the tract of land mentioned in the seventh clause of the will to be sold, proceeds of such sale to be paid to the executor so far as necessary, balance to be paid in equal proportion to said defendants," etc.

The record further shows a report of the commissioner that he sold the land in October, 1853, to W. D. Calhoun and W. B. Calhoun for \$2,900, and executed a deed to them for the same. This is all that is affirmatively shown ever to have existed—though it is admitted that there was a fire in 1873 that consumed all other or further record, if there was any. The will was also in evidence.

At the conclusion of the plaintiffs' proofs the court *ex mero motu* directed verdicts for defendants; the latter offering no proofs. The plaintiffs excepted to the ruling of the court, and the case is here on writ of error.

W. A. Gunter, of Montgomery, Ala., and A. L. Gaston, of Chester, S. C., for plaintiffs in error.

J. B. Park and F. B. Grier, both of Greenwood, S. C. (Grier, Park & Nicholson, of Greenwood, S. C., on the brief), for defendants in error.

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). The learned judge who tried this case, before instructing the jury in favor of the defendants below, made the following statement:

"These are two cases, brought by Mary R. Trimble and others, one against the Coronaca Oil Mill, and the other against W. G. Rice, Jr. It is admitted by all parties that the question is a legal one, depending upon the validity of a sale made in 1854. I charge you that the rights of the plaintiffs in these cases to recover depends upon the validity of the sale made by order of the court of equity for the district of Abbeville in 1853, and of the decree made by that court, the deed being dated the 22d of May, 1854.

"I charge you as a matter of law that that deed is a valid instrument; that, although many of the records are lost or destroyed, everything must be presumed to have been validly done at the time; that all the proper parties who should have been before the court according to the practice of the then existing court were before it, together with the subject-matter; and that it had jurisdiction of the subject-matter of the action. The order for sale or decree for sale which was made was, therefore, a valid decree, and the sale and deed made in pursuance of it was a good sale and deed, and passed title to this property, and the plaintiffs are, therefore, bound thereby, and not entitled to recover; so you will write on these complaints, 'We find for the defendants the property in dispute.'"

[1] It is insisted by counsel for the plaintiffs below that the chancery court, in which that proceeding was instituted and upon which the deed of defendants, as well as those under whom they claim, were based, was without jurisdiction to pass upon the rights of the remaindermen, who were not made parties to that suit. There was evidence introduced to the effect that the complainant, Edwin Calhoun, remainderman under the will, was born June 9, 1850, and was living with his father, Downs Calhoun, on said land, at the time the chancery suit was instituted by virtue of which this land was sold. The first question to be determined is as to whether, under the laws of South Carolina, such remainderman should have been made a party to that suit in order to give the court jurisdiction to pass upon his rights. An examination of the record discloses the fact that only W. B. and W. D. Calhoun were made parties to that proceeding. The caption of the report of H. H. Jones, commissioner, is in the following language:

"Nathan Calhoun, Executor, v. W. B. and W. D. Calhoun."

The deed executed in pursuance of that suit, among other things, contains the following recital:

"Whereas, Nathan Calhoun, executor of the last will and testament of Downs Calhoun, deceased, on or about the 11th day of June, 1853, did exhibit his petition in the court of equity, in the district of Abbeville, and state aforesaid, against Willis B. Calhoun and William D. Calhoun, for the sale of certain real estate of which Downs Calhoun, late of Abbeville district, died seised and possessed."

While it is contended that a portion of the record in this proceeding was destroyed by fire, nevertheless it affirmatively appears from the papers now on file that W. B. and W. D. Calhoun were made parties to that suit; but it nowhere appears that the remainderman, Edwin Calhoun, was made a party. If there had been found in the record an order or decree containing a recital to the effect that Edwin Calhoun, remainderman, was a party, it would have been a circum-

stance from which it might have been inferred that he had been made a party to such suit; but, as we have stated, no such paper was found. Nor does it appear that a summons was ever issued for the purpose of making the said Edwin Calhoun a party thereto. The two papers to which we have referred were essential parts of the proceeding. This is especially true of the deed executed by the commissioner, wherein the recital shows that only the life tenants were made parties, notwithstanding the fact that the remainderman had the larger estate and was as necessary a party as the life tenants.

It appearing that the court was without jurisdiction for want of proper parties, it could not pass upon the rights of the remainderman, unless there be some ruling of the Supreme Court of South Carolina to the contrary.

It should be borne in mind that it was provided in item 10 of the will that all the real and personal estate of the testator not devised thereby should be sold by the executor upon such terms as he might deem best and proper for the benefit of the devisees, and the proceeds of the same should be applied to the settlement of all just debts against said estate. Therefore it will be seen that, at the time the life tenants went into possession of this property, such property was not specially charged with the payment of the debts of the testator, because other provisions had been made for that purpose. And the provisions of item 11 of the will were to be effective only in the event that the property set aside for the payment of the debts of the testator should prove to be insufficient to pay the same.

As we have stated, the life tenants were in possession of the premises at the time the chancery suit was instituted, and it also appears that Edwin Calhoun, remainderman, was living on these lands with his father.

[2] Counsel for the defendants claim that under the fourth section of the statute of George II these lands could be sold under an ex parte proceeding. The section in question is in the following language:

"And from and after the said twenty-ninth day of September, in the year of our Lord one thousand and seven hundred and thirty-two, the houses, lands, negroes and other hereditaments and real estates, situated or being within any of the said plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands, of what nature or kind so ever, owing by such person to his majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the laws of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process, in any court of law or equity, in any of the said plantations respectively for seizing, extending or disposing of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties and demands, etc., in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts."

In this instance, it appears that the executor permitted the devisees to enter into the exclusive possession of these premises at a time when, according to the provisions of the will, there were no debts, and, if there had been any debts, the life tenants were bound to pay

the same. The Supreme Court of South Carolina has passed upon this question in the case of Brock v. Kirkpatrick, 60 S. C. 322, 38 S. E. 779, 85 Am. St. Rep. 847. In construing the statute of George II, the court, among other things, said:

"In Huggins v. Oliver, 21 S. C. 159, Mr. Chief Justice McIver, after a very thorough and discriminative review of the leading cases, * * * lays down the following rule: 'That while, as a general proposition, it is true that lands of an estate may be sold under a judgment recovered against the administrator upon a debt of the intestate, yet if the lands have passed into the actual and exclusive possession of the heirs before the judgment has been recovered, and before any lien has thus been fixed upon them, they can no longer be sold under such judgment, and can only be reached by the usual proceedings to subject real estate in the hands of the heir to the payment of the debts of the ancestor, to which proceedings the heir would, of course, be a necessary party. Without this qualification of the general rule stated in De Urphey v. Nelson [1 Brev. (S. C.) 289], it would be impossible to reconcile the various decisions to which we have referred, but with it the cases may all be reconciled.' We cannot do better than announce this excellent rule as the logical result of the numerous decisions on this vexed question. The doctrine which the rule embodies is clearly indicated in Gilliland v. Caldwell, 1 S. C. 198. The statute of George II does not make the descended lands in *possession of the heirs* liable for the payment of the debts of the ancestor; but the cause of action must be established against them in a suit to which they are parties, and they are not bound by a judgment against the administrators to which they are neither parties nor privies."

The forgoing decisions of the Supreme Court of South Carolina constitute a rule of property, and we are bound thereby. Such being the case, we are impelled to the conclusion that the lower court erred in directing a verdict in favor of the defendants.

[3] Counsel for defendants insist that the rule in Shelley's Case applies to the case at bar, and that the so-called life tenants by virtue of such rule were the owners in fee simple of the premises. The provision of the will devising this land was in the following language:

"I give and devise to my two sons, Willis Boyd Calhoun and William Downs Calhoun, during their natural lives, or the survivor of them, the following tract of land, containing five hundred and eighty acres, more or less. * * *"

The testator then described such land, and added:

"I give to my said two sons, Willis Boyd Calhoun and William Downs Calhoun, during their natural lives and no longer, and to the survivor during his life and no longer, and after the death of my said sons or either of them, then to their legitimate issue or to the legitimate issue of the son having such issue, whether the said son be living or deceased. On failure of such legitimate issue of my said sons or either of them, then I give the said tract of land of five hundred and eighty acres of land, more or less, to the surviving brother and sisters of the whole blood in fee simple, forever."

The court below was evidently of the opinion that the rule in Shelley's Case did not apply, and, after a careful consideration of the decisions of the Supreme Court of South Carolina, we are of the same opinion.

For the reasons stated, the judgment of the lower court is reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

Reversed.

UNION STEAMBOAT CO. v. CHAFFIN'S ADM'RS et al

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913.)

No. 1,890.

1. SHIPPING (§ 209*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—TIME FOR FILING CLAIMS—LACHES.

A libellant which delayed filing a petition for limitation of liability for nearly three years and did not commence taking testimony for nine years thereafter is not in position to charge damage claimants, who were enjoined from prosecuting pending actions, with laches for not proving their claims until later, where no order was made requiring it.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*]

2. LIMITATION OF ACTIONS (§ 134*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—EFFECT OF INJUNCTION RESTRAINING PENDING ACTIONS FOR DAMAGES.

An injunction granted in proceedings for limitation of liability restraining the further prosecution of pending actions for damages is in effect a removal of such actions into the admiralty court, where they are to be considered as continued for all purposes of the statute of limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 570; Dec. Dig. § 134.*]

3. SHIPPING (§ 166*)—LIMITATION OF LIABILITY—LIABILITY FOR NEGLIGENCE.

A vessel owner *held*, while not having actual knowledge of the illegal carriage of gasoline, etc., on the vessel, which exploded and killed and injured a number of stevedores, and therefore entitled to a limitation of liability, chargeable with such negligence in the premises as to render it liable for the death and injury claims.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 538-552; Dec. Dig. § 166.*]

Limitation of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

4. DEATH (§ 29*)—ACTION FOR WRONGFUL DEATH—EFFECT OF DEATH OF BENEFICIARY.

A right of action for wrongful death accrues immediately upon the death and becomes an asset of the estate of the beneficiary, and the subsequent death of such beneficiary does not terminate the right of action.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 33; Dec. Dig. § 29.*]

5. DAMAGES (§ 69*)—INTEREST—DISCRETION OF ADMIRALTY COURT.

In a proceeding for limitation of liability against death and personal injury claims, the commissioner's report fixing the amounts due damage claimants, although completed and notice given the parties was not filed until nearly four years afterward; the reason for the delay not appearing in the record. *Held*, that on the confirmation of the report it was not an abuse of the court's discretion to allow interest on the claims from the date when the report was completed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 137-140; Dec. Dig. § 69.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit in admiralty by the Union Steamboat Company for limitation of liability. Libellant appeals from decree allowing damage claims. Affirmed.

On July 11, 1890, the steamer Tioga, owned by appellant (herein termed libellant), was seriously damaged by an explosion of gas of some character while lying alongside libellant's dock in the Chicago river, causing injury to certain of the defendants hereto, and the death of the decedents of the several administrator respondents hereto and others, as well as destroying a considerable portion of her cargo.

On May 27, 1893, libellant filed its libel herein, setting out the pendency of numerous suits by the several administrator defendants hereto and others, for damages growing out of the injury to certain defendants, and the death of said administrators' decedents caused by said explosion, which, it alleges, took place without its fault, privity, or knowledge, and alleging that the claims and liabilities made against libellant, and alleged to have been caused by said explosion, exceed the value of libellant's interest in said steamer, including its outfit and pending freight, and asking that its liability in the premises be limited to the amount of its interest as owner in said wrecked steamer after said loss and her freight then pending, pursuant to the provisions of sections 4283-4285 of the Revised Statutes (U. S. Comp. St. 1901, pp. 2943, 2944), adopted March 26, 1851, and the Acts of Congress approved June 26, 1884, and June 19, 1886. The libel prays that the steamer be appraised and that libellant may give stipulation for her value as provided by statute, or pay into court a sum sufficient to satisfy claims presented, and to be presented, that a monition issue according to the court's rules of practice, requiring all claimants to prove up their claims in that court, which it reserves the right to contest, and asking for the usual restraining order.

Such proceedings were had upon the libel that the steamer was appraised at the sum of \$111,560 and a stipulation in due form with surety was filed, as provided by statutes, on January 23, 1894. Said stipulation was duly approved by the court on January 9, 1894, and the issuance of a monition to certain of the claimants was ordered returnable May 1, 1894, with directions as to the publication of notice thereof, together with a restraining order enjoining the institution and prosecution of suits. The record shows that the appraised value of the steamer largely exceeded the amount of claims allowed. From the libel it appears that some 21 suits were pending in this jurisdiction and elsewhere, and that a number of other claims were likely to be presented; but in many cases the names of the decedents are not given in the libel.

No order of record directing the presentation of claims in this proceeding within three months is set out save as above noted, nor does the monition itself, apart from the decree ordering it, appear in the record, nor any evidence of the publication thereof.

Respondents named in the libel or petition for an order of limited liability, and others, filed their respective answers to said libel on July 7, 1894, and on other dates, denying that the accident was incurred without fault, etc., of libellant, and that libellant was entitled to have its liability limited, and setting out the circumstances attending the explosion. The answers also set up the character of injuries inflicted, and allege the damages claimed in each case. They also set out the federal statutes, sections 4475 and 4476 (U. S. Comp. St. 1901, p. 3052), having reference to the transportation of gasoline, naphtha, etc., and the Illinois statute giving a right of action. They also set up the circumstances attending the explosion, the negligence of libellant, to which the accident is attributable. On December 21, 1900, respondent Holliday filed his claim herein by leave of court, and on or about January 26, 1903, by order of court claims were filed on behalf of the other respondents who had answered. The grounds of negligence alleged are: (1) The receiving for transportation by libellant of dangerous explosives which it knew, or by due care might have known, to be such; (2) storing the same, whether supposed to be only kerosene or otherwise, in

the same compartment with cotton waste; and (3) delay in unloading until such time as artificial light became necessary.

To the said claims, libelant filed answers, but made no reply to respondents' answers. It traversed the charges of negligence and knowledge of dangerous character of its cargo, and set up laches and the Illinois limitation with regard to the beginning of suits for personal injuries and causing death to two years.

The cause was referred to the Commissioner under two separate orders to report his findings of law and fact. No objection was made to the reference, which was upon libelant's motion. The Commissioner completed his report on December 1, 1906, and notified the parties to that effect. No objections were filed thereto. The report was filed in the office of the clerk of the District Court on December 15, 1910. On December 23, 1910, libelant filed its 36 exceptions thereto. The Commissioner found "that none of the general officers or agents of libelant had actual knowledge that benzine, gasoline, or naphtha were being shipped in said steamship Tioga" prior to said explosion, and that for that reason all liability of the libelant must be limited to the value of the steamer and freight pending after the explosion; "that the general officers of said company were guilty of such negligence as to make said company liable for all damages caused by said explosion, within the limited liability as above set forth, for the following reasons, viz.: Said general officers had notice that said Genesee Refining Company and the Brights were large dealers in benzine, gasoline, and naphtha. That said Brights applied to the general agents of said petitioner at Chicago for a rate on shipment of benzine, gasoline, and naphtha. That nothing was said about these products of petroleum when the contract was made in Buffalo. That every barrel shipped by the Brights and the Genesee Refining Company was shipped in open violation of section 4475 of the Revised Statutes of the United States as hereinbefore set forth. That the shipment upon the Tioga was placed in a closed hold and the remaining space filled with cotton waste, a most dangerous combination and one well known to lead to spontaneous combustion. That the shipments prior to those on the Tioga while remaining in the custody of petitioner had repeatedly been marked by the State Oil Inspector 'condemned for illuminating purposes,' and no effort had ever been made to ascertain why such shipments had been so marked by inquiry in proper quarters. For the reason that said Brockley had repeatedly seen the shipments prior to that on the Tioga stenciled 'Benzine,' 'Gasoline,' and 'Naphtha,' presumably knew that such shipments violated the rules of said petitioner, and clearly knew that gasoline was a dangerous explosive, and although it thereupon clearly became his duty to communicate what he had seen to his superior officer, failed so to do. That said general officers and agents, although well aware that said Brights and Genesee Refining Company were openly violating said section 4475 of the Revised Statutes, failed to cause any inspection to ascertain what said shipments contained or what the meaning of 'B,' 'G,' and 'N' were, and this although the shipments must have been many thousand pounds lighter than kerosene oil, which they claimed to have believed was being shipped. For the further reason that all of the persons killed or injured as hereinbefore set forth were at the time of said explosion employes of said petitioner and were then and there engaged in the performance of their respective labors as such employes, and were observing due and ordinary care for their own safety, and it thereupon became the duty of said petitioner to furnish said employes a reasonably safe place in which to perform such labors."

The report further finds: That respondents' intestates and said Holliday, save one, were stevedores, and that all were servants of libelant. That each of the following decedents left him surviving persons who were, in a proper case, entitled to recover damages, in the manner provided by statute of Illinois, against one wrongfully causing their death, respectively, to wit, Walter Chapin, Jacob Cherry, Henry Witherspoon, Albert Smith, John Watkins, Henry Alexander, Louis Alexander, Alexander Smith, James Perkins, Thomas Williams, Ogden Polk, Center Amis, David Amis, Clarence Le Valley, William Cuthbert, and William Smith. That the claims of the ad-

ministrators of the foregoing intestates be allowed for the following amounts, respectively:

Walter Chapin.....	\$2,500	Alexander Smith.....	\$3,500
Jacob Cherry.....	3,500	James Perkins.....	2,000
Henry Witherspoon.....	5,000	Thomas Williams.....	3,500
Albert Smith.....	3,500	Ogden Polk.....	3,500
John Watkins.....	5,000	Center Amis.....	3,000
Henry Alexander.....	2,000	David Amis.....	2,000
Louis Alexander.....	5,000	Clarence Le Valley.....	2,000
William Cuthbert.....	2,000	William Smith.....	2,000

(By the decree "Chapin" is corrected to read "Chafin.")

That the claim of Robert Holliday for injuries suffered by him through said explosion be allowed for \$7,500. That the claim of the administrator of the estate of John Neil or O'Neil, deceased, be disallowed for the reason that it does not appear that the intestate left any one dependent upon him. That the claim of the administrators of the estate of William Porter, deceased, and William Roberts, deceased, not having been put in suit within two years from the date of their several decedents' deaths, were outlawed, and that no recovery could be had thereon; and that, in a suit brought by the administrators of the estate of Carter Braxton, deceased, in the Circuit Court of the United States for this district, the libelant was found "not guilty," and that said several allowed claims should stand against the said amount covered by the stipulation filed in pursuance of said petition to limit libelant's liability.

Libelant's exceptions, in brief, are: (1) That the claims allowed were barred by the several claimants' laches in failing to present them within the time fixed by the court by its order of May 26, 1893, and for not filing or prosecuting them until after ten years had expired from the entry of said order; (2) that they were outlawed for failure to present them within two years under the Illinois statute; (3) that the report fails to find that claimants and their decedents were fellow servants of those unloading the steamer, and does not apply the fellow-servant rule of liability; (4) that the report fails to find that decedents and Holliday were advised or charged with knowledge of conditions on the boat as fully as was libelant; (5) that the report finds that libelant was chargeable with knowledge of the conditions existing on the steamer; (6) that the report finds the general officers of the steamer guilty of such negligence as makes libelant guilty of negligence and liable (giving the ground relied on by the report); that the report accounts for the explosion upon the theory of spontaneous combustion; (8) that the report fails to find that the action of the shipper, the Genesee Oil Works, at Buffalo, in loading the naphtha, etc., as oil, was the immediate cause of the accident; (9) that the amounts of the several claims allowed in the report are excessive and inconsistent; (10) that the report allowed Holliday \$2,500 for loss of wages and \$5,000 for injuries, pain, etc., making in effect a double allowance.

Hearing upon the exceptions was had before the court on August 1, 1911, and the same were overruled, and the report was approved, whereupon the court proceeded to decree that the claims as reported by the commissioner be paid by libelant; that the latter pay to claimants or into the registry of the court by October 21, 1911, sufficient to satisfy the sums so awarded, together with costs and interest from December 1, 1906, to July 31, 1911, at the rate of 5 per cent., said decree specifying in each case the amount awarded. From this order libelant prayed this appeal. The errors assigned are:

(1) The court erred in its decree entered herein as of the 1st day of August, 1911, in overruling each of the several exceptions filed by the petitioner to the report of Wirt E. Humphrey, Commissioner.

(2) The court erred in its decree entered herein as of the 1st day of August, 1911, in confirming said commissioner's report.

(3) Said court erred in its said decree entered as of the 1st day of August, 1911, in directing petitioner, appellant, to pay to the respective claimants therein mentioned, the several sums of money therein named, or to cause to

be paid into the registry of said court moneys sufficient to discharge and pay in full the said sums so awarded.

(4) Said court erred in its decree entered herein as of the 1st day of August, 1911, in allowing interest from the 1st day of December, 1906, to July 31, 1911, upon each of the said several claims allowed by said decree.

(5) Said decree is contrary to the evidence.

(6) Said decree is contrary to the law.

(7) Each of the said several amounts awarded said respective claimants are excessive.

Further facts appear in the opinion.

Frank H. Scott, Edgar A. Bancroft, Redmond D. Stephens, John E. McLeish, and George N. B. Lowes, all of Chicago, Ill. (W. O. Johnson, of Chicago, Ill., of counsel), for appellant.

Samuel B. King, Raymond W. Beach, Jule F. Brower, and Clair E. More, all of Chicago, Ill., for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLAAT, Circuit Judge (after stating the facts as above). [1] The defense of laches is not sustained by the evidence. The cause was at all times under the control of the libellant, and could have been expedited if desired by it.

There is nothing in this record to show that the court, by orders of May 26, 1893, and May 12, 1902, required the claims to be presented in this proceeding within three months from date of either of said orders. If any such were entered, they do not appear in the record.

Libellant delayed the filing of its petition to limit its liability to the value of the steamer for almost three years, and began to take its evidence on July 7, 1902, or more than nine years after filing the petition, and then under order of court. Libellant is in no position to complain of delay on the part of respondents. If authority for this position be necessary, it is found in *London Bank v. Horton*, 126 Fed. 593, 61 C. C. A. 515, and *The Martino Cilento* (D. C.) 22 Fed. 859. Nor can the defense of failure to bring suit within two years from the death in accordance with the Illinois statute of limitation in such case provided, prevail. Suit for each of the claims allowed by the commissioner was duly instituted before the expiration of two years from death, and before the filing of the petition to limit liability. By the order of the court entered herein on January 9, 1894, respondents are enjoined from further prosecuting any suit for or on account of injuries suffered by reason of said explosion. At that time said suits were pending. Thus the two-year limitation of the statute had been complied with.

Sworn answers were filed herein by all the respondents prior to July 7, 1894. These set up the claim of the respective respondents, giving the facts on which they were based. Later formal claims were filed. The present proceeding ousted the jurisdiction of the several courts in which the suits had been instituted (*Butler v. Boston Steamship Co.*, 130 U. S. 552, 9 Sup. Ct. 612, 32 L. Ed. 1017; *Providence & New York S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038) and suspended the running of the statute (*Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; *Union M. L. I. Co. v. Dice* (C. C.) 14 Fed. 523; *Newgass v. Atlantic & D. Ry. Co.*

(C. C.) 72 Fed. 716; *Fidelity Ins. Co. v. Roanoke Iron Co.* (C. C.) 81 Fed. 439). The dismissal of these suits for want of prosecution after the entry of the restraining order by the several courts in which they were pending worked no prejudice to respondents.

[2] Without having our attention called to any specific authority to that effect, we are of the opinion that in analogy to proceedings had in cases of removal from the state court to the federal court, and upon principle, the several suits of respondents were by the order granting the prayer for limited liability and restraining respondents from further action in the said suits, removed to this court; and that, for all purposes of limitation of time under the several statutes herein invoked, the said several rights of action set up in the several answers and claims of respondents herein must be treated as a continuation of their said several suits pending in the state and other courts; and that the defense of the statute of limitation interposed by libelant cannot prevail.

[3] We do not deem the fellow-servant doctrine, as claimed by libelant, pertinent to the facts set out. Respondents' decedents and Holliday, save one, were stevedores, and concerned merely with the unloading of the ship. So far as disclosed, they neither knew nor were chargeable with knowledge of the conditions existing on the steamer. Nor does it appear by any direct evidence that those in charge of the steamer had actual knowledge of the presence of volatile and dangerous substances in the cargo. The Commissioner found that none of the general officers or agents of libelant had such knowledge prior to the explosion, and we are thus brought to a consideration of the question whether the facts disclosed are such as to charge libelant with such knowledge and with such negligence as to make it liable for the damages caused by the explosion within the limited liability aforesaid. The Commissioner further found that on the facts herein libelant was so liable, and thereupon recommended the allowance of the several claims set out in the statement of facts. The District Court confirmed the report and allowed the claims as reported by the Commissioner. In this we concur.

[4] It is libelant's contention that at the date of the allowance of the said claims by the Commissioner, in several instances, the beneficiaries had deceased, and that, in view of that fact, the amount of those claims should have been reduced. It does not appear but that the Commissioner took such facts into consideration in making the allowance. The right of action arises immediately upon the death. In *Pitkin v. N. Y. C. & H. R. Ry. Co.*, 94 App. Div. 31, 87 N. Y. Supp. 906, cited by libelant on another point, it is said:

"The right to such damages which thus accrues became an asset of the estate of the beneficiary designated by the statute, and the death of such beneficiary does not prevent or terminate a right of action to recover damages which have thus been by him suffered"—citing *Matter of Meekin v. Brooklyn H. R. R. Co.*, 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635.

Respondents were entitled to recover as of the date of the deaths of their several decedents. The amount of damage sustained by the

widow or other beneficiary or dependent is necessarily incapable of exact computation, and in the cases at bar no deductions can be drawn from the evidence as to what elements of damages formed the basis of the allowance. The amounts allowed in the cases to which the objection is raised, were well within the statutory provision, and are not shown to be excessive.

[5] From the record it appears that the Commissioner's report was finished on December 1, 1906; that notice to that effect was given on that day and the parties given until January 7, 1907, to file objections; that no objections were filed before the Commissioner. For some reason not explained in the record, the report was not filed in the clerk's office until December 15, 1910. On the hearing upon the exceptions filed to the report before the District Court on August 1, 1911, the court adjudged the several claimants to be entitled to interest on their several judgments from the date when the report was finished, December 1, 1906. Libelant contends that interest should not have been allowed prior to the date of filing the report, December 15, 1910, or almost four years after the Commissioner had completed his report. The following authorities are discussed in the briefs: *Burrows v. Lownsdale*, 133 Fed. 250, 66 C. C. A. 650; *Hurd's Rev. Stat. Ill.* 1911, c. 74, § 3; *Ruddy v. McDonald*, 149 Ill. App. 111, 117; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Great Lakes Towing Co. v. Kelley Island L. & T. Co.*, 176 Fed. 492, 100 C. C. A. 108.

In the case of *Burrows v. Lownsdale*, supra, it was sought to secure allowance of interest from the date of filing the libel. The court held that:

"A personal injury never creates a debt, nor becomes one until it is judicially ascertained and determined, nor until that time can it draw interest."

To the same effect is *L. & N. R. Co. v. W. L. Wallace*, 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548.

Section 3 of chapter 74, *Hurd's Rev. St. Ill.* 1911, provides that:

"When judgment is entered upon any award, report, or verdict, interest shall be computed * * * from the time when made or rendered to the time of rendering judgment upon the same."

We are unable to see in what respect the case cited from 149 Ill. App. bears upon the present case. The court allowed interest on the amount found due by the master from the date of the filing of his report to the date of the entry of the decree. The case does not show the facts in detail, nor does it appear that anything more was asked for. Presumably, the report was filed as soon as completed. In *Tilghman v. Proctor*, interest was allowed from the date of the filing of the master's report in a patent suit, and complainant sought to set aside the master's report for failure to allow interest on profits before the date of his report. It does not appear that any time elapsed between the making and filing of the report. Manifestly, had the master included interest among the items allowed as damages, he would have been allowing it upon an unliquidated claim. *Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54. The court there held that interest could be allowed only after judicial ascertainment of the amount due on account-

ing. That, however, was not intended to be laid down as a general rule, but as one that was equitable in that case.

In *Great Lakes Towing Co. v. Kelley Island L. & T. Co. et al.*, it appears that the latter's steam barge, the Ohio, was, on June 25, 1901, sunk by reason of injuries caused by the towing company's tug, the Lutz, and certain obstructions placed by the city of Cleveland. On the hearing upon the libel filed by the owners of the steam barge, the District Court held that the Lutz alone was liable and, instead of making an allowance as and for profits, allowed interest on the value of the Ohio, whose owners had replaced her by another boat pending her restoration to a serviceable condition. The interest was figured from the date of the interlocutory decree, which was entered about a year previous to the filing of the Commissioner's report, up to the date of the entry of the final decree. The Court of Appeals found that both the Lutz and the city were liable, and reversed the case with direction to the District Court to enter a decree in accordance with its opinion, but sustained the allowance of interest in lieu of damages as fixed by the District Court.

In other cases, as in *Mowry v. Whitney*, 14 Wall. 620, 20 L. Ed. 860, and *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577, much is left to the discretion of the court under the circumstances of each particular case. In *The Albert Dumois*, 177 U. S. 240-255, 20 Sup. Ct. 595, 601 (44 L. Ed. 751), it is said:

"The allowance of interest in admiralty cases is discretionary and not reviewable in this court except in a very clear case"—citing *The Scotland*, 118 U. S. 507-518, 6 Sup. Ct. 1174, 30 L. Ed. 153.

To the same effect is *Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799.

The facts in the present case are unique. The interest on the claims, covering the period between the time when the Commissioner's report was completed and when it was filed, amounts to about 24 per cent., aggregating more than \$12,000. Thus the question presented becomes a very important one.

Considering briefly a number of the cases bearing upon the subject, we find a grave indefiniteness as to the precise point here involved. Most of the authorities quoted are taken from patent cases in which the subject of interest on unliquidated damages has often arisen.

In *Crosby Valve Co. v. Safety Valve Co.*, 141 U. S. 441, 12 Sup. Ct. 49, 35 L. Ed. 809, interest was allowed from date of filing the master's report. In *Parks v. Booth*, 102 U. S. 96-107, 26 L. Ed. 54, the Circuit Court allowed the amount found due by master's amended report and allowed interest on that amount from time of filing report to time of entering decree (November 24, 1875, to December 15, 1876). The decree was modified in the Supreme Court by eliminating items of \$627.20 and the interest on the authority of *Silbsby v. Foote*, 20 How. 378-386, with the statement that profits being in the nature of unliquidated damages do not bear interest without the special order of the court.

In *Silbsby v. Foote*, 20 How. 378-386, 15 L. Ed. 953, the verdict of a jury and the master's report were ignored by the Circuit Court, and the court took an accounting and allowed \$5,663.82 interest. Al-

lowance of interest was held to be error and deducted. It does not appear how interest was figured, though from the amount it would seem to have been figured as an item of the damages.

In *Keep v. Fuller* (C. C.) 42 Fed. 897-899 (Coxe, J.), interest was allowed from date of filing report after reducing the amount awarded on authority of *Tilghman v. Proctor*, and *R. R. Co. v. Turrill*.

In *Rose v. Hirsh* (C. C. A. 3d Cir.) 94 Fed. 178, 36 C. C. A. 132, *interest was allowed from the date of filing master's report*, on authority of *Tilghman v. Proctor*. The master and Circuit Court found no damages. The upper court reversed with directions to enter decree for \$1,649.23 and interest as above. It will be seen that the damages were not liquidated until the order of the Court of Appeals was entered.

In *Railroad Co. v. Turrill*, 110 U. S. 301-303, 4 Sup. Ct. 5, 28 L. Ed. 154, the case had gone to the Supreme Court and had been reversed with directions. In entering its decree, the Circuit Court allowed interest on the amount found due by the master, to whom the cause had been referred, from the date of his report. This was assigned for error. The decree was affirmed by the Supreme Court. What was meant by the phrase, "the date of the master's report," does not appear. The Supreme Court states its reasons for affirming and bases its conclusions on the fact that the allowance of interest was equitable.

From the cases examined, we are of the opinion that, under the circumstances of this case, the trial judge did not abuse the discretion vested in him in allowing interest from the time when the report was completed. By the decision of the District Court the finding of the Commissioner as to the amount of the several claims was approved. It thus appeared that the amounts found by the Commissioner were correct and were liquidated for all purposes of the present inquiry. Moreover, the District Court was charged with duty to adjust the claims equitably. We will not assume that either of the parties was responsible for the delay. Libelant could have paid when the Commissioner fixed the several amounts due and have saved interest. As it is, it withheld respondents' money and had the benefit of it for almost four years, and should not now complain if it is required to pay interest.

We find no merit in the other matters assigned as errors, and the decree of trial court is affirmed.

NEW YORK, N. H. & H. R. CO. v. MURPHY.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 201.

1. MASTER AND SERVANT (§ 137*)—DEATH OF SERVANT—OPERATION—RULES—REASONABLENESS.

Rules of defendant railroad company provided that a train must not run on a single track from any point until the arrival of all trains in the opposite direction of the same or superior class which are due by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

time-table at or before its schedule time of leaving; that an inferior train must keep out of the way of a superior train; that when an inferior train meets a superior train on a single track the inferior train must clear the superior train 10 minutes, unless otherwise provided in the time-table; that an inferior train must keep at least 10 minutes off the time of a superior train in the same direction; that no train shall follow another within 10 minutes, except as provided for in the time-table, unless some form of block signal is used; that when a train is stopped, or is delayed under circumstances in which it may be overtaken by the following train, the flagman must go back immediately with danger signals a sufficient distance to insure protection; also that, when acting as rear brakeman, the servant must protect the rear of the train without waiting for signals or orders to do so, and must keep a sharp lookout for signals carried by other trains, and be prepared to correct any oversight or mistake. *Held*, that such rules were reasonable, and, if complied with, were sufficient to prevent rear-end collisions, as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.*]

2. APPEAL AND ERROR (§ 1062*)—HARMLESS ERROR—SUBMISSION OF ISSUES—EFFECT—NEGLIGENCE—VERDICT.

Decedent, a rear brakeman on a freight train, while sitting in the caboose, was killed by a rear-end collision with an extra wrecking train following at high speed. If decedent had followed the rules for the protection of his train in connection with an order from the dispatcher's office, no collision would have occurred, and there was no evidence of negligence in the dispatching of the wrecking train; but there was evidence that this train was traveling at excessive speed. The court submitted to the jury issues of alleged negligence of the defendant in dispatching the wrecking train, and also in its operation at excessive speed, and plaintiff had a verdict. *Held* that, there being nothing to show on which of the issues the verdict was found, it could not be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

In Error to the District Court of the United States for the District of Connecticut; Julius M. Mayer, Judge.

Action by John Murphy, administrator of the estate of Charles J. Murphy, against the New York, New Haven & Hartford Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. F. Berry and Wm. C. Mitchell, both of New Haven, Conn., for plaintiff in error.

D. G. Perkins, of Norwich, Conn., and J. S. Murphy, of Lowell, Mass., for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. John Murphy, the plaintiff, a citizen of Vermont, brought this suit under the Employer's Liability Act of Congress of April 22, 1908, to recover damages of the New York, New Haven & Hartford Railroad Company, a corporation of Connecticut, for the death of his intestate, Charles J. Murphy, who was also his son.

April 2, 1910, the deceased was flagman of regular freight train 772, and while sitting in the caboose was killed by a rear-end collision with extra wrecking train 413. The complaint charges the defendant

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with negligence in failing to so dispatch the trains as to prevent the collision, and in running No. 413 at such great speed and at such a short interval after 772 that it overtook and collided with 772. The defendant's road between Norwich, Conn., and Worcester, Mass., is a single track, and on the morning in question three trains left Norwich bound north as follows: No. 772, a regular freight train, at 5:50 a. m. to Worcester; No. 704, a regular passenger train, at 6:08 a. m. to Worcester; No. 413, an extra wrecking train, at 6:22 a. m. to Plainfield, Conn. Before leaving Norwich, a written telegraphic order from the train dispatcher's office at Hartford was given to the conductor and engineer of No. 772 and to the engineer of No. 413 reading:

"Eng. 410 four ten will run extra Plainfield to Norwich with right over No. 772 seven seventy-two Plainfield to Jewett City and will meet extra 413 four thirteen north at Jewett City."

Train 410 was an extra south-bound freight. The meaning of the order was that 772 and 413 were to go to Jewett City north-bound, and there meet and let pass 410 south-bound. This last train is of no further importance in the case. Train 731 was a regular passenger electric train running on the defendant's track from a point north of Jewett City south-bound to Taft Station, scheduled to meet 704 at Jewett City and having preference over 772 and 413.

Some of the relevant rules of the defendant are:

83. A train must not be run on single track from any point until the arrival of all trains in the opposite direction of the same or superior class which are due by time-table at or before its schedule time of leaving. (See rule 86.)

86. An inferior train must keep out of the way of a superior train.

88a. When a train of inferior class meets a train of superior class on single track, the train of inferior class must take the siding and clear the train of superior class ten minutes, unless otherwise provided for in the time-table.

90. An inferior train must keep at least ten minutes off the time of a superior train in the same direction, unless otherwise provided for in the time-table.

91. No train or section of a train shall follow another train within ten minutes, except as provided for on the time-table, unless some form of block signal is used.

99. When a train stops or is delayed under circumstances in which it may be overtaken by a following train, or needs protection, flagman must go back immediately, with danger signals, a sufficient distance to insure full protection.

If upon a level or up grade, he will fasten one torpedo on top of rail at least 12 telegraph poles from the rear of his train, then go back 6 poles farther and fasten two more torpedoes on top of rail, one rail length apart; if on a down grade, he will fasten one torpedo on top of rail at least 18 telegraph poles from the rear of his train, then go back 18 poles farther and place two more torpedoes on top of rail one rail length apart; after doing this he may return to a point between the torpedoes placed and wait for any approaching train prepared to display proper signals in full view, using every effort to attract attention in season to stop it. When recalled, he will look and listen for any approaching train, and, if none is located, take up the single torpedo nearest the train (leaving the other two), and return. If recalled before placing torpedoes the required distance, a fusee should be lighted and left on the track. If called in after the train which he is protecting has taken a siding to allow a following train to pass, he will leave no torpedoes or fusee. Should the grade be heavy, weather bad, or view likely to be cut

off by smoke from passing trains, he must go as much beyond the distance named as circumstances may make necessary to safely protect his train.

In flagging at night great care must be used that a green or white light does not obscure the red. Stop signal should be swung until answered by approaching train.

When upon single track it becomes necessary to protect the front of the train, or when another track is obstructed, the front brakeman (when necessary the fireman) must go forward and use the same precautions.

809. When acting as rear brakeman they must be on the last car, and protect the rear of the train when necessary without waiting for signals or orders to do so. They must keep a sharp lookout for signals carried by other trains, and keep in mind all orders and notices regarding the movement of trains, so as to be prepared to correct any oversight or mistake, if there should be any occasion for so doing.

This is what happened: The north-bound trains passed Tafts as follows: 772 at 5:58; 704 at 6:15; 413 at 6:53. Train 772 then went into the first siding, which was two miles north of Tafts, viz., Lisbon Siding, to let 704, a first-class train, pass on north-bound to Jewett City, and remained there until 731, also a first-class train, had passed south-bound. All this was quite within the rules. Then it was the duty of 772 to pull out of the siding and proceed to Jewett City. It was at this point that the negligence which caused the collision occurred. After 731 had passed Lisbon Siding, 772 pulled out at 6:49. The morning was very foggy, yet the deceased did not protect his train by putting out torpedoes and burning a fusee as he should have done under rule 99. After 731 had passed Tafts, 413 started at 6:53, attaining a speed of 35 miles an hour. The engineer of 413 must have known that 772 had gone either into Lisbon Siding or Reade's Siding to let 731 pass, and in such close proximity it was a fair question whether the speed was not too great.

The trial judge left it to the jury to say whether the negligence of the defendant in dispatching the train was the proximate and sole cause of the collision, whether negligence in running 413 was the proximate and sole cause of the collision, and whether negligence of the deceased was the proximate and sole cause of the collision.

The material portion of the act in question is Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322):

"Section 1. That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then to the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Section 3 provides that contributory negligence shall not bar a recovery, but shall diminish the damages in proportion to the amount of negligence attributable to the employé.

The jury found a verdict for the plaintiff in the sum of \$10,000,

and made answer to two interrogatories that the full damages were \$15,000, and that they had deducted \$5,000 as the proportion attributable to the negligence of the deceased. The court reduced the verdict to \$7,000, and the plaintiff accepted the remittitur.

[1, 2] We think that there was no question of negligence in respect to the dispatching of the trains to be submitted to the jury and that it was error to do so. The defendant's rules were reasonable and sufficient. If they had been followed in connection with the order from the dispatcher's office, no collision would have occurred. In other words, if the deceased had protected train 772, or if 413 had observed the prescribed interval of 10 minutes in following 772, or had not gone at excessive speed, there would have been no collision. The negligence of the deceased was quite apparent, and so the jury found. Therefore the only ground left on which the plaintiff could have recovered was negligence in operation of 413. We cannot tell from the verdict whether the jury found in favor of the plaintiff on the ground of the defendant's negligence in dispatching the trains, or on the ground of negligence in operating 413, or on both grounds.

Judgment reversed.

HORNE v. THE JOHN I. BRADY.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1913.)

No. 2,346.

COLLISION (§ 95*)—STEAMER AND TUG WITH TOW MEETING IN NARROW CHANNEL—VIOLATION OF RULES.

A collision between a loaded steamer outbound and a barge in tow of a tug passing up the Port Arthur Ship Canal *held* due to the fault of both steamer and tug for various violations of the rules governing meeting vessels in narrow channels; the tug also being in fault for entering the channel before the steamer, which was already in the channel, had passed through, in violation of the rules, and for not using a bridle on her tow, as she should, in view of the narrowness of the canal, which was only from 75 to 100 feet on the bottom.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Suit in admiralty by P. Horne, master of the steamship *Edward Dawson*, against the steam tug *John I. Brady* and barge *Harry Morse*; the Texas Company, claimant. Decree for respondents, and libellant appeals. Reversed.

This is a suit in rem to recover damages suffered by the steamship *Edward Dawson* in a collision with the barge *Harry Morse* and steam tug *John I. Brady* about 1:45 p. m., June 9, 1909, in the Port Arthur Ship Canal, a narrow channel about seven miles long, running from Sabine river, above Sabine Pass, to Port Arthur, Tex. This canal was constructed along the west bank of Sabine Lake in a northwesterly direction, with some bends

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of more or less length, and with one long bend from Mud Bayou to half way between Keith Lake and Round Lake and with a width of 200 feet, with sloping banks, leaving the width on the bottom of from 75 to 100 feet, with a depth of about 23 feet at low tide. The tides are small and irregular; the rise and fall of the sea being much affected by winds. Navigation on this canal is controlled by the pilot rules for the rivers whose waters flow into the Gulf of Mexico and their tributaries, adopted by the Board of Supervising Inspectors February 13, 1907, approved by the Secretary of Commerce and Labor February 25, 1907. The following are pertinent in this case:

"Rule I. When steamers are approaching each other from opposite directions, the signals for passing shall be one short and distinct blast of the whistle to alter course to starboard so as to pass on the port side of the other, and two short and distinct blasts of the whistle to alter course to port so as to pass on the starboard side of the other.

"When two steamers are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

"When an ascending steamer is approaching a descending steamer, the pilot of the ascending steamer shall give the first signal for passing, which shall be promptly answered by the same signal by the pilot of the descending steamer, if safe to do so, and both shall be governed accordingly; but if the pilot of the descending steamer deems it dangerous to take the side indicated by the ascending steamer, he shall immediately signify that fact by sounding the alarm or danger signal of four or more short and rapid blasts of the whistle, and it shall be the duty of the pilot of the ascending steamer to answer by a signal of four or more short and rapid blasts of the whistle, and the engines of both steamers shall be immediately stopped, and backed if necessary, until the signals for passing are given and answered. After sounding the alarm signals by both steamers, the pilot of the descending steamer shall indicate by his whistle the side on which he desires to pass, and the pilot of the ascending steamer shall govern himself accordingly, the descending steamer being entitled to the right of way.

"Where possible, the signals for passing must be made, answered and understood before the steamers have arrived at a distance of half a mile of each other. * * *

"Rule III. When two steamers are about to enter a narrow channel at the same time, the ascending steamer shall be stopped below such channel until the descending steamer shall have passed through it; but should two steamers unavoidably meet in such channel, then it shall be the duty of the pilot of the ascending steamer to make the proper signals, and, when answered, the ascending steamer shall lie as close as possible to the side of the channel the exchange of signals may have determined, as provided by rule I, and either stop the engines or move them so as only to give the boat steerageway, and the pilot of the descending steamer shall cause his steamer to be worked slowly until he has passed the ascending steamer."

There was some evidence of a rule of the canal that speed was limited to four miles per hour. The Edward Dawson, of the length of 265 feet and 37 feet beam, was outward bound from Port Arthur, with a cargo of oil, and drawing 18 feet forward and 22 feet 3 inches aft. The barge Harry Morse, having a length of 198 feet 2 inches, beam 37 feet 5 inches, without cargo, and drawing from 11 to 12 feet, was in tow astern of the steam tug John I. Brady, 96 feet 8 inches in length, beam 21 feet, drawing 9 feet 4 inches, on a hawser about 50 fathoms in length, and was in Sabine Pass bound for Port Arthur.

About 12:40 p. m., June 9, 1909, the Dawson entered the canal at Port Arthur bound down the canal to sea. At that time the steamship Northwestern was in the canal going up to Port Arthur, and about the same time the tug Brady, with the Harry Morse in tow, entered the lower end to proceed up the canal to destination. The Dawson passed the Northwestern, and then, if not before, the Dawson was fully advised that the Brady, with the Harry Morse in tow astern, was ascending the canal. The Dawson kept on her course down the canal at slow speed, eventually stopping along the

west bank near, if not at, the head of the long bend, ending a short distance above Keith Lake, and there waited for the Brady and tow to pass.

The evidence of the Dawson's officers is that the engines of the Dawson were stopped, and that she made no headway down the canal; but the undisputed fact is that a slow tide was then running up the canal, and the Dawson could not have remained stationary along the bank, unless enough engine movement and headway were maintained to meet the tide, and all this makes it uncertain as to the exact place that the Dawson held the west bank for the Brady and tow to pass, and which was the actual place of collision. As the Brady and tow approached the Dawson and within regulation distance she blew one whistle, and the Dawson answered by one whistle. This was an assent that the vessels should pass port to port.

From this time the only material and undisputed facts to be gleaned from the pleadings and evidence are that the Brady cast off the hawser towing the Morse just before the Morse and Dawson collided, and that the Morse's port anchor a-cockbill at the port cathead raked the port side of the Dawson from forward nearly to stern, inflicting great damage, and finally making fast with the anchor in the after bulkhead of the Dawson.

F. D. Minor and Geo. C. Greer, both of Beaumont, Tex., for appellant.

John W. Griffin, of New York City, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). The libellant and appellant charges negligence on the part of the Brady and Morse:

"In entering the southern end of said Port Arthur Canal whilst the steamship Edward Dawson was already in said canal descending the same; in failing to lie as close as possible to the eastern bank of the canal while the Edward Dawson passed them; in towing by the steam tug John I. Brady of the barge Harry Morse by too long a scope of rope; in the towing of said barge on a single hawser, instead of on a double hawser, and without a bridle, and in not having said barge lashed alongside of said steam tug; in the great speed at which the said tug was towing the said barge Harry Morse, and in permitting the port anchor of the barge Harry Morse to hang or swing loose at the cathead, instead of being secured fast there, or at the hawsepipe; and in the want of skill and in the improper conduct of the persons navigating the said steam tug and barge in not taking the necessary further steps to prevent said collision."

The claimant, denying all negligence on the part of the Brady and Morse, alleges:

"That the officers and crew of said steamship Dawson were not skillful or competent, were not attentive to their duties, but proceeded with said steamship in a careless, reckless manner. That her officers and crew were not properly stationed, and were guilty of gross recklessness in entering said canal when by the exercise of ordinary diligence they could have seen that the steamship Northwestern and the tug John I. Brady and barge Harry Morse were already in said canal on their way to the Port Arthur basin, at the head of said canal wherein said steamship was then lying. That as the said steamship Edward Dawson was heavily loaded, and drew the full depth of navigable water in said canal, she could not be steered on a straight course, but because of her 'sucking' and 'smelling bottom' she steered wildly. Hence it was dangerous to bring such a vessel into the canal, while other vessels were navigating it, which she was bound to meet, if she entered; and it was gross negligence to continue on with said steamship through a straight reach to pass said towboat and barge in a bend, which she attempted to do,

because such a passage is more difficult than in a straight reach. That it was negligence to continue under way, and to run so far over to the west bank as to cause her to strike the incline bank and sheer over to the east bank and into the barge, and thereby occasioning the collision complained of in this cause."

The evidence in the transcript is unusually conflicting, even for an admiralty case, and it is useless to try to reconcile it on all the material issues. *Res ipsa loquitur*, and a few undisputed and preponderantly proven facts, however, point to a just conclusion.

1. As to entering the canal: The Dawson, entering the canal when the Northwestern was ascending, violated the spirit, if not the letter, of the navigation rule:

"When two steamers are about to enter a narrow channel at the same time, the ascending steamer shall be stopped below such channel until the descending steamer shall have passed through it"

—for the reason underlying is the danger to be avoided of two steamers passing in such narrow channel. The weight of the evidence is to the effect that the Dawson, the "descending steamer," was not only about to enter the canal, but had actually entered before the Brady and Morse entered at the lower end; and so we conclude that the Brady and her tow violated the letter and spirit of the said rule. Finding these violations, however, does not necessarily decide this case, for while leading up to and making the collision possible they were not the necessary and proximate cause of the same.

2. The said rule further provides:

"But should two steamers unavoidably meet in such channel, then it shall be the duty of the pilot of the ascending steamer to make the proper signals, and, when answered, the ascending steamer shall lie *as close as possible to the side of the channel the exchange of signals may have determined*, as provided by rule I, and either stop the engines or move them so as only to give the boat steerageway, and the pilot of the descending steamer shall cause his steamer to be worked slowly until he has passed the ascending steamer."

The undisputed facts are that the Brady, as the ascending steamer, signaled to pass port to port, and the Dawson answered, assenting, and then both parties reversed the rule. The Dawson went to the right bank to remain, while the Brady and her tow kept on ascending the canal. Reversing the rule was a violation thereof by both parties, and though it led up to the collision it did not really compel it.

3. In maneuvering to pass, the Dawson, following the understanding, as we find the weight of the evidence, took the right bank to *lie as close as possible*, very near to the head of the long bend which runs from Mud Bayou up above Keith Lake, if not actually in it, instead of taking, as she ought, the straight reach above. The Brady rounded the head of the bend and had nearly passed the Dawson, while the Morse, following, took a sheer over towards the Dawson, and this was followed by the Morse colliding with the Dawson, just prior to which, when the Brady should have pulled its best, the master of the Brady threw off the hawser, leaving the Morse without motive power and under strong headway to take care of herself.

There is unanimity among claimant's witnesses to the effect that the Dawson was well inside the bend, and was under headway and zigzagging in the channel, and that she actually ran down and into the Morse, while the latter only made a little sheer to port, caused by touching the bank; but all this is substantially met by the evidence of the officers of the Dawson, supported by the strong presumption that the pilot and master of the Dawson could not have intended, nor even wished, to run down the Morse.

4. It was not negligent for the Brady to tow the Morse astern, instead of abreast and lashed alongside. In the narrow channel of the Port Arthur Canal, and where, according to the evidence in this case, nobody appears to pay any attention to the navigation rules, it was probably best to tow the barge astern; for, with vessels of the length and beam herein involved, the three abreast would take up 95 feet 5 inches of actual beam, and a passage even in a straight reach of the canal would be very hazardous.

When towing astern, when other vessels are at the time likely to be using the canal, a hawser with a bridle—or, better, two hawsers—should be used. Nor was it negligent for the Morse to carry her port anchor a-cockbill at the cathead. In those waters it was proper, if not necessary, to carry a large anchor, necessary for quick letting go in an emergency. Inboard it would take time to get it out. Hanging at the hawsehole, it would probably impede navigation. The evidence tends to show that both parties violated the canal rule limiting speed.

On the whole case, we find that in the collision between the Dawson and the Harry Morse both vessels were in fault. The Dawson has made proof, to the satisfaction of the judge of the lower court, of damages amounting to \$12,532.05; but the claimant contends that they are exaggerated, and that no good opportunity has been given to contest them. The claimant in his answer avers that the Morse suffered damages in the collision amounting to over \$400. Following the usual rule in collision cases, where both parties are in fault, the damages must be divided, and a reference follows, if damages are not admitted.

For all the foregoing, the decree appealed from is reversed, and the cause is remanded, with instructions to enter a decree finding both libellant and claimant in fault, and dividing the proven damages equally, and thereafter to proceed according to established admiralty rules and usages. The appellee to pay the costs of this court.

GRAIN DISTILLERY NO. 8 OF EASTERN DISTILLERY CO. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 17, 1913.)

No. 1,127.

INTERNAL REVENUE (§ 46*)—PROCEEDING FOR FORFEITURE FOR VIOLATION OF LAW BY DISTILLER—MEASURE OF PROOF.

In a proceeding in rem for the forfeiture of distillery property for violation of the internal revenue laws, the government is required to prove such violation by a preponderance of the evidence only.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 117-141; Dec. Dig. § 46.*]

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Information by the United States against Grain Distillery No. 8 of the Eastern Distillery Company. From a judgment of forfeiture, claimant brings error. Affirmed.

Thomas H. Willcox, of Norfolk, Va. (H. L. Lowry and Willcox, Cooke & Willcox, all of Norfolk, Va., on the brief), for plaintiff in error.

D. Lawrence Groner, U. S. Atty., of Norfolk, Va., and Robert H. Talley, of Richmond, Va., for the United States.

Before GOFF, Circuit Judge, and ROSE, District Judge.

GOFF, Circuit Judge. The writ of error we are now to dispose of is prosecuted by the defendant below to a judgment rendered on the verdict of a jury, by which said defendant's property was condemned as forfeited to the United States. The information alleged that such property had been duly seized by the collector of internal revenue, on the ground that the same had been forfeited for the reason that the defendant, being engaged in the business of a distiller, did unlawfully attempt to defraud the United States of the internal revenue tax on the spirits distilled by it; that it unlawfully engaged in carrying on the business of a distiller with intent to defraud the United States of the internal revenue tax on spirits, and did attempt to defraud the United States of said tax, in that it omitted to make true and exact entries of the quantities of grain and other materials used by it, as required by section 3303 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2155).

To this information an answer was filed by the defendant, denying all the allegations of defrauding or attempting to defraud the United States as set forth in the information. A trial by a jury was had, the verdict being:

"We, the jury, on the issue joined, find for the United States government."

On this verdict judgment of forfeiture was entered, and a writ of error granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The assignment of error relied on by the plaintiff in error relates to an instruction given to the jury by the court below, which was in these words:

"That the same degree of proof is not required in order to the finding of a verdict for the government in the present case as in the case of a criminal prosecution; that is to say, while the jury, in order to find for the government, must be satisfied from the evidence that the offense or offenses charged in the information has or have been committed as charged, they need not be so satisfied beyond a reasonable doubt. A preponderance of evidence is sufficient."

The contention of the plaintiff in error is that the proceeding in the court below was a criminal prosecution, and that consequently it was error to charge the jury that a preponderance of evidence was sufficient; that the rule in criminal cases requiring guilt to be proved beyond a reasonable doubt was applicable, and should have been given to the jury.

It may be conceded that some years ago there was a variance in the decisions of the courts relating to this matter, but all doubts concerning it were—so far as the courts of the United States are concerned—dissolved by the decision of the Supreme Court in *Lilienthal's Tobacco v. United States*, 97 U. S. 237, at pages 266, 267, 24 L. Ed. 901. We quote from that case:

"In criminal cases the true rule is that the burden of proof never shifts; that in all cases, before a conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt, of the affirmative of the issue presented in the accusation that the defendant is guilty in the manner and form as charged in the indictment. * * * In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates. * * * Authorities to show that the case before the court is a civil case are scarcely necessary, but if any be needed they are at hand. 1 Bishop, Cr. Law (6th Ed.) § 835; *United States v. Three Tons of Coal*, 6 Biss. 379 [Fed. Cas. No. 16,515]; *Schmidt v. Insurance Company*, 1 Gray (Mass.) 533; *Knowles v. Scribner*, 57 Me. 497."

In the case of *Boxes of Opium v. United States* (C. C.) 23 Fed. 395, which was an information in rem for the forfeiture of certain boxes of opium, alleged to have been smuggled into the port of San Francisco in violation of the customs law of the United States, it was insisted during the trial that the evidence necessary was the same as would be required in a criminal case, but in the disposition of the case the court held otherwise. Referring to the *Lilienthal Tobacco Case*, supra, Judge Sawyer said:

"I regard this case as giving the last expression of the views of the Supreme Court, and as controlling in this court in this case; also as adopting, in a civil case in form, by information against the goods to enforce a forfeiture, notwithstanding it is essentially criminal and intended to punish a crime, the ordinary rule that a mere preponderance of evidence should determine the finding of a court or the verdict of a jury. * * * For the purposes of this case, therefore, in accordance with what I conceive to be the authoritative rule laid down by the Supreme Court in its latest decisions, I shall apply the rule in ordinary civil cases, that a mere preponderance of evidence in favor of guilt must determine the controlling question of fact as to whether the opium was smuggled into San Francisco on the *Tokio* or not."

In the case of *United States v. One Distillery (D. C.)* 193 Fed. 720, Judge Boyd, when instructing the jury, said:

"The United States has alleged that Foster, or his agents, or his employes, no matter which, during the operation of this distillery by him, operated it, intending at the time of the operation to defraud the government of the United States of the tax upon the product of the distillery or a part of it. The government having made that allegation, the burden rests upon it to prove it, not beyond a reasonable doubt but by the weight of the testimony; that is, in order to return a verdict for the United States, the jury must have that quantum and character of testimony which by its preponderance satisfies their minds that the allegation is true."

We do not find it necessary to further consider cases bearing upon this question, but we will refer to some of them as illustrative of the principles involved: *Hawloetz v. Kass (C. C.)* 25 Fed. 765; *U. S. v. Shapleigh*, 54 Fed. 126, 4 C. C. A. 237; *The Good Templar (D. C.)* 97 Fed. 651; *U. S. v. Brown*, 24 Fed. Cas. 1248; *Coffey v. United States*, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684.

The judgment complained of is without error.
Affirmed.

In re ROSETT et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 241.

BANKS AND BANKING (§ 15*)—PRIVATE BANKER—SECURITIES—DEPOSIT—PERSONS ENTITLED TO SECURITIES.

General Business Law (Consol. Laws N. Y. 1909, c. 20, as amended by Laws 1911, c. 393) § 25, declares that, except as provided in section 29d, no individual or partnership shall receive bank deposits without license from the comptroller, which shall authorize the transaction of business at any place other than that described in the certificate, except with the comptroller's written approval. Section 29d provides that the foregoing provisions shall not apply to any individual or partnership who would otherwise be required to file a bond with the comptroller, where the business is conducted in a city having a population of 1,000,000 or over. *Held*, that where the bankrupt transacted a private banking business in New York City, and maintained branches in other states, each of which was subject to the laws of the state in which it was located, and not to the laws of New York, the New York depositors were exclusively entitled to the benefit of the \$100,000 deposit made by the banker with the comptroller in New York, in the administration of his affairs in bankruptcy.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 12-17; Dec. Dig. § 15.*]

Petition to Revise Order of the District Court of the United States for the Southern District of New York; George C. Holt, Judge.

In the matter of bankruptcy proceedings of Moritz Rosett and Max Rosett, individually and composing the firm of M. Rosett. On petition of Joseph M. Conklin, as trustee, to revise an order of the District Court (203 Fed. 67), reversing a referee's order providing for distribution of the funds deposited by the bankrupts with the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

comptroller of the state of New York, and denying a motion for declaration of a dividend. Affirmed.

Olcott, Gruber, Bonyng & McManus, of New York City (L. L. Ernst, of New York City, of counsel), for petitioner.

R. P. Beyer, Deputy Atty. Gen., and Morris Cukor and Archibald Palmer, both of New York City, for respondents.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. Moritz and Max Rosett, partners composing the firm of M. Rosett, were adjudicated bankrupts, both individually and as a firm, in an involuntary proceeding. The firm had carried on the business of private bankers at 197 Stanton street, in this city, and at branches in New Jersey, Pennsylvania, and Ohio. The accounts of all these offices were kept at 114 Liberty street, New York City, where no banking business was done. In accordance with the provisions of sections 25 and 29d of chapter 393, Laws of 1911, amending the General Business Law (Consol. Laws 1909, c. 20), the firm deposited corporate stock of the city of New York of a value of \$100,000 with the state comptroller, who, under an order of the District Court, has turned the stock over to the trustee in bankruptcy, who has converted the same into cash. The question in the case is whether this fund is distributable among all the creditors who did banking business with the bankrupts, or only among such creditors as did banking business with them in the city of New York. The referee took the former, and Judge Holt, on a petition to revise, the latter, view. We agree with Judge Holt.

Section 25 provides that no individual or partnership shall engage in the business of receiving deposits of money for safe-keeping, or for the purpose of transmission to another, or for any other purpose, in cities of the first class, except upon certain conditions, among others, the depositing of moneys or securities with the state comptroller and the giving of a bond to him to secure the faithful performance of their engagements in the business. Upon conforming with the provisions of the section, the applicant is entitled to receive from the comptroller a license to do business at the place indicated in it. The section further provides:

"The money and securities deposited with the comptroller as herein provided and the money which in case of default shall be paid on the aforesaid bond by any applicant or the surety thereof shall constitute a trust fund for the benefit of the depositors of the license and of such persons as shall deliver money to such licensee for transmission to another, and such beneficiaries shall be entitled to an absolute preference as to such moneys or securities over all general creditors of the licensee. Such money and securities shall in the event of the insolvency or bankruptcy of the licensee be delivered by the comptroller on the order or judgment of a court of competent jurisdiction to the assignee, receiver or trustee of the licensee designated in such order or judgment."

Section 29d is as follows:

"Exceptions. The foregoing provision shall not apply * * * (5) to any individual or partnership who would otherwise be required to comply with section 25 of this article who shall file with the comptroller a bond in the sum of \$100,000 approved by the comptroller as to form and sufficiency,

for the purpose and conditioned as in the said section prescribed, where the business is conducted in a city having a population of 1,000,000 or over and if conducted elsewhere in the state such bond shall be in the sum of \$50,000, or in lieu thereof money or securities approved by the comptroller of the same amount. The provisions of section 29a shall be applicable to such bond or deposit of money or securities."

It is quite clear that the Legislature was regulating the business of banking to be done within the state of New York and was speaking of cities and places within that state. The business the bankrupts were licensed to do within the state of New York was to be done subject to this law, and what business they did in their branches in other states was subject to regulation, not by the laws of New York, but by the laws of those states. Every state has a constitutional right to regulate such business. *Engel v. O'Malley*, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. Ed. 128. In point of fact, the bankrupts did have licenses from the states of New Jersey and Ohio to do the business of banking within those states. None was required in Pennsylvania.

The bankrupts took advantage of the foregoing exception—29d (5). Although they received no written license as provided in section 25, they were none the less quite as effectually licensed; i. e., in consideration of their compliance with the provisions of the exception they were permitted—that is, they were licensed—to do banking business in New York City. Inasmuch as the exception provides that the securities delivered and the bond given to the comptroller are to be "for the purpose and conditioned as in said section (25) prescribed," their proceeds must now be applied as a trust fund for the benefit of the firm's customers who did deposit with and deliver money to it in New York City. In the language of section 25 it "shall constitute a fund for the benefit of the depositors of the licensee and of such persons as shall deliver money to such licensee for transmission to others. * * *

It is true that the branches are parts of the main concern, and that all those who dealt with the branches knew that to be the fact, and were creditors of the firm of equal standing. It is also true that the branches made daily reports and forwarded all moneys they received in excess of needs for current expenses to the office of the firm at 114 Liberty street. These facts, however, do not show that the moneys forwarded by the branches were deposits with or deliveries to the firm in New York by the customers of the branches, and do not bring those customers within the protection of this special fund of \$100,000.

The decree is affirmed.

HALE et al. v. HATCH & NORTH COAL CO. et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 183.

MONOPOLIES (§ 2S*)—CIVIL DAMAGES—EVIDENCE—QUESTION FOR JURY.

In an action by a private individual to recover threefold damages, authorized by Sherman Anti-Trust Law July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), against an alleged combination of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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coal dealers in a city, engaged in interstate commerce, to force plaintiff out of business and into bankruptcy, which they were successful in doing, evidence *held* to entitle plaintiff to submission to the jury of the question whether a combination and conspiracy among defendants existed, whether they maintained a secret organization to keep up prices and to boycott dealers who did not enter the organization, and whether plaintiff was injured as the result of such conspiracy.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

In Error to the District Court of the United States for the District of Connecticut; James P. Platt, Judge.

Action by Charles R. Hale and others against the Hatch & North Coal Company and others. A judgment was entered in favor of defendants by direction of the court, and plaintiffs bring error. Reversed.

Ralph M. Grant and Josiah H. Peck, both of Hartford, Conn., and James A. Marr, of Bridgeport, Conn., for plaintiffs in error.

Henry Stoddard, of New Haven, Conn., and Hyde, Joslyn, Gilman & Hungerford, J. Gilbert Calhoun, and John J. Dwyer, all of Hartford, Conn., for defendants in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. This action is brought under the Sherman law (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), the seventh section of which gives a private individual, whose business is injured by any of the acts forbidden by the law, or declared unlawful thereby, the right to sue therefor and recover three-fold damages. The act declares contracts, combinations and conspiracies in restraint of trade or commerce among the several states, illegal. It also provides that every person who shall monopolize or combine or conspire with any other person to monopolize interstate commerce, or make a contract or enter into a combination or conspire in restraint of trade, shall be guilty of a misdemeanor. For several years after October, 1903, the plaintiff, Charles R. Hale, had been engaged, at Hartford, Conn., in buying and selling coal mined in states other than Connecticut. A large part of this coal was mined in Pennsylvania and was the subject of interstate commerce.

The defendants were coal dealers of Connecticut, having a place of meeting at Hartford where they frequently met. The plaintiff had built up an increasing business and had received a contract to supply the city with coal, for which he had underbid the other dealers. Soon thereafter he found it impossible to get coal from wholesale dealers, who not only refused to supply him, but in one instance, at least, canceled an order already accepted. Parties to the alleged conspiracy endeavored to persuade dealers outside of Hartford not to furnish him with coal. Other parties endeavored to persuade him to join the combination. The final result was that the plaintiff was forced into bankruptcy.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

During the comparatively short period in which Hale had been engaged in buying and selling coal he succeeded in building up a flourishing and steadily increasing business until he was successful in procuring the contract with the city in competition with the defendants. Then his troubles began; difficulty after difficulty confronted him, obstacle after obstacle was placed in his path; the result being, as before stated, failure and bankruptcy. We have, then, a successful and growing coal business destroyed. A large number of local dealers whose interests were hostile to those of Hale. Inability on Hale's part to purchase coal except at ruinous prices.

In looking for the causes responsible for Hale's ruin, we naturally turn to those persons who were being injured by his success, viz., the local coal dealers of Hartford. It appears that they rented a room in the Hartford Trust Company building where they held meetings, that they met there and elsewhere under circumstances indicating secrecy. It also appears that several of the members openly expressed the opinion that Hale's conduct was demoralizing the price of coal in Hartford. One of the witnesses testified that the Secretary of the Hartford Coal Dealers' Association, and a defendant, stated to the witness that "they had an association that was holding up the price of coal; and that everybody was in it with the exception of Mr. Hale."

Without considering the entire testimony which points to the defendants, or some of them, as the parties responsible for the destruction of Hale's business, we think enough has been stated to make it clear that the question was one of fact which should have been submitted to the jury. It is true that the evidence is to a large extent circumstantial. The defendants did not write out and formally pass a resolution declaring that Hale was demoralizing the trade by selling at lower prices than the association deemed reasonable and that, therefore, they would not deal with him themselves or with any wholesaler who sold him coal. Conspirators do not work in this way. They do not advertise their purpose openly, their methods are secret, sinister and clandestine. It is rare, indeed, that a conspiracy is proved by direct evidence. In a vast majority of cases circumstantial evidence is relied on. Such evidence is as efficacious as direct if it establishes the proposition that the defendants, or some of them, had a common purpose to violate the law which they succeeded in accomplishing. *Marrash v. United States*, 168 Fed. 225, 229, 93 C. C. A. 511.

The jury might have found that the combination and conspiracy alleged in the complaint existed; they might have found that there was a secret organization of Hartford dealers to keep up prices and to boycott those who did not enter the organization. Had they so found their verdict could not have been set aside as contrary to the evidence. It matters not whether the evidence was strong or weak, it is sufficient that the jury was justified in finding that it established the alleged conspiracy. It cannot be held as matter of law that the plaintiff failed to make a case.

The judgment is reversed.

MILLER v. CHICAGO & A. R. CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 142.

RAILROADS (§ 144*)—CONSOLIDATION—RIGHTS OF STOCKHOLDERS.

Where a railroad consolidation agreement provided that, until all of certain stock of one of the consolidated companies outstanding shall have been exchanged for stock in the consolidated company, every holder of such unexchanged stock shall be entitled to share proportionately in the earnings and assets of the consolidated company, as if there had been no consolidation, etc., and it thereafter appeared that the earnings of such initial road had been used to pay dividends to stockholders of the consolidated company, as against complainant, who had not exchanged his shares, complainant was entitled to an accounting, and it was error to compel him to elect either to take a decree against the consolidated company for dividends or suffer a dismissal of his bill.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 392, 393, 451-455; Dec. Dig. § 144.*]

Rights and liabilities of stockholders of railroads on consolidation, see note to *Bonner v. Terre Haute & I. R. Co.*, 81 C. C. A. 480.]

Appeal from the District Court of the United States for the Southern District of New York; George C. Holt, Judge.

Suit by William Starr Miller against the Chicago & Alton Railroad Company. From a decree dismissing the bill (198 Fed. 695), complainant appeals. Reversed, with directions.

Philbin, Beekman, Menken & Griscom, of New York City (C. K. Beekman and S. P. Anderton, both of New York City, of counsel), for appellant.

Joline, Larkin & Rathbone, of New York City (A. Stickney and A. H. Van Brunt, both of New York City, of counsel), for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. This bill is filed by a minority stockholder of the old Alton Railroad on behalf of himself and of all other stockholders similarly situated. The cause has been so often before the courts that it will be unnecessary to repeat the facts out of which it arises. A demurrer to the bill was overruled. (C. C.) 171 Fed. 253. A demurrer to a cross-bill was sustained. (C. C.) 176 Fed. 379, affirmed 193 Fed. 41, 113 C. C. A. 113. The appeal now to be considered is from the final decree of the District Court.

This decree gave the complainant an election either to take a decree against the defendant for the amount of dividends theretofore tendered to him by it, without interest, or for dividends as computed by one Benson, the defendant's comptroller, with interest, and, in case he refused to elect, the bill to be dismissed, and in any event the defendant to have costs. The complainant having refused to elect, the bill was dismissed, with costs. We do not think the court could put the complainant to this election. The decree should have been either

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in his favor, and for an accounting, or against him, dismissing the bill. The opinion of the District Judge is reported in 198 Fed. 695.

The question is whether the complainant can enforce the stipulation contained in article 4 of articles made in 1906 consolidating the old Alton Railroad, of which he is a stockholder, and the old Alton Railway, into the present defendant, the Chicago & Alton Railroad Company. Article 4 reads as follows:

"Article 4. Until all of the 73 shares of preferred stock and 4,387 shares of common stock of the party of the first part, not now owned by the party of the second part, shall have been exchanged for prior lien stock of the consolidated company as herein provided, every holder of any such unexchanged share of such preferred stock or of such common stock of the party of the first part shall continue to have the right to share proportionately in accordance with the existing respective rights of said two classes of stock, in the earnings and assets of the party of the first part hereby consolidated and merged into the party of the second part as if the said consolidation and merger had not taken place and the entire capital stock of the party of the first part, now consisting of 34,795 shares of preferred stock and 187,511 shares of common stock were still outstanding."

The bill prays that the defendant may be declared to hold the property of the old Alton Railroad as trustee to protect the complainant's rights; that the defendant may be enjoined from applying any earnings of that road, to which he may be entitled as a stockholder of it, upon the property of the old Alton Railway, or for the benefit of its stockholders; and that the defendant be required to keep accounts showing the business and earnings of the old Alton Railroad separately.

The District Judge held, first, that the complainant's right as a stockholder in the old Alton Railroad was to receive such dividends as the directors of that road should declare, and that after consolidation his right is to receive such dividends as the directors of the consolidated road shall declare; second, that it would be impossible to keep separate accounts of the two original properties while they are being operated as one road; third, that the attitude of the complainant is unreasonable, and that a court of equity will not specifically enforce a contract which will result in much greater trouble and expense to the defendant than benefit to the complainant.

We do not think the complainant asks for the specific performance of any contract. The contract which resulted in the consolidation was between the old Alton Railroad and the old Alton Railway, both of which corporations have ceased to exist. The effect of the articles of consolidation was to vest the title to the two properties in the present defendant, but subject to the express trust which it assumed in favor of the stockholders of the old Alton Railroad who did not exchange their stock for stock of the consolidated company. The complainant made no contract with the defendant. What he seeks is to enforce this trust in favor of himself and of all other stockholders of the old Alton road in a similar position.

Nor is the complainant seeking to recover dividends from the defendant. He is not a stockholder of the consolidated company. He asks such an accounting as will effectuate the stipulations of article 4 of the articles of consolidation. We think that the consolidated

company is bound to operate the whole property, just as if there had been no consolidation, until all the outstanding stock of the old Alton road has been exchanged for prior lien stock of the consolidated company. The bill charges that earnings of the old Alton Railroad have been applied for the benefit of the old Alton Railway property, and in payments of dividends upon stock of the consolidated company exchanged for stock of the old Alton Railway. This is admitted in answer to interrogatories annexed to this bill. It is also admitted that the defendant's accounts do not show separate earnings of the old Alton Railroad. The complainant is therefore entitled to an interlocutory decree for an accounting. It may be that the books of the consolidated company cannot be kept entirely separate as to both properties, and that an accounting cannot be stated in all its details, just as if the properties were being separately operated. Still the books of the company must be kept on the theory that the properties are separate, so far as it is possible, and an account must be so stated as nearly as possible.

The compilation made by the defendant's comptroller of the dividends which the complainant was entitled to receive showed a larger amount due him than had been tendered. Besides, it was premature, and not binding upon him. We feel obliged to enforce the trust in the shape it was deliberately assumed by the defendant.

The decree is reversed, and the court below directed to enter an interlocutory decree sustaining the bill and ordering an accounting.

SALSBURG v. BLACKFORD (two cases).

(Circuit Court of Appeals, Fourth Circuit. February 10, 1913.)

Nos. 1,069, 1,104.

1. BANKRUPTCY (§ 439*)—REVIEW—PROCEEDINGS—APPEAL—PETITION TO SUPERINTEND AND REVISE.

The remedies by appeal and by petition to superintend and revise, provided for review in bankruptcy, are not cumulative, but mutually exclusive.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 439.*]

2. BANKRUPTCY (§ 288*)—OWNERSHIP OF PROPERTY—PLENARY PROCEEDINGS—WAIVER.

Where, in a suit by a bankrupt's receiver to recover goods alleged to have been fraudulently conveyed, a trustee acquired and maintained possession, and after the trial judge had upheld a decision of the referee that the receiver's possession had been properly obtained, and that the title to the goods could rightfully be determined in summary proceedings, the transferee participated in the trial of the issue, and costs and expenses were incurred which the trustee had no assets to pay, apart from the proceeds of the goods in dispute, the transferee's right, if any, to have the issue determined in a plenary proceeding, was waived.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. BANKRUPTCY (§ 467*)—APPEAL—REVIEW—FINDINGS OF REFEREE.

Findings of a referee in bankruptcy, affirmed by the trial judge, will not be set aside on appeal, unless it is clear that justice requires a different conclusion.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 467.*

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Appeal from and Petition for Revision of Proceedings of the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge.

In the matter of bankruptcy proceedings of Herman Schoenfield, bankrupt. Heard on appeal and on petition by Jacob Salsburg to superintend and revise in matter of law proceedings denying his right to certain property of the bankrupt claimed by the trustee and found by the court to have been fraudulently transferred (190 Fed. 53). Affirmed.

Charles H. Sachs, of Pittsburgh, Pa., A. J. Montague and R. L. Montague, both of Richmond, Va., and J. B. Handlan, of Wheeling, W. Va., for petitioner and appellant.

J. W. Ritz, of Wheeling, W. Va., for respondent and appellee.

Before PRITCHARD, Circuit Judge, and WADDILL and ROSE, District Judges.

PER CURIAM. [1] This case is brought here by petition to revise and by appeal. At the hearing at this bar the counsel for the petitioner and appellant admitted that these remedies were not cumulative, but were mutually exclusive. They elected to stand upon the appeal.

The petition to revise in No. 1,069 must therefore be dismissed.

[2] The findings of the referee, and the learned court below, are fully set forth in *Re Schoenfield* (D. C.) 190 Fed. 53. The evidence in the record abundantly sustains the findings that the goods taken possession of by the bankrupt's receiver were part of the bankrupt's estate, and liable for the payment of the bankrupt's debts. Appellant most strenuously insists that he was in possession of the goods, and that he claimed title in them adverse both to the bankrupt and the receiver and trustee, and that he could not properly be deprived of the possession, except as a result of plenary proceedings against him. In point of fact, the receiver actually obtained possession at the very inception of the controversy. They remained in his possession and that of the trustee until they were sold by order of the court and with the consent of all parties. Since then the trustee has held the proceeds. Before any considerable expense had been incurred, the learned judge below upheld the decision of the referee that the receiver's possession had been properly obtained, and that consequently title to the goods could rightly be determined in summary proceedings. Almost all of the enormous expense in the case has been since incurred. Had the validity or propriety of that order been then brought before us, the situation would have been very different from that with which we are now confronted. If, on the record as it at that time stood, we had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been of opinion that the appellant was entitled to have the controversy between himself and the trustee fought out in plenary proceedings, no one would have been greatly the sufferer. Since then much has happened. There have been incurred costs and expenses which are both relatively and absolutely large. Outside of the proceeds of the goods in dispute, there are no assets in the hands of the trustee out of which a judgment for costs could be made. The appellant has himself testified fully in support of his claim. He has put a number of witnesses upon the stand. It is almost inconceivable that any tribunal in any form of proceeding could, with the evidence before it which is to be found in this record, reach any other conclusion than that the merchandise which was taken possession of by the receiver was in fact the property of the bankrupt, and that the transfer of it to the appellant was fraudulent, to the knowledge of all the parties to such transfer.

[3] The referee and the learned judge were both of the opinion that the receiver was properly in possession of the goods and so found. When they agree, their conclusions are accepted by this court, unless it is clear that justice requires us to reach a different conclusion. In this case we do not find ourselves under such compulsion.

The decree in No. 1,104 will therefore be affirmed.

WALAAS v. JOHNSON et al.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1913.)

No. 2,465.

COLLISION (§ 141*)—DAMAGES RECOVERABLE—UN SOUND CONDITION OF VESSEL.

Where the extent of the injury to a vessel in collision was due in part to her age and the unsound condition of her timbers, due allowance should be made therefor in awarding damages against the other vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 294; Dec. Dig. § 141.*]

Appeal from the District Court of the United States for the Southern District of Alabama; Harry T. Toulmin, Judge.

Suit in admiralty by Thomas A. Johnson and others, owners of the pilot boat Eben D. Jordan, against the steamship Agnella; A. Walaas, claimant. Decree for libelants, and claimant appeals. Modified and affirmed.

For opinion below, see 198 Fed. 147.

Palmer Pillans, of Mobile, Ala. (H. Pillans and H. Hanaw, both of Mobile, Ala., on the brief), for appellant.

T. M. Stevens, of Mobile, Ala. (A. T. Dean and Gessner T. McCorvey, both of Mobile, Ala., on the brief), for appellees.

Before PARDEE and SHELBY, Circuit Judges, and SHEPARD, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SHEPPARD, District Judge. This is an appeal from the District Court of the Southern District of Alabama, awarding damages in the sum of \$7,328.64, in favor of libelants against the steamship *Agnella* for a collision with the pilot boat *Eben D. Jordan*, at the outer station off Mobile bar.

Negligence in the maneuvers of both vessels in the attempt to deliver and take aboard a pilot was charged and countercharged by the libel and answer. The judge, after hearing the testimony himself, which was voluminous, and in which there was not a little conflict, held the steamship solely at fault and made a reference of the cause to a special commissioner to ascertain and report to the court the damages sustained by the pilot boat by reason of the collision.

The commissioner made his report, stating the sundry items of damage considered, and allowing libelants \$7,298.64. The judge disallowed a credit of \$130, which the commissioner had allowed as proceeds of the sale of the pilot boat, and deducted from the account \$100, which the commissioner had allowed for renewed stem, and approved the finding in the sum of \$7,328.64. There were exceptions and counter exceptions challenging the allowances and disallowances in the various items which made up the finding of the commissioner.

On the question of negligence, we are not disposed to disturb the decree; but the damages allowed, we think, are excessive. There is no direct evidence of the value of the *Eben D. Jordan* when she was sunk; but it was shown that the *Jordan* was an old craft, built in 1883, had been from time to time to some extent repaired, but her hull had not been rebuilt. Her frame and deck beams were old, and found to be her original timbers. The rotten wood taken from the planking after the accident and produced here by exhibit is unmistakable evidence that the schooner was old and her planking and beams were in a state of decay. On no other plausible theory can the collapsed condition of her deck at the time she was raised be accounted for.

The conclusion from the evidence is irresistible that the age and condition of the schooner greatly increased the extent and cost of repairs. It is clear that the force of the collision could not have been responsible for the collapse of her decks. There is no evidence of pounding by heavy seas that could have produced such a result.

In the case of *The Young America*, Judge Brown, of the Southern District of New York, held that, where the evidence showed that the damages were as much due to defects in the injured vessel as to the negligence of the other, the damages should be equally divided. *The Young America* (D. C.) 54 Fed. 410. It was held in *The Atlanta* (D. C.) 34 Fed. 918, that where the injured vessel was old and weak, and consequently damaged more than a boat in ordinary condition would have been, she should be entitled to recover only half damages.

The occupation of a pilot boat should require a staunch and strong craft, and it is a reasonable presumption that only this class are engaged in the protection of commerce by sea. The *Agnella* was

justified in assuming that the pilot boat was staunch. It is not just that the owners of this old boat should continue her in service with her concealed infirmities until an accident compels repairs or rebuilding, and then recover as for a total loss at the expense of others. The Howard (D. C.) 30 Fed. 280; The Quaker City (D. C.) 19 Fed. 141.

The rule in admiralty is not to limit the recovery to old boats of half damages, unless for fault on their part, actual or constructive. We are firmly of the conviction that no such damage would have resulted to the Jordan, had she been strong and staunch, and her owners must be held to some responsibility for the exposed position of the pilot boat. The "notice rule" seems to have been confined to narrow channels, or when vessels are moored and inactive.

The decree appealed from should be amended, with directions to allow half damages, and it will stand affirmed, the costs of this court to be equally divided; and it is so ordered.

HAGAN v. SWINDELL et al.

(Circuit Court of Appeals, Third Circuit. April 4, 1913.)

No. 1,700.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ANNEALING FURNACE.

The Swindell patent, No. 624,401, for an annealing furnace, in which gas is used as the fuel, especially adapted to the annealing of metal sheets, covers a combination which is novel and discloses invention. The invention is also important and valuable, and the patent is entitled to a reasonable range of equivalents; also *held* infringed.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by Edward H. Swindell and Bessie Swindell, as executors of William Swindell, deceased, and John C. Swindell, against George J. Hagan. Decree for plaintiffs, and defendant appeals. Affirmed.

For opinion below, see 198 Fed. 490.

Harry Easton, of Pittsburgh, Pa. (F. H. Bowersock, of New York City, of counsel), for appellant.

G. H. Parmelee and Clarence P. Byrnes, both of Pittsburgh, Pa., for appellees.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. We do not agree with the appellant's criticism of Judge Orr's opinion reported in 198 Fed. 490; but there may, perhaps, be some advantage in explaining the patent a little more fully. In doing so we shall take the liberty of making free use of the appellees' brief.

It should first be observed that, while the claims refer to "a furnace," it is manifest from the specification and the drawings that a particular class of furnace—namely, an annealing furnace—was especially the object of the inventors. The specification says so repeatedly, and,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as this controversy is between two annealing furnaces, it is not necessary to decide whether the claims are to be so construed as to embrace a furnace built for another purpose. So far as appears, also, both furnaces are built and used for the sole purpose of annealing metal sheets or plates with gas fuel. Now, a furnace to anneal metal sheets must be specially built and operated. The floor must support and resist very heavy loads and strains, as the charges often weigh as much as 40 tons, and sometimes twice as much. The boxes with their contents are arranged in a row, parallel with the sides, and the prime object is to subject every box, surface and contents, to the same uniform heat. Otherwise, some sheets may be burnt by overheating, and some may be underheated, so as to require reannealing. It is desirable to preheat the air that is fed in to assist combustion; for preheating promotes a higher temperature, and is an important factor in economy and a larger output. In the process of annealing, the boxes and sheets are raised to a red heat, and then gradually cooled down; the time needed being 12 to 20 hours. Before the Swindells entered the field with the patented device, annealing furnaces were not satisfactory; they were of old designs, and were ordinarily heated by a coal fire. They were all of the same type; the gases of combustion passed through the furnace from end to end, passing over the boxes in a similar direction, namely, in tandem, one result being that the heat was greater near the firebox than at the farther end. Obviously, there was continual danger either that the first boxes would be overheated, or that the last boxes would not be heated sufficiently and would need to be reannealed. It was difficult also to anneal the contents of each box uniformly; either the top sheets were in danger of being burned, or the lower sheets were in danger of being underheated. These troubles happened, whether the heat came from coal or from gas. The boxes were short-lived, the output was relatively small, and, as the air was not preheated, more time and more fuel were needed to obtain the proper temperature. With these disadvantages to overcome, the furnace of the patent was devised, and a remarkable success followed speedily.

We shall quote the specification in a few moments, but a brief description of what the invention has accomplished may precede the quotation. In the furnace of the patent, uniform heating for every box and uniform annealing for its contents have practically been secured. Instead of the old tandem arrangement, the boxes are now placed between a row of inlet ports for gas and air, respectively, on one side of the combustion chamber, and a row of waste ports on the other. When the gas and the air are ignited, a sheet of flame equally distant everywhere from the row of boxes envelops them all, top, bottom, and each side, and finally leaves the chamber through the waste ports in the floor on the opposite side. The ports for gas and air are vertical, arranged along one side of the furnace at some distance above the floor; air and gas alternating so as to mix readily and burn to advantage. By raising the ports for gas and air above the floor, the flame does not short-circuit, but normally divides, and thus passes both above and below each box to the waste ports, heating the box uniformly during the passage.

Another advantage is obtained by the way in which the air is preheated. While preheating air is not new, the patentees were the first to apply the idea to annealing furnaces. By a simple and efficient arrangement of flues they were able to preheat the air, and also to take care of the great weight of the boxes. The boxes, sheets, and thick metal slabs or bottoms are very heavy, and, in order to support the weight and meet the strain of charging and discharging, the old annealing furnaces ordinarily had a solid floor and foundation. But the patentees solved the problems of support and of preheating by building longitudinal flues in the floor structure, each flue being parallel with the ports for air and gas, with the boxes, and with the waste or outlet ports. Of these flues one supplies air, and its roof is the hot floor of the combustion chamber. Another supplies hot producer gas to the gas ports; and this flue runs along and just within the side wall. The third is the hot waste flue, connecting with the waste ports in the floor. It will be seen that by this construction the longitudinal walls between these parallel flues furnish strong and continuous piers to carry the boxes and to resist the strain of charging and discharging. These flues are placed under the floor, and do not extend outside the furnace. The air in its flue is preheated through the floor of the chamber, and also by the hot wall of the waste flue, and perhaps to some extent by the hot wall of the gas flue. This arrangement has proved to be amply strong for all purposes.

The furnace of the patent has greatly increased the output, has promoted economy of fuel, has lengthened the life of the boxes, and has so improved control over the heat that the necessary continuance of a high temperature and the subsequent cooling are much more readily attained. The furnace may be either single or double, the double form being preferred. In this form, there is only one waste flue in the center, the air and the gas flues being repeated on each side. Two sheets of flame, each the whole length of the chamber, meet at the center and enter the waste ports in the floor. The double furnace is more economical, and probably heats more evenly. Of course, the whole structure becomes very hot in use; but this was also true with the older types and does not account for the success of the patent. Evidently the arrangement, especially of the flues, was the chief factor in a rapid success. The Swindell invention has held the field almost to the total exclusion of other annealing furnaces. Indeed it is not too much to say that the patent has brought the art of sheet annealing to its present stage, and has continuously held an unusually high place.

The specification is entitled "Annealing Furnace," and, after stating that William Swindell and John C. Swindell "have invented a certain new and useful improvement in annealing furnaces," proceeds as follow (except at one place we omit the reference letters and numbers):

"Our invention relates more particularly to furnaces of the class designed to receive and impart heat to annealing boxes containing sheets, plates, or other articles which are to be annealed; and its object is to provide a furnace of such class in which a uniform degree of heat may be imparted to the annealing boxes and an economical consumption of gaseous fuel be attained. * * *

"In the practice of our invention we construct a furnace having an annealing chamber, which is preferably square or rectangular in horizontal section above its floor, and a series of gas and air flues below the floor. The annealing chamber is inclosed by and between the floor, an arched top or roof, side walls, and end walls, openings closed by doors being formed in one of the end walls for the insertion and removal of the annealing boxes and their contents. The required degree of heat is imparted to the annealing boxes in the chamber by the combustion of a mixture of gas and heated air, which is supplied to the chamber through a series of flues located below the floor and supply passages formed in the side walls and connecting therewith, the essential features of which flues and passages are as follows:

"Longitudinal gas-supply flues are formed in the masonry of the lower portion of the furnace, each of said flues extending throughout the length of the furnace below the floor of the annealing chamber and adjacent to one of the side walls. Pipes lead from a suitable gas producer to the gas-supply flues, the flue on each side of the furnace communicating at one end with one of said pipes and the supply of gas therefrom being controlled by a suitable valve. The gas flues communicate with the annealing chamber by a plurality of vertical gas-supply passages, which are formed on the inner sides of the side walls and open into the annealing chamber a short distance above the floor.

"Two transverse air-admission flues, the outer open ends of which may be provided with proper valves or doors, extend from the sides of the furnace toward its center below the gas-supply flues and adjacent to the end of the furnace at which the pipes leading from the producers are located. Longitudinal air-supply and heating flues communicate at one end with the air-admission flues, and lead therefrom to, or nearly to, the opposite end of the furnace, where they communicate through ports with superposed longitudinal air-supply and heating flues. The flues communicate through ducts with a plurality of vertical air-supply passages, which are formed on the inner sides of the side walls, each being located adjacent to one of the gas-supply passages and opening into the annealing chamber on or nearly on a level therewith.

"A central waste or discharge flue extends longitudinally through the furnace below the floor and communicates with the annealing chamber by a plurality of discharge passages. The flue is connected at one end by transverse passages or connecting flues with two lateral waste or discharge flues, which extend through the furnace and passing out of the opposite end thereof are led into a common stack. Each of the flues is provided with a damper, governing communication with the stack.

"The air-supply and waste flues are so located relatively one to the other that the heat of the products of combustion passing from the annealing chamber to the stack shall be imparted as fully as possible to the currents of air passing to the annealing chamber through the flues. To this end a flue is located on each side of the central waste flue and on each side of each of the lateral waste flues. The air flues are each located immediately above one of the lateral waste flues and immediately under and in contact with the floor of the combustion chamber, so that they are effectively heated. The walls separating the waste and air flues are made as thin as is consistent with stability of construction, and it will be seen that the lateral waste flues are each surrounded on three sides by air flues and that there are air flues on two opposite sides of the central waste flue, while the air flue, through which the air passes just prior to its entrance to the combustion chamber, is between the highly heated floor of the latter and the waste flue.

"Access to the gas flues is afforded by openings controlled by doors, and the air flues may also be provided with suitable openings and doors.

"While the most effective results are attainable by a duplicate system of air, gas, and waste flues on opposite sides of the longitudinal central plane of the furnace, as above described, it will be obvious that such duplication is not an essential of our invention and that the same structural and operative principle would be embodied in a furnace of a construction substantially similar to that of one-half of the furnace shown.

"In the operation of the furnace, gas from the producer passes from the pipes into the flues and thence into the annealing chamber by the passages, which distribute it throughout the length of the chamber. Air enters at the open ends of the admission flues and thence passes in divided currents through the flues (13), from which it passes through the flues (14) and is thence distributed throughout the length of the chamber by the passages, each of which is in close proximity to a gas passage. The gas and air meet and are mingled at the outlets of the passages, and the mixture is ignited and burns thereat; the heat evolved being exerted with substantial uniformity throughout the annealing chamber. The hot products of combustion pass from the annealing chamber by the discharge passages into the waste flue, and thence pass through the connecting flues and lateral flues to the stack. In their passage through the flues their heat is imparted to the walls thereof and thence to the currents of air passing through the flues to the annealing chamber. The heat of the waste gases is thus effectually utilized before their escape into the stack."

The claims in controversy are the first and the second:

"1. In a furnace, the combination of a combustion chamber, a gas-supply flue extending longitudinally below the floor thereof, a plurality of gas-supply passages leading from the gas-supply flue into the combustion chamber, an air-supply flue extending longitudinally below and in contact with the floor of the combustion chamber so as to be heated thereby, a plurality of air-supply passages leading from the air-supply flue into the combustion chamber, and a waste flue leading out of and extending below the floor of the combustion chamber and adjoining the air-supply flue.

"2. In a furnace, the combination of a combustion chamber, a gas-supply flue extending longitudinally below the floor thereof whereby it is heated, a plurality of gas-supply passages leading from the gas-supply flue into the combustion chamber, a waste flue leading out of and extending below the floor of the combustion chamber, air-supply flues extending longitudinally below and in contact with the floor of the combustion chamber whereby they are heated, and adjoining opposite sides of the waste flue whereby they are further heated, and a plurality of air-supply passages from the air-supply flues into the combustion chamber."

After what has been said, we need not spend time in discussing the prior art. The combination is novel, and discloses invention, and is entitled to a reasonable range of equivalents. And, indeed, it is at this point that the defendant's principal contention appears. He insists that the patent must be so narrowly construed that his own structure does not infringe, and if he fails here he fails altogether. We have attentively considered his argument, but without being convinced. In a few words, we think it comes to this: The patent calls for an arrangement of flues by which the air is carried twice along and under the length of the chamber before it is ignited, and is thus more effectively heated than if it were only carried once, whereas the defendant contents himself with carrying it only once. This is the substance of his position, although there is much more detail in the argument. But we must decline to accept it as valid. The patent is important and valuable, and is not to be impaired by so slight a change. The claims in dispute are not confined to the double-pass construction—which is claimed elsewhere in the patent, and is no doubt the preferred form—but in our opinion clearly cover the defendant's furnace. There can hardly be room for doubt about claim 1, which reads directly on that structure, and we agree with the District Court that claim 2 covers a duplicate arrangement of claim 1.

The judgment is affirmed, with costs.

PRATT & WHITNEY CO. v. UNION TWIST DRILL CO.

(Circuit Court of Appeals, First Circuit. March 4, 1913.)

No. 997.

PATENTS (§ 328*)—INFRINGEMENT—MILLING CUTTER.

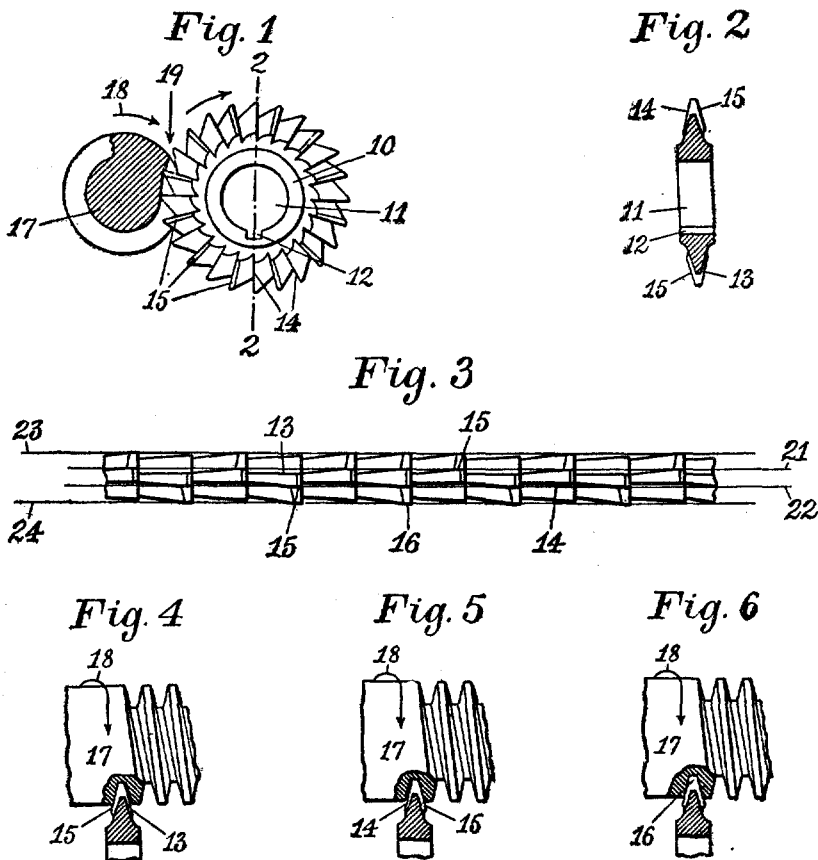
The Hanson patent, No. 703,577, for a milling cutter, claim 1, construed, and held not infringed.

Appeal from the District Court of the United States for the District of Massachusetts; Le Baron B. Colt, Judge.

Suit in equity by the Pratt & Whitney Company against the Union Twist Drill Company. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion of the District Court, by Colt, Circuit Judge:

This is a suit for infringement of the Hanson patent, No. 703,577, dated July 1, 1902, for improvements in milling cutters. The following drawings from the patent illustrate the patented cutter:



*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The specification says:

"This invention relates to the milling cutters employed for forming various contours, the object of the invention being to provide an improved cutter having the contour of its teeth relieved at suitable intervals to permit the ready access of oil to the succeeding cutting edges of the tool and to permit the chips to roll up more freely. * * *

"In the use of milling cutters for forming contours which are not in a straight line two principal difficulties are encountered: First, that of conveying a supply of oil directly to the cutting edges of the succeeding teeth as they follow each other through the cut, this difficulty being due largely to the fact that each tooth is ordinarily made of the full contour to be formed, and each tooth therefore effectually stops and wipes out of the cut all of the oil conveyed therein, thus allowing practically no oil to pass to any succeeding tooth until its preceding tooth has emerged from the cut. The second difficulty is that of rolling up the chip which is carved from a contour departing to any extent from a straight line, the difficulty increasing with the angularity of the contour. These difficulties are obviated by the present invention. * * * As hitherto made, the teeth of such cutters are all of the full desired contour, as represented by the tooth 16 of Fig. 6. In this improvement portions of the contour of these teeth are relieved, as shown at 13 and 14 in Figs. 2, 4, and 5, the unrelieved or cutting edges being indicated by the numeral 15 in each case. In practice and for most purposes it is deemed advisable to relieve the same portion of alternate teeth, as shown in Figs. 1 and 3. It is also preferred, whenever the number of teeth and the contour thereof will permit, to provide the relief on alternately opposite sides of the succeeding teeth, as is also shown in Fig. 3. * * *

"The action of the relieved portions of the teeth in permitting the passage of the oil to the succeeding teeth and the consequent desirability of having these relieved portions on the alternately opposite sides of the succeeding teeth are best understood from Figs. 1, 4, and 5. * * * If the teeth were all of the full contour, as represented by the tooth in Fig. 6, each one would sweep the oil out clean along with the chip, leaving a dry and closed channel behind for the succeeding teeth; but by relieving the alternate teeth, like those of Figs. 4 and 5, the oil flows readily past the relieved portions of each tooth to the succeeding tooth, and by alternating these relieved portions on the succeeding teeth, as shown in Fig. 3, the oil can easily flow to all the teeth in the cut sufficiently to keep the work and the cutter cool. The cutting edge of each tooth is thus immediately behind the relieved portion of the preceding tooth, and therefore immediately in the pathway of the oil which passes that relieved portion.

"For convenience in forming the teeth of these cutters it is desirable to have at least one tooth, as 16, carrying the full contour—that is to say, to leave one tooth entirely unrelieved, like that of Fig. 6—since this facilitates the grinding and gaging of the cutter and also facilitates setting or adjusting it in the desired relation to the work to be done. * * *

"The term 'relieved' is herein used in its more general sense of being sunk below adjacent parts, and not in the specific and technical sense in which the term is sometimes employed as applied to cutting edges, having reference to the backward bevel or clearance which is provided on the rearward sides of cutting edges to facilitate their cutting action."

The two claims of the patent read as follows:

"1. A contour-milling cutter having one or more teeth of the full contour to be cut, and having some of the remaining teeth relieved below the contour at different portions of succeeding teeth.

"2. A thread-milling cutter, provided with closely adjacent integral teeth, having the contour of a truncated V, the succeeding teeth being relieved slightly below the cutting contour on alternately opposite sides, whereby the chips are cleared out of the cut by each tooth while providing for the flow of oil directly to the cutting edges of the succeeding teeth."

These extracts from the patent show that Hanson had the idea that he was the first inventor to cut away portions of the contour or cutting edge

of the teeth in a milling cutter in order to secure the access of the oil and to permit the chips to pass off more freely. His original application contained the following claims in which this broad feature is embodied:

"1. A milling cutter provided with integral teeth having their contour-forming edges relieved below the contour at different portions of the succeeding teeth.

"2. A milling cutter provided with integral teeth having their contour-forming edges relieved below the contour at different portions of alternate teeth."

These claims were rejected by the Patent Office on reference to the prior art, and the patent was finally allowed with the two claims above cited.

It is clear to my mind, in view of the prior Lutz and Reiss patent, No. 93,212, that Hanson was not the first to cut away the edges of the teeth of a milling cutter at different portions of succeeding teeth in order to facilitate the cutting action, and hence that he was not entitled to a patent covering broadly this feature.

Coming, now, to the consideration of the claims as allowed, we find that the first claim is for a milling cutter having one or more teeth of the full contour to be cut, and having some of the remaining teeth relieved, or cut away, below the contour at different portions of succeeding teeth.

The invention covered by this claim rests upon the idea of making one or more teeth of full contour to be cut in a milling cutter having its remaining teeth relieved or cut below the contour at different portions of the succeeding teeth. This claim covers any milling cutter in which some of the teeth are cut below the contour at different portions of succeeding teeth, provided it has one or more of the teeth of the full contour to be cut. In other words, this claim is like the first rejected claim, with the added feature that one or more of the teeth must be of the full contour to be cut. With respect to this last feature, the patent says: "For convenience in forming the teeth of these cutters it is desirable to have at least one tooth, as 16, carrying the full contour—that is to say, to leave one tooth entirely unrelieved, like that of Fig. 6—since this facilitates the grinding and gaging of the cutter and also facilitates setting or adjusting it in the desired relation to the work to be done." This feature was not included in any of the claims of the original application. It was, however, subsequently made the important element in claim 1, as allowed.

The second claim is more specific in character, and it covers, as it seems to me, the essential part of the invention as it lay in the mind of Hanson, as shown by the specification and drawings of his patent. The further consideration of this claim, however, is unnecessary, since the complainant during the taking of the testimony withdrew the charge of the infringement as to this claim.

With respect to the first claim, I may say that, construing it broadly, or according to its language, I have some doubt as to its validity; in other words, I have some doubt as to whether the addition of one or more teeth of full contour to a milling cutter of the Hanson type, which the patentee says was a matter of convenience, involved invention. But, assuming this claim to be valid, I am satisfied that it should not be given a construction beyond the plain import of its terms.

The defendant's cutter differs from the Hanson cutter, as shown in his patent, in two particulars: First, it does not have any of its teeth of the "full contour to be cut"; and, second, it does not have the teeth cut away below the contour in the way described in the Hanson patent and shown in the drawings. It does have, however, the teeth cut away below the contour at different portions of succeeding teeth, and hence it comes within the broad terms of the second element in claim 1.

The question of infringement, therefore, narrows itself down to the proposition whether the "gage tooth" in the defendant's cutter is a tooth of "full contour to be cut" within the meaning of the Hanson patent. The defendant's gage tooth is "relieved" or cut away on one side. I mean by this that there is a substantial part, or about half the cutting surface on one side,

which is cut away, so that this tooth has not the full contour to be cut as defined in the specification and claim of the Hanson patent.

Hanson does not say that a sufficient cutting edge must be left to permit the application of a gage by which it may be determined that the cutting edge of the tooth will correspond with the gage, but his specification and claim specifically limit these teeth to teeth "of the full contour to be cut," which means that no portion of the cutting edge shall be "relieved" or cut away.

For these reasons, I am of the opinion that the defendant's cutter does not infringe the first claim of the Hanson patent, and it follows that the bill must be dismissed, and a decree may be drawn accordingly.

Bill dismissed.

Heath Sutherland, of Hartford, Conn., for appellant.

Ellis Spear, Jr., of Boston, Mass. (Charles E. Hellier, of Boston, Mass., on the brief), for appellee.

Before DODGE, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. This is an appeal from a decree of the District Court dismissing a bill brought by the appellant, alleging infringement of letters patent to Hanson, No. 703,577, July 1, 1902, for "milling cutter."

For a description of the invention, and a statement of the principal questions, we may refer to the opinion of the District Court. Only claim 1 of the patent is in issue:

"A contour-milling cutter having one or more teeth of the full contour to be cut, and having some of the remaining teeth relieved below the contour at different portions of such succeeding teeth."

The specification states:

"As hitherto made the teeth of such cutters are all of the full desired contour, as represented by the tooth 16 of Fig. 6."

In order to permit the ready access of oil to the cutting edges of the tool, and to permit the chips to roll up more freely, Hanson sought to improve the old type of milling cutter by cutting away portions of the teeth. Teeth so cut he calls "relieved."

The District Court correctly held that, in view of the prior Lutz & Reiss patent, No. 93,212, Hanson was not entitled to cover broadly this feature. Each tooth of the Lutz & Reiss cutter is notched, or "relieved," if we use that term broadly, and apparently enough of every tooth remains to serve for the application of a gage if that were desired. This is true, also, of all the teeth of defendant's cutter, every one of which has some portion of its cutting edge removed or relieved. One of these teeth, however, retains more of the cutting edge than others, and is doubtless specially designed to perform the function of a "gage tooth." According to the testimony, this one tooth, which is cut away but partially on one side, is slightly more convenient for gaging than the other teeth, which are partly cut away on both sides, but which still retain enough for gaging purposes. Except for this one tooth, specially designed for gaging, there could be no contention that claim 1 is infringed by the defendant's cutter.

Bearing in mind that both the complainant and defendant are entitled to improve upon the full contour cutter of the prior art by providing notches in the cutters, it follows that invention must be found, if at all, in specific applications of this idea. Hanson's cutter teeth were relieved or cut away in a special manner. Except the tooth of full contour, which had cutting edges on both sides as well as at the top, the teeth were staggered; i. e., the alternative sides of successive teeth were completely relieved, so as to have no cutting edge. This arrangement is described in claim 2, which is not in suit, as follows:

"2. A thread-milling cutter, provided with closely adjacent integral teeth, having the contour of a truncated V, the succeeding teeth being relieved slightly below the cutting-contour on alternately opposite sides, whereby the chips are cleared out of the cut by each tooth while providing for the flow of oil directly to the cutting edges of the succeeding teeth."

The full contour to be cut "is complete in any two adjacent teeth"; but, because one tooth is not opposite the other, it is impractical to apply a gage to determine the full contour.

This disadvantage of the staggered tooth arrangement in respect to gaging led to the retention of one tooth of old form. This one tooth enabled the cutter to be gaged in the same manner that full contour cutters of the prior art could be gaged—by applying a gage to a single tooth.

In the complainant's milling cutter we have, therefore, the combination of a gage tooth with other teeth, which are not gage teeth because staggered, and not in contact with both sides of the contour to be cut. In claim 1, however, the teeth other than the gage teeth are described in very indefinite terms:

"Some of the remaining teeth relieved below the contour at different portions of succeeding teeth."

The "relieved" teeth shown in the patent are cut completely away on one side.

The defendant's teeth are not cut completely away on either side. They are partly "relieved" on each side, except the gage tooth, which is partly relieved on one side only, and unrelieved on the other side.

The District Court held that the expression, "one or more teeth of the full contour to be cut," meant that no portion of the cutting edge of these teeth was cut away or relieved. The appellant contends that this was error, for the reason that one function of such a tooth "of the full contour to be cut" is to furnish a "gage tooth" to serve as a gage or guide in regrinding the cutter, and that a tooth might still perform this function, though a portion of its cutting edge were removed or "relieved."

It is contended that it is not necessary that the edges of the tooth be continuous, provided that they be of sufficient extent to support the gage when applied, and to clearly indicate whether or not the teeth have been ground to correct shape.

But there is a difficulty in applying this argument consistently. Claim 1 is for a milling cutter having two kinds of teeth—full contour teeth and relieved teeth. If we interpret the term "full contour" to

include a relieved tooth, and if a relieved tooth is of full contour if capable of being gaged, then by such interpretation we have destroyed the only distinction made by the claim between the two kinds of teeth. The claim, then, instead of being limited to a combination of gage teeth and teeth which are not gage teeth, covers a cutter, in which all teeth are gage teeth. In other words, the claim then is broad enough to cover any cutter having nicked teeth that can be gaged.

This is not merely a verbal difficulty, arising from the interpretations placed upon the language of the claim. The difficulty is more substantial. The teeth of the cutters of the prior art were all capable of being gaged, since they were of full contour. It is proven that teeth may be relieved, so as to permit the flow of oil and permit the chips to roll up, without destroying the capacity of the teeth to be gaged. It was old to insert notches in the teeth of cutters for this purpose. Since Hanson adopted the staggered teeth, relieved entirely upon one side, such teeth did not possess the advantage of the teeth of the prior art in respect to gaging. It was from this special mode of relieving teeth that arose the practical necessity for a gage tooth. Other applications of this general idea of relieving a tooth did not destroy the capacity for gaging, which was a feature of teeth of full contour, and also of teeth which, though nicked or grooved, retained enough of the lines of a full contour to permit gaging.

The defendant's device has teeth which may be said to be staggered at the upper cutting ends; but all teeth preserve enough of the lines of the full contour to permit the application of a gage to any tooth. It may be said that all of the teeth are gage teeth, although one is a slightly better gage tooth than the others.

There is not, however, in defendant's device the combination of teeth, incapable of gaging, with a gage tooth.

We are of the opinion that claim 1, if given the interpretation which complainant would have us place upon it, is practically meaningless in its failure to distinguish between the two kinds of teeth; and, if restricted to teeth relieved in the specific manner described in the specification and in claim 2, is not infringed.

Complainant's argument that the gage tooth of the defendant is substantially the equivalent in function of the gage tooth of complainant, and that infringement cannot be avoided merely by evading the letter of a claim, provided the means are substantially equivalent, would be a sound argument in many cases; but in this case the fact that all the other relieved teeth of the defendant are substantially equivalent to the complainant's single gage tooth, and possess a feature which was common to milling cutters of the older type and not new with Hanson, deprives this argument of force as applied to this particular case.

In construing the claim as a whole, it is evident that the patentee intended to make a distinction between teeth of full contour and teeth relieved below the contour. An interpretation which destroys this distinction is not permissible, since the claim then becomes meaningless.

We are, therefore, of the opinion that the District Court was justified in giving the words, "of full contour to be cut," their ordinary meaning, which, as is pointed out by the learned judge, accords with

the language of the specification, "carrying the full contour; that is to say, to leave one tooth entirely unrelieved, like that of Fig. 6."

The decree of the District Court is affirmed, and the appellee recovers costs in this court.

PROTECTOR LAST RE-ENFORCING CO. v. JOHN PELL & SON, Inc.

(District Court, D. New Jersey. April 5, 1913.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—REINFORCED LAST.

The Baker patent, No. 870,760, for a reinforced last having a fiber-topped heel, with an under cushion of leather or other yielding material to enable the last to be used without injury during the heeling operation, was not anticipated, and discloses invention of a meritorious character; the device being one of great practical value. Also, *held* valid as against a claim that the patentee was not the real inventor, and infringed.

2. PATENTS (§ 237*)—INVENTION—SUBSTITUTION OF MATERIAL.

While as a general rule the substitution of one material for another does not involve invention, it may do so if some new and useful result is thereby attained.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 374, 375; Dec. Dig. § 237.*]

3. PATENTS (§ 35*)—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.

The success of a patented device, which met a general demand that many others had tried unsuccessfully to supply, is true indication of invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. § 35.*]

4. PATENTS (§ 36*)—VALIDITY—EVIDENCE OF INVENTION BY OTHERS.

Testimony that others than the patentee were the real inventors of the thing patented, adduced in an infringement suit to defeat the patent, should be of such dignity and weight as to satisfy the court beyond a reasonable doubt, or it should be unhesitatingly rejected.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 40; Dec. Dig. § 36.*]

In Equity. Suit by the Protector Last Re-enforcing Company against John Pell & Son, Incorporated. On final hearing. Decree for complainant.

George H. Maxwell, of Boston, Mass., for complainant.

W. Jay Ennisson, of New York City, for defendant.

CROSS, District Judge. The bill of complaint alleges that patent No. 870,760 for a re-enforced last, for boots and shoes, issued November 12, 1907, to Winthrop B. Baker, assignor to the complainant, and which is owned by it, is valid and has been infringed by the defendant. The bill prays for the customary relief. The defendant denies the validity of the patent, but asserts that if it is mistaken in that respect it nevertheless has not infringed it.

[1] The patent contains three claims, all of which are in issue; they are as follows:

"1. A wooden last for boots or shoes provided with a recess at the comb portion and with a protective cushioning plate fitted in said recess, said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cushioning plate comprising an outer layer of fibrous substantially incompressible material and an under layer of cushioning material, substantially as described.

"2. A protective comb plate for wooden lasts comprising an outer layer of fibrous substantially incompressible material and an under layer of cushioning material secured thereto and having its sides and rear end shaped to conform with the sides and rear of a last at the comb portion thereof, substantially as described.

"3. A last provided at its comb portion with a protective cushioning plate comprising an outer layer of fibrous substantially incompressible material and an under layer of cushioning material and means for attaching said protective plate to the comb of a last, substantially as described."

The character, nature, and object of the invention, as set out by the patentee in the specification of the patent, are in part as follows:

"My invention relates to improvements in lasts used in the manufacture of boots and shoes, and it has for its object to so construct and protect a wooden last that it can be used during the heeling operation.

"In the manufacture of boots and shoes, it is very desirable to be able to attach the heels thereto without removing therefrom the wooden last upon which the shoe has been lasted, and upon which it has been supported and shaped during the operation incident to its manufacture up to the heeling operation, and the consequent relasting of the shoe after the attaching of the heel causes a distortion of the upper and sole of the shoe, which is objectionable, and the labor incident to the withdrawal of the wooden last and the subsequent relasting adds to the cost of production. The result is that many attempts have been made to reinforce and strengthen the heel portion of wooden lasts so that they may be capable of withstanding the tremendous pressure incident to the attaching of the heel and the proper compression of the heel and toplift.

"It has been found impracticable to use the ordinary wooden last, for the reason that there is considerable play between the spindle of the jack of the heeling machine and the thimble of the last, and therefore the last is liable to tip while under compressive strains, thus producing torsional strains between the jack spindle and the last, which frequently splits the last at the heel portion. Furthermore, the metallic block which supports the spindle of the jack of the heeling machine cuts into the fibers of the wood and destroys the surface of the last in contact therewith.

"The object of the present invention, therefore, is to provide a pressure receiving cushioning protective plate to be secured to a wooden last at the comb portion thereof, and thus protect the last from splitting and from being injured by the block of the heeling machine."

Upon the question of the validity of the patent, the bill shows that certain specified patents in the prior art are claimed to anticipate it; prior use is also asserted, and the allegation made that Baker, the patentee, was not the real or sole inventor thereof, but that the idea of the alleged invention was suggested to him by three different persons, on as many different occasions, and that he appropriated it from them. These matters will hereafter be considered somewhat in detail, but it may as well be settled from the outset that if the patent is valid the defendant has infringed it. And this notwithstanding the claim made in behalf of the defendant that the alleged infringing devices, which by the way are perfect copies of the patented article, have not been brought home to the defendant. It may be admitted that a clearer case might have been made, but even so sufficient facts appear to make out, in the judgment of the court, a *prima facie* case. The defendant was thereby put upon its defense, which, however, it did not see fit to

make, but chose rather to stand upon the alleged insufficiency of the complainant's proofs. Of course, it had a perfect right to do this, and take its chances of winning out on that ground, but with the facts all pointing as they did in but one direction, and that towards the defendant, it was a hazardous course to pursue, so hazardous indeed as to warrant the suggestion that it had no defense to offer.

With regard to the prior art, it may be said of the "anvil heel type" of last, concerning which considerable testimony was taken, that the defendant admits it has no relevancy to the case; consequently no further attention will be paid to any of the patents of that type in evidence, unless they have been particularly referred to by defendant's counsel. Those, however, which counsel for defendant has referred to in his brief, and apparently relies upon, will now be considered in detail, and first among them is one issued to R. L. Campbell, No. 337,131, in 1886. This counsel admits lacks any underlying layer of cushioning material. Indeed, it may fairly be said to belong to the anvil type. It shows an iron plate to protect the cone of the last from the force and effect of the heeling blow. It in no wise suggests, must less does it embody, the device of the patent in suit.

The next was issued to one J. Elam, No. 667,204, in 1901. This again shows the cone protected, or attempted to be, by an iron plate so placed as to receive the blow of the heeling operation. This device is also of the anvil type; indeed, the inventors speak of the plate as an anvil; furthermore it is entirely apart from the idea disclosed by the patent in suit.

Another patent referred to was issued to one Davis, No. 770,048, in 1904. Speaking of this patent, defendant's counsel is content with merely saying that it "illustrates a layer of some material along the cone of the last there shown, but makes no reference to this plate in the specification." Notwithstanding the slight attention given this patent by counsel, it has been carefully examined without, however, discovering in it anything which could reasonably be said to anticipate the Baker patent. Defendant's counsel discovers a dotted line and imagines that it represents "a layer of some material" which perhaps was intended for use as a cushioning device. His conjecture may be correct; but since he admits that no reference to it can be found in the specification, it can hardly be regarded as instructive to those seeking the device of the patent in suit.

Next in order is a patent to Scott, No. 679,514, 1901, for a thimble for a shoe last. This patent shows a thimble having a flange extending over the cone of the last to which it is attached by screws. It is claimed also that underneath the plate referred to, as indicated in the drawing by a dotted line, is imposed some other plate which counsel claims is suggestive of the cushioning layer of the patent in suit; he, however, admits that no reference is made to it in the specification, hence whatever is claimed in respect to it is highly speculative, and must be ignored as it was in the consideration of the Davis patent.

But one other patent has been referred to, that of Turner & Cote, No. 300,414, issued in 1884, for a last. This patent shows a plate of iron slightly raised from the cone of the last so that, when it is pressed

upon by the block of the jack of the heeling machine, the plate will strike against the wood of the top of the heel of the last, and, it is claimed, deliver the blow over its entire surface. It would seem, however, that a blow delivered to a plate thus raised, however slightly, from the wood of the last, would possibly impart a more uneven and more destructive blow to the wood than it would if it rested, in the first instance, firmly against the cone of the last. Integral with this plate is a hollow shaft fitted into a hole in the last, at the foot of which is a cushion of leather upon which the end of the hollow shaft rests. This construction counsel claims is a cushioning device, but even so it does not foreshadow the combination of the Baker patent. Moreover, there is no evidence that the device is practicable; but, on the contrary, there is evidence that it is impracticable and has proved to be a failure. At all events, and admitting everything that can properly be claimed for it, it constitutes but a mere suggestion of a cushioning device in connection with an iron plate to which, however, it was not attached, and with which it was not in combination.

An important admission made by defendant's counsel will not be set forth. He says:

"It is noticeable that the patent art shown in the record beyond the peculiar form shown in the Turner & Cote patent does not contain patents with protective plates of hard material over a cushioning layer."

The admission thus frankly made was entirely warranted by the state of the art as disclosed in the record.

Certain testimony was introduced on the part of the defendant, with reference to the prior use of the noncushioning protective plates. But since such devices do not meet, and in no respect attempt to meet, the claims of the patent in suit, it is unnecessary to spend time in their consideration.

Notwithstanding the admission by defendant's counsel above referred to, concerning the patent prior art, he nevertheless claims that a prior use of a last, involving the principle of the Baker last, has been shown, and that such use was so long continued and has been so conclusively proven as to defeat the patent in suit. His argument in this respect is founded upon the testimony relating to a pair of lasts called the "Banister lasts," and known in the case as exhibits Nos. 41 and 42. The use referred to may, however, fairly be termed experimental. Mr. Lance, the foreman of the heeling and finishing department of the Banister factory, testified that he first saw those lasts "somewhere about 15 years ago," while another witness thinks that it is about 15 years since they ceased to have lasts made in that way in that factory; and Mr. Lance, after testifying that he had seen lasts fitted up similar to the exhibits just mentioned, was asked how long ago, and answered:

"Well, that's on some of our older lasts you know; we don't have them on any of our later lasts at all, only the leather part."

There is also evidence of experts in the case which shows that in their opinion these lasts were really old ones which had been repaired where the wood had broken away by substituting for the

broken wood layers of leather, whereupon the last was mounted for use substantially after the manner of the Denny patent No. 280,724 of 1883. Whether, however, the testimony just referred to is correct or not, is perhaps immaterial, since the lasts in question, whenever actually made, concerning which the testimony is most vague, are really of the anvil type; they have the iron plate above the cone, and a shank running through the last in contact with and resting upon, though not actually integral with, the heel plate. This fact appears not only from the testimony, but from an examination of the lasts themselves. Lasts thus constructed do not meet or narrow the construction of the claims of the Baker patent. A witness, McNeill, also testified to having seen lasts somewhat similar to the Banister lasts. His testimony, however, is not impressive, if for no other reason than that he appeared to yield too willingly to the suggestions of leading questions. But aside from that his testimony shows that the last he refers to was used experimentally and as one of many devices used and thrown aside in an endeavor to find a reliable one. This appears from the following question and answer:

"Q. Were the lasts having a metal plate on top of the leather in regular use in connection with the manufacture of shoes? A. Yes, they were put on so as to protect the last from breaking; we used that scheme once; we tried so many things to protect the tops of the lasts. * * * After years of trying, I have come to advise my customers to have nothing but two or three leathers, a tube, and a rivet."

Furthermore, the testimony of this witness is so general and indefinite as to fall far short of the character of testimony which the law demands in order to establish a prior use.

Again, it is contended on behalf of the defendant that no metal or other hard plate is necessary for the protection of the cone of the last; that a strip or two of leather nailed thereon are of themselves sufficient protection; that such a method of protection was very common and had been for many years; and that Baker himself admits that he had known of it for from 20 to 25 years. It is unnecessary, however, to take up time in answering this line of argument, since such a construction is obviously outside of the scope of the patent in suit. The defendant corporation is not complained of on any such ground, or because of any such use. Those who, with it, think that leather alone affords the best or even a sufficient form of last-protection, are at liberty to adopt and use it. A long line of similar argument, as that last makers in general prefer leather tops to fiber tops; that some makers after using fiber tops have changed back to leather tops; and that the leather top needs no plate, either of metal or fiber, but is better without—requires no further or special mention.

[2] Assuming that a use, other than experimental, of protectors formed of layers of metal and leather have been proved, it is further argued in behalf of the defendant that there is no novelty or invention involved in substituting for the metal plate a layer of fibrous substantially incompressible material, which the Baker patent calls for, and that such a substitution is a change of materials only.

It is true that the substitution of one material for another is ordinarily a mere matter of mechanical judgment, and does not involve invention, but while that, speaking generally, is so, it nevertheless does not fully state the rule given below, which has been followed ever since it was first promulgated by Mr. Justice Bradley, in *Hicks v. Kelsey*, 18 Wall. 670, 673 (21 L. Ed. 852). He there says:

"The use of one material instead of another in constructing a known machine is, in most cases, so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called an invention, unless some new and useful result, an increase of efficiency, or a decided saving in the operation, is clearly attained."

As illustrative of what might be called exceptions to the general rule, see *King v. Anderson* (C. C.) 90 Fed. 500; *George Frost Co. et al. v. Cohn et al.*, 119 Fed. 505, 56 C. C. A. 185; *Hogan v. Westmoreland Specialty Co. et al.* (C. C.) 163 Fed. 289; *National Casket Co. v. Stoltz* (C. C.) 153 Fed. 765; *George Frost Co. v. Samstag et al.*, 180 Fed. 739, 105 C. C. A. 37. Patents having to do with the material of which the filaments in the bulbs of electric lighting lamps are composed are also illustrative.

As already appears, the Baker invention has to do with the nailing of heels to shoes by means of power machines. During this operation, a crushing blow is struck on the heel of the last, the effect of which is to split and break down, unless protected, the thin portion or cone of the last. This operation was so destructive to lasts that some manufacturers just before it was performed were accustomed to withdraw the wooden last and insert instead an iron one to receive the shock of the blow of the heeling machine. But to do this caused delay, and delay meant loss and expense; consequently they had to choose between one of two evils, either to have a very considerable portion of their lasts quickly destroyed, or else incur loss and expense in the direction above indicated. The evidence shows that multitudinous unsuccessful attempts covering a period of many years were made to solve the problem which Baker, according to the evidence, ultimately and successfully solved. Even the defendant recognized the value of his invention and became a licensee thereof, and so continued for a considerable period of time.

[3] As has already been shown, the prior art discloses no successful attempt to solve the problem which was solved by the patent in suit. That the invention in question is valuable, is attested by the large and increasing sales of the patented device. The success of the invention and the want which it met are true indications of invention. Several last-manufacturers have testified that they do not push the invention because it costs them more, some say about three times as much, to supply lasts with it, than it does to supply lasts with other protective devices; and yet, since their customers demand it, they are compelled to furnish it, notwithstanding their profits on the lasts are thereby materially lessened, since they get no more for them with the patented device attached, than with the other and cheaper devices.

Furthermore, several witnesses offered in defendant's behalf testify to the practical value of the device of the patent in suit. For instance, Mr. Belcher, a manufacturer of lasts, says that he regards the invention as of real practical value, and gives his reasons therefor. He also stated that he bought of the complainant, in 1907, 1,000 pairs of their lasts; in 1908, 1,400 pairs; 1909, 7,650 pairs; 1910, 17,465 pairs; and 1911, 21,837 pairs. Another of defendant's witnesses, an office manager of a large last manufacturing concern, testified that, while they had not pushed the Baker last, they had nevertheless sold of that make during the years 1909, 1910, and 1911, 99,650 pairs. Mr. Paine, a witness for the complainant, who was superintendent of the Regal Shoe Company for the past eight years, in answer to appropriate questions, said:

"In the Regal Shoe Factory we make a great many trial shoes. On these trial lasts we had some fiber tops. My attention was called to this by Mr. Morehouse, who asked me to try them out on the next order which we placed with him. This was done with such good results that we continued to order our lasts made with this top. All damaged lasts or lasts that were unfit to use again are brought to my office before being burned, that I can see just the condition they are in. I noticed that whenever a fiber or top last came in on the rack with the others, that the trouble was always in some other part of the last, rather than in the top. On the regular lasts, the top would always split out, become ragged, and tear the linings of the shoe. The only criticism we ever had (of the fiber top last) came from the cost-accounting department, who asked if I thought the lasts were worth the extra price. I told them that I thought they were worth the extra price and had no further criticism."

He also gives as his reason for regarding the fiber top lasts as a very much better and more durable last than the older forms, that there is a resiliency to the fiber and leather together which does not permit the cone of the last to be splintered as is the case of the wood top. There is other testimony on this line showing the practical advantage and usefulness of the invention. That it has great practical value over the other forms of last-protection shown in the case, appears beyond controversy. The gist of the invention seems to lie in the combination between the fiber and leather. An expert witness on behalf of the complainant, after giving the result of a somewhat remarkable test designed to show the relative efficiency and durability of this last as compared with lasts having other protective devices, says:

"I attribute this result to the fact of the cushion that the leather gives when the pressure is applied through the fiber top. The fiber in itself, in conjunction with this cushion of leather, distributes the pressure more evenly over the surface of the whole cone. With fiber directly on the wood, the pressure settles the wood down, but with the fiber on leather on the wood the pressure on the fiber will not settle the wood down appreciably. The fiber used in conjunction with the leather seems to have something in the nature of resiliency so that it gives something in the nature of hard rubber, only not quite so much so. The fiber, in itself, stays hard and keeps in shape, and yet it will give, because the leather under it permits it to. The fiber helps out the leather and the leather helps out the fiber. It is the combination of the two that makes the success of the fiber top."

In further explanation of what he meant by using the word "gives" in the above quotation, he said in substance that he did not mean that

it compresses, but that it yields without distorting itself; "that it never swages out sidewise so as to spread." The importance of this testimony lies in the fact that it appears in the case that iron or other metal plates dent and crack and swage, which necessarily impairs, in the first place, the efficiency of the protector itself, and sooner or later of the last. Before leaving this branch of the case, an extract from the testimony of another of complainant's experts will be given for the purpose of setting forth somewhat more at length, than has already been done, the advantages of the last-protector in question:

"This construction provides a last which can be kept in the shoe continuously until it is finally taken out after the shoe is substantially finished. The reinforcing plate constructed as set forth makes the upper heel portion of the last strong and durable to receive the very heavy thrusts and pressure of the heeling operation without being distorted or prematurely worn down, thereby effecting a great saving in labor by avoiding the necessity for removing the last, inserting an iron form for the heeling, and then reinserting the last. It is also an important improvement in that it avoids the distortion of the upper of the shoe which is inevitable in reinserting the last after it has been once removed before the shoe is finished.

"I consider the special form of protective cushioning plate set forth of special importance for effecting these advantageous results, for the reason that the hard, tough fiber employed for the outer portion unites the strength of metal with a shock-deadening, impact-absorbing property, thus serving effectively at the same time as a wear-resister and a jar-dampener. This is especially for the reason that there is a certain amount of give and flexibility to the fiber. No matter how small the jack block may be, the built-up protective top spreads the pressure over a considerable area, i. e., substantially the entire top of the comb or ankle portion of the last, while eliminating and practically entirely avoiding the hammering and swaging blows and thrusts which would otherwise be delivered upon the underneath material of the last. By reason of this, and of the relatively large size of the plate, the pressure cannot be localized to have a destructive effect on any particular spot at any time.

"By reason of the co-operative relation between the underneath layer, illustrated as leather, with the hard fiber of the top, a certain amount of self-adjustment and relative give for proper seating is possible, both between the hard fiber top plate and the wood of the last and between the fiber top plate and the supporting jack block, whereby the wood of the last is protected from bruising and splintering, and at the same time destructive action upon the fiber top is minimized. This co-operative relation between the special fiber top and the underneath cushioning layer further results in reducing and deadening the thrusts upon the cushioning layer which, were it directly engaged by a metallic surface, would result in its early destruction, as the hammering is too severe to be withstood by a substance such as leather, or any other material known to me which has the requisite yielding property.

"This fiber top construction is further important in that it permits a slight yielding, and an effective shock-deadening effect lengthwise of the last whereby the wood is protected from transverse thrusts and especially twisting angular thrusts which always occur to a greater or less extent upon the supporting jack post. This results from the fact that such thrusts imparted from the wood of the last to the protective plate edgewise thereof are transmitted through a considerable extent of the stock of the fiber to the central jack pin, and this affords a sufficient yield and shock-dampening property of itself without the interposition of a separate cushioning pad in this direction. The hard, tough nature of the fiber causes the plate to transmit these lateral edgewise thrusts to the supporting jack pin without distortion or mutilation of the plate and results in a relatively long period of usefulness for the last, without any material enlargement of the central jack pin receiving hole in the plate, and hence preventing any distortion and spreading of the comb or ankle portion of the last."

Other evidence of like character might be quoted, but to avoid undue prolixity it will not be done, and indeed the testimony already quoted or referred to is so reasonable and commends itself so strongly to one's judgment, as not to require cumulative support.

There is one other matter about which a great ado was made at the argument, and concerning which much testimony, and as it seems to the court unnecessary testimony, was taken. Indeed, it might be said to be a feature of this case that every little matter has been unduly magnified, apparently in furtherance of a remarkably determined effort to break down the patent in suit. The point referred to, as stated by defendant's own counsel, is that the invention is not that of Baker, or at least that he was not the sole inventor thereof. In support of this proposition, three witnesses have testified that Baker, before he filed his application for the patent in suit, showed them, not all together, but when apart from each other, a last-protector consisting of a layer of fiber, without the layer of leather underneath the layer of fiber, and that they suggested to him the advantage of the latter construction. None of these witnesses, however, had the courage openly to claim that he was the inventor of the device as patented. Baker absolutely denies their statements. Furthermore, their testimony as to time, place, and circumstance is exceedingly indefinite. Again, it is a rather remarkable circumstance that these men, or the concerns with which they have been connected, have bought lasts made under the Baker patent, for the intervening period of four or five years, without protest that Baker was not the inventor, and without claim that either of them was its inventor, or that either of them was in any wise or to any extent connected with its invention.

[4] Testimony of the character under consideration, adduced for the purpose of defeating a patent, should be of such dignity and weight as to satisfy a court beyond any reasonable doubt of its accuracy, or else it should be unhesitatingly rejected. Were the rule otherwise, no patent would be safe against an insidious assault of this character. The attempt made to reinforce the evidence referred to by certain outside correspondence is ineffective for that purpose. It is obviously open to too many interpretations, other than that put upon it by defendant's counsel.

However, in further answer to the claim of said witnesses to be the inventors in whole or in part, of the patent in suit, the complainant has introduced much evidence intended to show that the invention in question was made some months prior to the time when the alleged suggestions were severally made to Baker, the patentee. It is not deemed necessary, however, to consider this evidence, as I am thoroughly convinced that the testimony of the three witnesses above referred to, and any other matters incidental thereto, ought not, for reasons already given, to be deemed sufficient to destroy this patent.

Finally it appears that prior to the time of filing the application for the patent in suit, Baker filed an application for a last-protector consisting merely of the fiber layer without the cushioning layer of leather. This application he failed to prosecute, and it is claimed on behalf of the defendant that he thereby abandoned whatever invention was embodied in that application, and that it is now open to the public.

The failure to prosecute an application is not, however, necessarily an abandonment of the invention; furthermore, the abandonment of the application for a patent for the fiber layer only, did not effect either the grant or validity of the patent in suit for a combination of fiber and leather, the application for which was filed but four or five months after the alleged abandoned application was filed.

A decree in favor of the complainant will be entered in the usual form, with costs.

STROMBERG MOTOR DEVICES CO. v. PARKER.

(District Court, N. D. Illinois, E. D. April 28, 1913.)

No. 30,815.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CARBURETER.

The Perkins patent, No. 731,218, for a vaporizer or carbureter, the prime object of which is to maintain a constant mixture of air and fuel, while not anticipated and valid, is entitled to only a narrow construction, and, as so construed, *held* not infringed.

In Equity. Suit by the Stromberg Motor Devices Company against Leonard A. Parker. On final hearing. Decree for defendant.

Brown & Williams, of Chicago, Ill. (Charles A. Brown, of Chicago, Ill., of counsel), for complainant.

Heidman & Street, of Chicago, Ill. (Hillary C. Messimer and A. M. Austin, both of New York City, of counsel), for defendant.

SANBORN, District Judge. Bill for infringement of patent 731,218, issued to Oscar B. Perkins June 16, 1903, on a vaporizer or carbureter. The suit is defended by the manufacturers of defendant's device, L. V. Fletcher & Co., of New York.

As shown in the patent, the Perkins device is a mixing chamber to which air and gasoline are admitted by a spring-controlled valve located in the bottom of the chamber. Two spiral springs, one longer and lighter than the other, may be made to bear upon the top of the valve. Above the springs is a plate, whose position is regulated by a thumbscrew. Normally only the light spring bears on the valve, but both may be brought to bear, and their tension increased, by tightening the screw. Thus there is a two-spring adjustment governing the whole carbureter, while defendant uses a three-spring adjustment in an auxiliary air valve, which does not directly govern or control the fuel port. When the vacuum pull of the engine is exerted, the valve is raised, oil and air admitted and mixed, and furnished to the engine; the amount being regulated exclusively by the spring tension previously determined, and without using the common butterfly throttle valve.

The important specific question is the position of the oil port. This is shown by the drawing to be in the valve seat, so that the latter must open in order to get any oil vapor in the mixing chamber. De-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fendant contends that it must be so located to be within the spirit and object of the invention, but complainant insists the contrary.

It appears that the Perkins device has never been sold or used, except in an experimental way. In 1912 plaintiff had begun an infringement suit against Fletcher & Co. for infringement of the Goldberg patent of 1909, relating to a two-spring adjustment of an auxiliary air valve used with a carbureter. That suit was dismissed by plaintiff, because it was found that a similar adjustment was used in the Peerless car of 1906. Complainant then purchased the Perkins patent for \$250, and brought this suit. It seems that, if defendant infringes the Perkins patent by its three-spring adjustment of the auxiliary air valve, complainant must, in like manner, have infringed the Perkins structure by the Goldberg device, prior to its purchase of the former. At the time the patent issued, Perkins was in the motor boat business, but went into the automobile business in 1909.

Defendant's carbureter is in appearance quite a different thing from Perkins'. It uses two fuel ports and one air inlet in its main port, and a three-spring adjustment to govern a second air inlet as an auxiliary. The latter is substantially the same as the Perkins device, omitting the fuel port. Complainant insists that the three-spring adjustment of the auxiliary air valve, together with the secondary fuel port in defendant's carbureter, are an equivalent to Perkins. Defendant must use the ordinary butterfly throttle, while the Perkins valve may be used with or without this.

Perkins' invention has had no influence on, and never was used in, the automobile carbureter art. It should not rightfully be allowed to dominate that art, unless infringement is clear. From the specifications, drawing, and patent claims the idea is apparent of a device in which the valve governs both air and fuel inlets, and keeps the mixture of the air and gasoline at a constant ratio. To use the inventor's own words:

"The prime object of the present invention is to provide a vaporizer in which the ratio of the air and fuel in the explosive mixture will remain the same."

His drawing shows the same condition by locating the fuel port in the valve seat. Defendant does not use the "constant mixture" method, nor locate its secondary fuel port in the valve seat of its auxiliary. Unless the patent claim and description are to be given a pretty liberal construction, it does not infringe.

This is not a case for liberal interpretation. The patent has earned no such position. The patentee uses a vague term in his claims, and cannot complain if his description narrows that term. He claims a vaporizer, comprising a shell having air and oil supplies and a valve coacting therewith, two springs, and means for bringing one or both into action to resist the opening of the valve. The term "coacting therewith" is as vague as possible; but the specifications and drawings show its meaning to be "governing" or "commanding"; so that neither oil nor air can enter unless the valve is open. On the patentee's own construction there is no infringement, because the three-spring adjustment of defendant's auxiliary valve does not gov-

ern either one of its fuel ports. It does, indeed, seem to coact with them; so do the rubber-tired wheels of the car on which they are placed. Nor is there infringement for another reason—that defendant does not maintain a constant mixture of air and fuel. This is declared by the patentee to be the prime object of his invention.

The Perkins patent may easily be held valid. It was not anticipated by the Allman or Burger patents, or any other prior device, and possesses utility and merit.

Infringement not being shown, the bill is dismissed.

VAUGHN v. GILMORE.

(District Court, N. D. Illinois, E. D. April 28, 1913.)

No. 30,951.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BOTTLE OPENER.

The Vaughn patent, No. 1,029,645, for a bottle opener, for opening bottles having crown caps, *held* not anticipated, valid, and infringed.

In Equity. Suit by Harry L. Vaughn against Leslie A. Gilmore. On final hearing. Decree for complainant.

Knapp & Campbell and Offield, Towle, Graves & Offield, all of Chicago, Ill., for complainant.

Samuel Friedlander, of Chicago, Ill., for defendant.

SANBORN, District Judge. Infringement suit on patent No. 1,029,645, issued to plaintiff June 18, 1912, for a crown cap bottle opener. Both parties make the same devices, so the only question is whether the patent is valid.

Claim 3:

"A bottle opener consisting (1) of a fixed base, (2) having a right angular extension; (3) said extension having a semicylindrical end, adopted to engage the cap of a bottle, (4) and a resilient brace therefor."

Three of these elements are present in the patent issued to the same plaintiff December 21, 1909, No. 943,759, except that the right-angle extension is in the first patent an "inclined portion connecting the semicylindrical portion with the base." The second patent adds the resilient brace, and generally improves the utility and appearance of the device as a whole. There is a new mode of operation and an improved result. Within *Murray v. Orr & Lockett Hardware Co.*, 138 Fed. 564, 71 C. C. A. 68, the patent should most clearly be sustained. The device is exceedingly useful, and has been sold in large numbers. It can be fastened to a bar, wall, window casing, or any fixed support, and is simple, handy, and exceedingly rapid in operation.

The patent being valid within narrow limits, and infringed, there should be a decree for complainant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

SOUTHERN RY. CO. et al. v. UNITED STATES (INTERSTATE COMMERCE COMMISSION et al., Interveners).

(Commerce Court. March 11, 1913.)

No. 82.

1. COMMERCE (§ 85*)—INTERSTATE COMMERCE ACT—DISCRIMINATION BETWEEN LOCALITIES—FINDING OF INTERSTATE COMMERCE COMMISSION.

Section 15 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1911, p. 1297) confers on the Interstate Commerce Commission ample power, in a hearing under section 13, to determine whether rates put in force by carriers are unjustly discriminatory as between two cities, to extend the scope of its examination far enough to arrive at the true situation with respect to all matters which properly tend to show whether or not, under section 3, undue preference or advantage is given to one city over the other; and its determination of the question of fact, when supported by any substantial evidence proper to be considered, is not reviewable by the courts.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

2. COMMERCE (§ 85*)—INTERSTATE COMMERCE ACT—DISCRIMINATION IN RATES—JURISDICTION OF COMMISSION.

Petitioners, railroad companies with lines extending from Norfolk, Va., into what is known as the Southeastern territory, lying east of the Chattanooga-Birmingham line, are engaged in carrying traffic between Norfolk and points in such territory, and also between such points and Newport News, although they do not reach such place with their rails, but by connection with the line of another company from Richmond, or by water lines, owned by the latter company and by one of petitioners, from Norfolk, 12 miles across Hampton Roads. They have established through routes and joint rates on the Newport News business, which rates exceed the Norfolk rates to the extent of the charges, rates, or divisions of rates exacted and received by the carriers directly serving Newport News. For a period they maintained the same rates to and from Newport News as to and from Norfolk, and such rates are still in force as to certain commodities, and on export and import traffic, and on traffic to or originating in the territory west of the Chattanooga-Birmingham line. *Held*, that a finding by the Interstate Commerce Commission that the rates established by petitioners were unjustly discriminatory against Newport News, and an order requiring them to make the same rates between that place and all points in the Southeastern territory more than 150 miles distant as between Norfolk and such points, were within its jurisdiction, and not reviewable by the courts.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

Suit by the Southern Railway Company, the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway, the Norfolk & Western Railway Company, and the Norfolk Southern Railroad Company, as petitioners, against the United States, as respondent, and the Interstate Commerce Commission and the Chamber of Commerce of Newport News, as interveners. Decree for respondents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 204 F.—30

R. Walton Moore, Frank W. Gwathmey, and M. Carter Hall, all of Washington, D. C., and W. B. Rodman, of Norfolk, Va., for petitioners.

Blackburn Esterline, Sp. Asst. Atty. Gen. (Thurlow M. Gordon, Sp. Asst. Atty. Gen., on the brief), for the United States.

Charles W. Needham, of Washington, D. C., for Interstate Commerce Commission.

R. G. Bickford, S. O. Bland, and Charles C. Berkeley, all of Newport News, Va., for Chamber of Commerce of Newport News.

Before KNAPP, Presiding Judge, and HUNT, CARLAND, and MACK, Associate Judges.

HUNT, Judge. In 1911, the Chamber of Commerce of Newport News, Va., instituted a proceeding before the Interstate Commerce Commission against these petitioners, the Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railway, Norfolk & Western Railway Company, Norfolk Southern Railroad Company, and other carriers, including the Chesapeake & Ohio Railway Company, which are not petitioners herein, for the purpose of requiring the establishment and observance of the same rates on all traffic between Newport News and points in the territory hereinafter described as between Norfolk and such points, upon the ground that the higher Newport News rates then in force were an undue discrimination against that city and the business interests thereof. After full hearing the Commission sustained this contention (*Chamber of Commerce of Newport News v. Southern Railway Company et al.*, 23 *Interst. Com. Com'n. R.* 345), and by order made June 7, 1912, directed the defendant carriers to cease and desist on or before October 1, 1912, and for a period of not less than two years thereafter to abstain from charging or collecting higher rates for the transportation of freight from all points on their respective lines, not within 150 miles of Norfolk, in the territory east of a line drawn from Chattanooga, Tenn., than are contemporaneously charged for the transportation of freight from the same points in the described territory to Norfolk, Va., and also requiring said carriers to desist from charging or collecting higher rates for the transportation of freight from Newport News to all points on their respective lines in the territory, not within 150 miles of Norfolk, east of a line drawn from Chattanooga, Tenn., as hereinbefore described, than are contemporaneously maintained from Norfolk, Va., to the same points, and also requiring said carriers on or before October 1, 1912, to establish and maintain, for a period of not less than two years, rates for the transportation of freight from Newport News, Va., to all points on their respective lines, except those within 150 miles of Norfolk, in the territory east of a line drawn from Chattanooga southward, as heretofore referred to, which rates should not be higher than rates which they contemporaneously maintained for the transportation of freight from Norfolk, Va., to the same points, and also requiring said carriers to establish and maintain for a period of not less than two years, rates for the transportation of

freight from all points on their respective lines in the territory, not within 150 miles of Norfolk, east of a line drawn from Chattanooga, Tenn., southward, as already described, known as the Chattanooga-Birmingham line, to Newport News, Va., which should not be higher than rates for the transportation of freight contemporaneously maintained by them from the same points to Norfolk, Va. By a supplemental order of the Commission, the order of June 7, 1912, was amended so as not to be effective until October 20, 1912.

To annul the order of June 7th, petitioners brought this suit. Answers were filed by the United States and the Commission. Petitioners filed affidavits and moved for a temporary restraining order. This was denied. Thereafter counsel for all parties filed a stipulation to the effect that certain copies (annexed to the stipulation) of the individual freight tariffs of the Southern Railway Company and the Norfolk & Western Railway Company showed the existing construction of rates and charges made by such carriers upon domestic and foreign freight originating and billed by them from the Southeastern territory to Newport News, Va., and from Newport News to points in the Southeastern territory, and that such tariffs were concurred in by the Atlantic Coast Line, Seaboard Air Line, and Norfolk Southern Railway Companies as intermediate carriers. The stipulation also included a copy of the individual tariff of the Chesapeake & Ohio Railway Company, showing the rates and charges in force charged by it upon domestic and foreign freight between Newport News and the Southeastern territory, and that upon all domestic and foreign freight originating at points in and billed from the Southeastern territory by the Atlantic Coast, Seaboard Air Line, and Norfolk Southern there is charged the combination of the Virginia cities rates and the arbitraries on such freight charged by the Chesapeake & Ohio. Upon the pleadings and the stipulation just referred to the case has been submitted. A correct understanding of the situation calls for statement of the substance of the pleadings:

Petitioners aver that the Southern Railway Company, Seaboard Air Line Railway, Norfolk & Western Railway Company, and Norfolk Southern, with lines of railroad extending from Norfolk into the territory heretofore described, have been and are engaged in the transportation of interstate traffic between Norfolk and points in the territory referred to in the order of the Commission, and that with various other connecting common carriers they have participated and are now participating in the transportation of traffic between Newport News and the said territory, in connection with the Chesapeake & Ohio Railway Company, serving Newport News either by rail from Richmond or by water from Norfolk; the through transportation charges between Newport News and points in the Southeastern territory being in excess of the through transportation charges between Norfolk and points in said territory, to the extent of the charges, rates, or divisions of rates exacted and received by the carriers directly serving Newport News. Petitioners set up that the evidence before the Commission showed that the rates carried by petitioners to and from Norfolk were and are compelled by competitive circumstances and conditions beyond

petitioners' control, existing at Norfolk and not at Newport News, and that the Commission had no power to compel application by petitioners of the Norfolk rates to or from Newport News and the territory defined, or to prescribe the Norfolk rates.

Petitioners also plead that the traffic moving between Newport News and this Southeastern territory is handled by the Chesapeake & Ohio between Newport News and Richmond, which is the place of interchange by that company with the Southern Railway Company, Atlantic Coast Line Railroad Company, Norfolk & Western Railway Company, and Seaboard Air Line Railway, or by barges of the Chesapeake & Ohio Railway Company between Newport News and Norfolk. The Chesapeake & Ohio does not enter Norfolk with its rails. Petitioners say that to give to Newport News the same rates of transportation on traffic between Newport News and the territory described, as between Norfolk and said territory, would necessitate a division of rates with the Chesapeake & Ohio on the all-rail traffic, and on traffic moving across Hampton Roads either a similar division of revenue with water carriers or the establishment and maintenance of a barge service at great expense to petitioners, and that the effect would be to compel these petitioners, whose rails do not reach Newport News, on traffic between Newport News and points on petitioners' lines in the territory described, either to allow the Chesapeake & Ohio its charges to and from Newport News and points on petitioners' lines in said territory, and thus sacrifice petitioners' revenues and compel them to absorb the charges of the lines reaching Newport News, or themselves to establish and maintain facilities for transporting such traffic from Norfolk to Newport News, in order to make delivery there.

Petitioners admit that for a certain period they participated in rates to and from Newport News not higher than the Norfolk rates, but say that any such former adjustment cannot be made the foundation for the order of the Commission in the premises. It is alleged that the Commission has undertaken to hold petitioners severally responsible for transportation charges between Newport News and points in the defined territory, when the petitioners do not reach or serve Newport News with their own rails or facilities, and cannot and do not control the total transportation charges, and that the order deprives petitioners of their constitutional rights.

The Commission denies that the facilities of petitioners do not reach or serve Newport News, and alleges that the petitioners are now participating in the transportation of traffic between Newport News and the Southeastern territory in connection with the Chesapeake & Ohio Railway Company to Newport News, either by rail from Richmond or by water from Norfolk. The answer avers that in December, 1894, the petitioners, by resolution of an association of railroads with which petitioners were associated, gave to Newport News the same rates from and to what is known as the Southeastern territory as were and are given to Norfolk, and that until August 1, 1899, all the petitioners by their lines served shippers to and from Newport News upon precisely the same rates that were charged to

shippers to and from Norfolk; that after August 1, 1899, these petitioners refused longer to give to the shippers to and from Newport News the same rates as to shippers to and from Norfolk, and since then have charged shippers on all through business from or to the said Southeastern territory, except pig iron and lumber and export and import traffic, rates based on differentials from Norfolk. The Commission denies that compliance with the order means that petitioners will have to reduce their rates or furnish additional water equipment required to make deliveries at Newport News, for the reason that the order of the Commission only requires the removal of the undue discrimination found by the Commission to exist against Newport News, and in favor of Norfolk, without specifying how such discrimination shall be removed. It is denied that as an incident to the removal of the discrimination shippers at Newport News would have any advantage by way of switching charges or otherwise over Norfolk shippers; and the Commission alleges that these petitioners, and each of them, hold themselves out to receive freight, and do receive freight, from points in the Southeastern territory destined to Newport News; that the traffic is billed through by petitioners from points of origin to Newport News, and a through rate is charged and collected therefor; that they pursue a like course with respect to freight originating at Newport News for points in the Southeastern territory; that they receive traffic originating at points in said territory for points in foreign countries billed and transported from the lines of petitioners and their connections via Newport News, and pursue a like course with respect to traffic originating in foreign countries and received at Newport News and destined to points in the Southeastern territory; that a considerable portion of the through traffic, such as has just been described, is transported over the lines of the petitioners through Norfolk to Newport News, and from Newport News through Norfolk to points in the Southeastern territory. All allegations of excess of authority or illegal action in the premises are denied.

The United States, in its answer, alleges that the Southern Railway Company reaches Newport News with its own floating equipment, and the Norfolk & Western reaches Newport News by means of the floating equipment of the Southern Railway Company, and that petitioners have through routes and joint rates and through billings to Newport News with the Chesapeake & Ohio. It sets up that the lines of the Chesapeake & Ohio, and those of two other companies not parties hereto, the Norfolk & Portsmouth Belt Line Railroad Company and the New York, Philadelphia & Norfolk Railroad Company, do not extend to the Southeastern territory, but that the Chesapeake & Ohio and the other companies just last mentioned have through routes, joint rates, and through billings with the petitioners; that the Chesapeake & Ohio is ready to transport and deliver freight to Newport News on such through routes and joint rates and through billings at the Norfolk rates, and to accept fair and reasonable divisions of the through rates. It is alleged that the cities of Norfolk and Newport News sustain intimate commercial relations with the

South, and depend upon the South for materials used in the manufacturing and markets of the two places; that the Southern Railway Company delivers import and export traffic at Newport News either by its own floating equipment or by the Chesapeake & Ohio; that the Atlantic Coast Line and Seaboard Air Line use for such service the floating equipment of the Chesapeake & Ohio; that the Norfolk & Western uses for such purpose the floating equipment of the Southern; that as to all territory west of the Chattanooga-Birmingham line petitioners have kept Newport News and Norfolk on the same basis; that east of the Chattanooga-Birmingham line petitioners, in maintaining Newport News on the same basis as Norfolk, would not be obliged to handle the traffic in any manner different from that now used in handling the traffic originating west of the line; and that in maintaining Newport News on the same basis as Norfolk, on traffic originating east of said line, the differentials to be absorbed by the petitioners would be less than the differentials now absorbed by them on traffic originating west of said line. All allegations to the effect that the rates made by the petitioners to and from Norfolk were compelled by competition such as does not exist at Newport News are denied. Referring to the previous increase of the Newport News rates, the United States avers that they grew solely out of differences of the petitioners with the Chesapeake & Ohio relating to divisions of the through rates, but that the Chesapeake & Ohio is now ready to receive, transport, and deliver freight to Newport News on through routes, joint rates, and through billings, and to accept fair and reasonable divisions of the through rates, and restore the previous adjustment, but that petitioners decline to do so.

The report of the Commission, upon which the order under examination is made, is quite elaborate in its explanation of the situation of Newport News and Norfolk, and among other things sets forth these facts: That the Chesapeake & Ohio is the only railroad the tracks of which reach Newport News, and that it there maintains float bridges, wharves, piers, and other terminal facilities; that Norfolk is separated from Newport News by 12 miles of water; that the Norfolk & Western road reaches Norfolk by rail; that the Norfolk & Southern has a terminal at Berkley, which is a part of the city of Norfolk; that the Southern and Atlantic Coast Line, respectively, have terminals on the west side of the Elizabeth river, near Norfolk; that the Seaboard Air Line has a terminal at Portsmouth, on the west side of the Elizabeth river, near Norfolk; that the New York, Philadelphia & Norfolk Railroad, which is not a party to this proceeding, maintains tracks extending from connections with the Southern and Coast Line to Port Norfolk on the west side of the Elizabeth river, where it has complete terminal facilities; that the Norfolk & Portsmouth Belt Line Railroad maintains track connections with the other lines except the Chesapeake & Ohio; that at Port Norfolk and Portsmouth, on the west side of the Elizabeth river, at Norfolk itself, at Lambert's Point, on the east side of the river, and at Berkley, on the west side of the eastern branch of the river, there are piers, float

bridges, wharves, and warehouses belonging to the several railroad companies, which appeared as defendants before the Commission, among which were the petitioners herein. It appears that the Chesapeake & Ohio has a terminal in Norfolk, and maintains piers, a float bridge, yards, and warehouses.

The Commission explains how the interchange of traffic between certain of the companies is effected, that is, by means of the short line tracks of the New York, Philadelphia & Norfolk, or by the Belt Line, or both, or by the floating equipment owned and operated by certain of the railroad companies, and also by drayage service; that the Southern receives and delivers import and export traffic at Newport News, either by means of its own floating equipment or that of the Chesapeake & Ohio; that the Coast Line and Seaboard Line use the floating equipment of the Chesapeake & Ohio, and that the Norfolk & Western uses the floating equipment of the Southern. It was found that both Newport News and Norfolk sustain intimate commercial relations with the South, that both are dependent largely upon the South, and particularly upon the Associated Railways territory and Southeastern Freight Association territory, which sections are found to embrace all the territory east of a line drawn from Chattanooga, Tenn., southward, through, but not including, Birmingham, Selma, and Montgomery, Ala., to Pensacola, Fla., known as the Chattanooga-Birmingham line. These last-named places are reached by the rails of the Southern, Coast Line, Seaboard, Norfolk & Southern, and their connections, and in part by the Norfolk & Western and its connections. The Commission then details an arrangement entered into between the Chesapeake & Ohio, the Southern, the Coast Line, the Seaboard, and their connections, by which for a number of years Newport News had the same rates as Norfolk to all common points in each of the Association territories. Joint rates were maintained until July 31, 1899, and rates to and from local stations on the Southern are shown to have continued until July 28, 1900. Because of some dispute between the carriers which are parties to the joint rates as to divisions allowed the Chesapeake & Ohio on traffic to and from points east of the Chattanooga-Birmingham line, the Southern carriers withdrew from the arrangement, and thereafter the joint rates, except on import and export traffic, were canceled as to all common points in the Association territories.

It is pointed out that, while through routes have remained open substantially as before via both Norfolk and Richmond, the rates to and from Newport News have been maintained on a basis of differentials over Norfolk on a scale of 15 cents for 100 pounds first class, down to 4 cents class D, and that commodity rates have obtained on substantially the same basis. It is found that the Chesapeake & Ohio was dissatisfied merely with the divisions it received, but that that road now assumes an attitude whereby it would give to Newport News the same rates as Norfolk to and from the South, but that the Southern lines have not been willing to reduce their rates in order to place Newport News on the Norfolk rate basis. It is shown that in the territory west of the Chattanooga-Birmingham line, reached by the South-

ern carriers and their connections and by the Chesapeake & Ohio and its connections, the rates to and from Newport News have continued the same as rates to and from Norfolk, and that on Newport News traffic to or from points west of the Chattanooga-Birmingham line, which usually moves via Richmond, the divisions of the joint rates received by the Chesapeake & Ohio are measured by a scale of 26 cents per 100 pounds first class, down to 8 cents, with divisions of commodity rates on relatively the same basis. On certain classes of traffic the Commission finds that the Newport News rates remained the same as Norfolk rates after July 31, 1899. This is true of pig iron from certain points in Tennessee and from iron-producing sections of Georgia and Alabama, and on lumber from various points in Alabama.

Deliveries to Newport News are found to be by floating equipment of the carrier handling the traffic or the equipment of the Chesapeake & Ohio, if it moves via Norfolk, Portsmouth, or Pinner's Point, or via the Chesapeake & Ohio rails, if the traffic moves through Richmond. It is shown by the Commission that between Baltimore and various important points in the Association territories the Southern lines and their connections maintain lower rates than to and from Newport News. An explanation is made of what is known as Virginia cities rates; that is, rates to certain points in Virginia, made because of competitive conditions existing at those points. The Commission then considers the question of Virginia cities rates to Newport News, and finds that there is no competition to compel the Southern lines to maintain Virginia cities rates from Roanoke to points beyond the terminus of the Carolina extension of the Norfolk & Western, and that the argument made by the Southern carriers before the Commission for not giving Virginia cities rates to Newport News was not persuasive. Explicit finding is made that Newport News is placed in a position of material disadvantage as compared to Norfolk. Consideration is given to whether such disadvantage is the result of unjust discrimination or undue or unreasonable prejudice, due to the rate adjustment.

In analyzing the situation, the Commission considers natural advantages, the relative merits of the harbors, and the dependencies of the two cities upon the South for the materials used in their manufacturing, and for markets for their manufactured products. Regard is had to the fact that, while none of the rails of the Southern, Coast Line, Seaboard, and Norfolk & Western actually reach Newport News, nevertheless each of these companies serves Newport News, carrying to and from the South by way of Norfolk or through connections with the Chesapeake & Ohio at Richmond. The Commission says that the Southern carriers practically control the rates between Newport News and points within Association territories. Reference is made to the accepted fact that the rates between Newport News and points west of the Chattanooga-Birmingham line are influenced by competition induced by the Chesapeake & Ohio and its connections, the lines of which penetrate their territory, and it is found that this accounts for the equal rates between those points and Newport News and Norfolk, as the Chesapeake & Ohio reaches both cities either by all rail or by rail and water. But as to the Western situation, the Commission was

of the opinion that the rate was the material matter, and not the reasons which induced it. Reference is also had by the Commission to the equal rates given on pig iron from points in Tennessee, Alabama, and Georgia, east of the Chattanooga-Birmingham line.

While the fact that there is equality of rates on exports and imports is adverted to by the Commission, emphasis is laid on the contention of the Newport News Chamber of Commerce, not that there was any discrimination in the export or import rates, as compared with the domestic rates from Newport News, but rather that the Southern lines, by engaging in import and export business via Newport News, have made themselves common carriers as to that point, and thereby assume an obligation to transport domestic traffic also, and to maintain the necessary equipment for that purpose. After discussing the competition of certain lines of steamers between Baltimore and various Southern cities which affects rail and water rates between Baltimore and various Southern points, it is held that in view of all the considerations stated by it, the situation at Newport News is not the result of competition or other conditions beyond the control of the carriers then before it, and that upon the record the former rate adjustments were shown to have been set aside solely because of the disagreement had with the Chesapeake & Ohio. It is also noted that through routes exist by which traffic is transported under through bills of lading between Newport News and the South, and it is held that joint rates should be established by way of such through routes between Newport News and all common points outside of Virginia in Associated Railways and Southeastern Freight Association territories, and that such joint rates as to points not within 150 miles of Norfolk should not exceed the rates contemporaneously applied by these petitioning carriers between Norfolk and the same points.

[1] Petitioners cannot avoid the force and effect of these findings of the Commission. It was for that body to hear and ascertain what the actual conditions are, and whether rates or charges demanded or collected by the petitioning carriers for the transportation of freight are unjustly discriminatory or unduly preferential or prejudicial in favor of Norfolk as against Newport News, and to make an order that the carrier or carriers should desist from any violation found. Under the provisions of section 15 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), ample power is vested in the Commission in a proceeding before it to extend the scope of its examination far enough to arrive at the true situation with respect to all matters which properly tend to show whether or not under section 3 undue preference or advantage is given to one city over the other. Involved in such an investigation appears to be inquiry into just such facts and circumstances as were adverted to by the Commission herein, namely, relative location, method of service, how interchange is made, whether rates are joint, whether both foreign and domestic business are affected, the relation of rates charged to other rates, whether or not there is competition of rail and water, natural advantages, markets for traffic, and the welfare of the

communities affected. Presumably the evidence which was introduced bearing upon these points was competent and relevant to the issues of the pleadings.

These are the matters, whether actual or circumstantial, from which were drawn the inference that as a fact there was a disadvantage to Newport News, and that that city was unjustly discriminated against. The Commission may have so far carried its inquiry as to have considered, among other things, evidence of rates into territory not so closely related to that directly involved as to have material bearing, or it may have given great weight to evidence introduced to show competition that affected rates, and little to that which showed the relative volume of traffic in and out of the two cities affected, or it may have failed to correlate well the evidence of natural advantage with that of rates; but inasmuch as it did have before it substantial evidence proper to be looked at which supported the allegations of the complaint made by the Newport News Chamber of Commerce, together with such evidence as these petitioners as defendants in the proceeding referred to cared to introduce upon the issue of discrimination, which was the only issue presented, it is not for the courts to disturb the ultimate judgment of the Commission by saying that under the evidence there was no unjust disadvantage to Newport News. *Interstate Commerce Commission v. Union Pacific R. R. Co. et al.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308. The Supreme Court, in *Texas & Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940, after reviewing the English case of *Denaby Main Colliery Company v. Manchester, etc., Railway Company*, 3 *Railway & Canal Traffic Cases*, 426, from which Justice Shiras quotes quite fully, states its own conclusions as to the act to regulate commerce as follows:

" * * * That, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to consider fully all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment; that among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and, in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

[2] The petitioners urge that section 3 of the act is not applicable to an instance where a common destination is served from two different points of origin by carriers wholly independent of each other in the sense that each carrier has its own rails from the point of origin which it serves to the destination, and that this section is inapplicable

where a common destination is served from two different points of origin by carriers wholly independent of each other in the sense that between the destination and one of the points of origin one of the carriers alone operates, while between the destination and the other point of origin the two carriers operate in connection with each other. These propositions are contended for upon the principle stated by Justice Jackson in *Interstate Commerce Commission v. Baltimore & Ohio Railroad Company* (C. C.) 43 Fed. 37, that:

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue preference or disadvantage, persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound and adopted in other trades and pursuits."

It is argued that, if the order of the Commission stands, it means unwarranted interference with the management of the business of the carriers, shrinking of revenues to one point served in order to allow another point not served to have a scale of rates lower than it otherwise would have, and responsibility upon a carrier, not alone for the rates to a point which it serves, but also for rates to another point to which it owes no duty. The necessary predicate for these suggestions is that each of the carriers situated as are these petitioners is to be regarded as independent of the line of the Chesapeake & Ohio operating from Newport News via Richmond to the same destination in connection with the same Norfolk carriers, that the Richmond rate is the same as the Norfolk rate and is reasonable, and that inasmuch as the rates from Newport News are reasonable, and not assailed as unreasonable, to give Newport News the same rates as Norfolk would give to that city rates it cannot lawfully ask.

It may be that, where a common destination is served from two different points of origin by carriers wholly independent of each other in the sense stated by petitioners, section 3 is inapplicable. *Tozer v. United States* (C. C.) 52 Fed. 917, is cited by petitioners as holding to this view. That case, however, involved a criminal charge under section 3, based upon a mere disparity existing between a local and a joint through rate. But we need not decide that exact question, because we have here charges, not simply of a disparity between a local and a joint rate, but of acts of discrimination against Newport News, where there have been rates made by petitioners from the territory hereinbefore referred to to Newport News, and where freight is carried under through bills of lading from the territory described to Newport News. It is thus that a situation has arisen wherein Newport News is served by way of Norfolk or through connection with the Chesapeake & Ohio at Richmond, which makes a case calling for the exertion of the power of the Commission to ascertain whether the discrimination created was due or undue as comprehended by section 3 of the act.

That the rails of the petitioners do not go to Newport News is not important. All actually serve Newport News. And although it would appear as if the Commission approved of the contention made before it by the representatives of Newport News, that inasmuch as these petitioners by engaging in the export and import business via Newport News made themselves common carriers generally as to that point, and thereby assumed obligations to transport domestic traffic also, still as it was of record before the Commission and is before us that these petitioners as shown by their tariffs engage in domestic as well as export and import traffic to Newport News via Norfolk, we may resolve the questions involved, holding that under the evidence of the service offered to be performed, the conclusion of the Commission that there was unjust discrimination against Newport News was justified and involved no excess of power.

It is not of moment to this inquiry that Norfolk shippers may have to pay switching charges on traffic originating or destined to that point, while Newport News shippers may not. If that should be the case, it would not necessarily constitute ground for annulling the order of the Commission. The order does not direct the carriers to carry to Newport News for less rates than they carry to Norfolk, but does require that within the territory described they shall desist from charging more for transportation on their respective lines from and to Newport News than they contemporaneously charge from and to Norfolk. This was responsive to the issues before the Commission, and cannot be disturbed by the courts.

Decree for respondents.

SOUTHERN COTTON OIL CO. v. CENTRAL OF GEORGIA RY. CO.

(District Court, E. D. Georgia, S. D. April 22, 1913.)

ACTION (§ 6*)—MOOT QUESTIONS.

Since the Interstate Commerce Commission is primarily charged with the duty of passing on the validity of a contract between a railroad company and a corporation operating a wharf, for transferring freight from cars to vessels, the federal courts would not take jurisdiction of a friendly suit by the corporation against the railroad company to recover compensation under its contract, which involved no actual controversy and was brought merely to obtain a judgment which might be pleaded in defense of a disapproval of the railway company's allowance by the Commission.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 40; Dec. Dig. § 6.*]

At Law. Action by the Southern Cotton Oil Company against the Central of Georgia Railway Company. Dismissed.

Geo. W. Owens, of Savannah, Ga., for plaintiff.

Lawton & Cunningham, of Savannah, Ga., for defendant.

SPEER, District Judge. The petition before the court recites that the Central of Georgia Railway Company is indebted to the South-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ern Cotton Oil Company in the amount of \$844.16, besides interest from the 12th day of June, 1909. This indebtedness is declared upon the facts following:

On the 10th of April, 1909, the defendant company published its tariff as follows:

"G. F. O. Special No. 18-A.
Cancels G. F. O. Special 18.

I. C. C. No. 1522.
Cancels I. C. C. No. 1491."

From this change in the tariff it is claimed that:

"Five (5) cents per ton of 2,000 pounds will be paid to the Southern Cotton Oil Company out of the published rate for wharfage and handling at Savannah, Ga., on cotton seed oil cake delivered to vessels berthed at Central of Georgia Railway wharves."

This payment was made for the cost of labor in handling the product from the cars to the shipside, and for grinding and sacking the cotton seed oil cake at the grinding plant of the Southern Cotton Oil Company, located at Savannah, on the Central of Georgia Railway terminals. This tariff became effective on May 15, 1909. This appears by the statement of C. T. Airey, freight traffic manager of the defendant company, at Savannah, Ga.

Petitioner declares that by virtue of this tariff it is entitled to be paid by the defendant 5 cents per ton on 24,405 tons, delivered to 18 steamships, the names of which are set forth. The sum thus earned is \$1,220.25, and of this the defendant has paid \$376.09, leaving \$844.16, besides interest from the 12th day of June, 1909, due and unpaid. This balance petitioner declares defendant fails and refuses to pay. To this petition defendant has apparently filed no formal answer. On the hearing, however, the indebtedness sued for was admitted; but defendant declined to pay it, unless expressly authorized so to do by the judgment of the court. This refusal on the part of defendant is ascribed to the fear that it may be adjudged in contempt of the views of the Interstate Commerce Commission governing such payments.

The duty which the defendant has thus imposed upon the court is somewhat unusual. The Interstate Commerce Commission is not a party to the proceedings, and, if it were, no other court would proceed with greater reluctance in contravening the rulings and orders which have done so much to give the people concerned in interstate commerce inestimable protection and equality of opportunity, for which, before the Commission was created, the most sanguine could scarcely hope.

It is true that the Supreme Court, in the case of *Interstate Commerce Commission v. Duffenbaugh*, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83, holds that the interstate commerce act does not attempt to equalize fortunes, opportunities, and abilities. While this, then, is not the purpose of the law, it is, nevertheless, its effect. In that case it appears that, in order to facilitate business and make quick return of cars, it became necessary for the Union Pacific Company to pass shipments of grain through elevators at Omaha and Kansas City. While passing through the elevator the grain was also weighed. If

the Union Pacific could not use these instrumentalities to expedite the grain traffic, it could not compete with other roads which have through lines across the grain country. With these necessities in mind, the railway company made a contract with one Peavey, by which he built an elevator at Council Bluffs, on the other side of the river from Omaha. He was to receive not exceeding $1\frac{1}{4}$ cents per 100 pounds for the first 10 years and 1 cent for the next 10 years for grain transferred through his elevator. No additional charge was made to the shipper for the elevator service. It appeared, further, that in 1904 the Interstate Commerce Commission investigated this matter and upheld the contract, including the allowance to Peavey & Co., not only for the grain of other shippers, but for their own grain. The matter having been brought to the attention of Congress by the Commission, that body by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1285), provided that:

"The term 'transportation' shall include * * * all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes," etc.

By section 6 the carrier was required to state separately in its schedules all terminal charges and all privileges or facilities granted or allowed, and by section 15 it was further provided:

"If the owner of the property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished."

Upon this legislation the Supreme Court observes, through Mr. Justice Holmes, delivering the opinion:

"Congress clearly recognized that services such as those rendered by Peavey & Co. were services in transportation, and were to be paid for, notwithstanding the possibility that some advantage might be gained as a result."

It further appears from this opinion that upon further reflection the Interstate Commerce Commission had begun to change its views:

"In 1907, upon rehearing, it cut down the allowance of Peavey & Co. to three-quarters of a cent, estimating that to be the actual cost, and being of opinion that to allow any profit would be in effect to permit a rebate. 12 Interst Com. Com'n R. 85. The order made required the railroad company to desist from paying more than three-fourths of a cent per hundred pounds, for service rendered in the transfer or elevation of grain at Council Bluffs or Kansas City, to any one interested in the buying, selling or shipment of grain at those places, especially naming the appellees. This," said the learned justice, "is one of the orders complained of. The chief object of complaint, however, is an order made in the following year, on June 29, 1908. In that the Commission took the last step, and ordered the Union Pacific to desist from paying any allowance to Peavey & Co. on grain in which they have any interest that is not reshipped from their elevators within 10 days, or that

has been mixed, treated, weighed, or inspected in any of their elevators at the above-named points."

Discussing to some extent the reasons which led the Commission to this conclusion, a majority of the Supreme Court hold it erroneous.

"As the carrier is required," said the learned justice rendering the opinion, "to furnish this part of the transportation upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it. In this case there is no complaint that the rate out of which the allowance is made is unreasonable, and it is admitted that three-quarters of a cent barely would pay the cost of the service rendered, without any reasonable profit to Peavey & Co. for the work."

In fine, the Supreme Court holds that the ruling of the Interstate Commerce Commission requiring the railroad company to desist from paying more than three-fourths of a cent per 100 pounds for the elevator service must stand, but its ruling prohibiting any allowance whatever to Peavey & Co. for the elevator service must be modified. This permitted to the elevator allowances for grain reshipped within 10 days.

From our understanding of this decision it seems very clear that the propriety of such charges as those sued for here must depend upon the facts of each case. It is easy enough to see how a contract made with the Central of Georgia Railway Company with an elevator or other instrumentality for furnishing transportation and handling freight constructed by a favored company at its own terminals would not only have the effect of a rebate, but could drive all competitive shippers of similar freight out of business.

Here we are favored with no facts, except that the Central of Georgia Railway Company is willing to pay the charges, provided the court will grant some judgment which might be pleaded in defense, should the Interstate Commerce Commission disapprove these allowances by the Railway Company to the Cotton Oil Company. Here is no controversy, and the judicial power of the United States extends to controversies alone. While not necessarily collusive, this is obviously a friendly proceeding. If the particular question before the court has been submitted to the Interstate Commerce Commission, the record does not disclose it. That Commission, and not the court, is primarily charged with the duty of passing on questions of this character. To anticipate its ruling would seem at once superfluous and premature.

In view of these considerations, the court, *ex mero motu*, must decline to exercise jurisdiction.

IN RE CONNELLY.

(District Court, E. D. New York. April 19, 1913.)

BANKRUPTCY (§ 178*)—SALE TO BANKRUPT—RETURN OF PROPERTY—PROCEEDS.

Where W. sold an automobile truck to a bankrupt under an oral contract, making no attempt to reserve title for the unpaid portion of the price, and, with knowledge that the bankrupt was insolvent and that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bankruptcy was impending, accepted a return of the machine, which he sold, and deposited the proceeds to the credit of a bank account in the name of another in alleged payment of a false debt, the transaction constituted a fraud as against the bankrupt's creditors, and W. was properly required to surrender the proceeds of the sale to the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.*]

In Bankruptcy. In the matter of bankruptcy proceedings against Daniel Connelly, alleged bankrupt. Proceeding to compel one Weissman, brother-in-law of the bankrupt, to turn over to the trustee an automobile truck, or the proceeds of a sale thereof. Granted.

Marshall B. Clarke, of New York City, for petitioning creditors.

Harold R. Zeamans, of New York City, for intervening creditor.

CHATFIELD, District Judge. It appears from the testimony that the bankrupt was assisted by his brother-in-law, one Weissman, and other parties, to engage in the sale of automobile supplies, although he had had no experience therein and had no capital; that this brother-in-law and the other parties interested gave unfounded and reckless statements of credit to the various parties who were referred to them by Connelly, the bankrupt, in pursuance of a deliberate plan, understood by Connelly and his brother-in-law and the other individuals concerned, prior to the beginning of the business venture. The brother-in-law, Weissman, claims to have loaned Connelly some \$1,800, for which he received nothing in return, and also to have sold Connelly an automobile truck for the sum of \$1,200, which Connelly was to pay back in monthly installments of \$200 each, and of which but one installment was paid at about the time the sale was made, but when this was Weissman cannot state. This automobile truck was never marked with any sign denoting that it was the property of any one, except as it bore the manufacturer's labels, and was kept in a garage where Weissman made his headquarters and conducted a sales business in automobiles in the borough of Manhattan. This garage was the property of one Mary O'Bierne, who is the mother of the person really conducting the business and responsible therefor. Connected also with this garage is a livery stable, owned by George O'Bierne, the son and manager of his mother's garage. This George O'Bierne is one of the persons who deliberately and knowingly endeavored to secure credit for Connelly by reckless and unfounded statements as to his financial responsibility. It appears that Connelly either made an entire failure of the automobile supply business, or has not accounted for the proceeds, if they were not lost as he alleges. Connelly's testimony is not definite nor persuasive as to any of the matters upon which he is examined, and he voluntarily admitted that his earlier testimony was false in several particulars, and that he had no regard for accuracy of statement, even when testifying.

Early in the month of December, Connelly, according to the testimony, found himself unable to make a further payment on account of the automobile truck, and it was taken back by Weissman, either on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the day before or the day after Christmas, in liquidation of the balance due; that is, \$1,000. Weissman's testimony was to the effect that a conditional bill of sale had been given; but it subsequently appears, and is admitted on this motion, that nothing but an oral arrangement was had. Hence the statute of the state of New York as to conditional sales, being section 63 of the Personal Property Law as adopted in 1909 (Consol. Laws 1909, c. 41), was never in any way complied with, and the simple situation existed of Connelly's having a truck for which he had not fully paid, and of surrendering it in order to wipe out the debt. This of itself would show a preferential transfer, for the evidence is conclusive that both Weissman and Connelly knew all of the facts, and knew that Connelly was insolvent, but would be absolutely void if Connelly were secreting his assets to defraud creditors.

While the truck was still in Weissman's possession, he was examined under section 21a of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]), and testified that he had the truck. During the same day, and after warning with respect thereto, he sold it to an outside party for the sum of \$800, and turned over this amount to George O'Bierne, manager of the garage, who deposited it in his mother's bank account in payment on account of an alleged loan which Weissman and George O'Bierne state was owing to Mrs. O'Bierne for money advanced. It appears from the testimony that Weissman has at various times put money in the O'Bierne bank account for his own convenience, and has received the same back when desired. Neither he nor the O'Bienes furnish any evidence of debt, nor show any testimony which can be believed as to a loan by the O'Bienes to Weissman, and the entire story of their loans is such as to satisfy the court that the proceeds of this truck, viz., the said sum of \$800, are still in the control of Weissman, and merely deposited by him with the O'Bienes for his own protection.

The receiver and the petitioning creditors have asked that Weissman be compelled to turn over the automobile truck, or the proceeds thereof, and be punished for contempt of court for disposing of the same, unless he restore the property to the estate. He has objected to any such order, on the ground that the court has no jurisdiction over him or the fund, and that he is the holder of the property under a bona fide claim of title. He also denies that he was in contempt of any order of this court in selling the automobile and using the proceeds. It would appear that no order had been previously made restraining Weissman, and, if the automobile truck were his, that a bona fide sale and use by him of the proceeds was within his rights. We must therefore consider the question as to whether the automobile truck was the property of the bankrupt estate in such a way that, even if Weissman had disposed of it to an innocent holder, he was bound to account for the proceeds thereof to the estate; it being evident that, after his examination as to the whereabouts of this truck, and as to Connelly's title thereto, he had notice, and the record shows that this claim was particularly called to his attention.

If Weissman was a bona fide creditor, and if his debt was paid preferentially, then the present application must be denied, and the creditors left to a suit against him to secure the return of the prefer-

ence. But it appears from the testimony that Weissman was in no way a creditor. His claim of loans is not substantiated. His claim of the conditional sale of the automobile proves to have been merely a transfer of title to Connelly, who was to pay for the automobile, although it had not been delivered. In fact, a chauffeur representing Weissman always went along with the machine when it was allowed to be brought to Brooklyn for Connelly's use, and it was returned to New York and into Weissman's possession as soon as Connelly's needs were supplied. Such a sale was in no sense conditional, nor was there any security to the vendor in the ordinary sense of the term. As a matter of fact, Connelly would have been merely making deposits with a view to future purchases, if title had not yet passed. But as title had passed, and Weissman was acting as agent for Connelly in taking care of the machine, then a claim against Connelly existed for the balance of the purchase price, and an arrangement by Weissman to take back the machine was not merely an attempt to get a preference, but was a plain endeavor on the part of both Weissman and Connelly to conceal some of Connelly's assets, in contemplation of what both must have known would result in bankruptcy proceedings; that is, a plan on the part of both Connelly and Weissman to defraud Connelly's creditors. Such a fraud could pass no title, and if, while in the possession of the machine, Weissman sold it for \$800, and deposited the \$800 with the O'Biernes for an alleged loan, which the court finds does not exist, then Weissman should be compelled to turn over the \$800 to the bankrupt estate.

An order to that effect may be entered.

In re McLELLAN.

(District Court, N. D. New York. April 29, 1913.)

1. BANKRUPTCY (§ 384*)—COMPOSITION—DUTY TO CONFIRM.

It is the duty of the court to confirm a composition, if satisfied that it is for the best interests of the bankrupt's creditors, that he has not been guilty of any of the acts, or failed to perform any of the duties, which would bar a discharge, and the offer and its acceptance are in good faith, and have not been made or procured, except as provided in Bankr. Act July 1, 1898, c. 541, § 14, subd. 3, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427) as added by Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (U. S. Comp. St. Supp. 1911, p. 1496), or by any means or promises or acts therein forbidden.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590-592; Dec. Dig. § 384.*]

2. BANKRUPTCY (§ 407*)—DISCHARGE—DENIAL—GROUNDS—FALSE STATEMENT.

The making of false statements by a bankrupt in order to obtain credit will not bar his discharge, if there is no substantial evidence that money or property was obtained from any one on the faith of such statements, or in case it is not proved that the statements were in fact false when made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.*]

3. BANKRUPTCY (§ 384*)—DISCHARGE—PREFERENCES—COMPOSITION.

The confirmation of a composition between a bankrupt and his creditors would not be denied because of an alleged preferential payment of certain notes made to a bank and indorsed by the bankrupt's mother, where it was not shown that the bank or the indorser knew or had reasonable cause to believe, when the notes were paid, that such payment would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590-592; Dec. Dig. § 384.*]

4. BANKRUPTCY (§ 407*)—DISCHARGE—VIOLATION OF STATE LAW.

Violation of a civil or criminal law of the state by a bankrupt is not ground for denial of a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.*]

5. BANKRUPTCY (§ 377*)—COMPOSITION—ACTS OF ATTORNEYS FOR CONSENTING CREDITORS.

A bankrupt having proposed terms of composition, which were approved by a majority of the creditors, such creditors and their attorneys had an interest in common in securing an acceptance of the composition offered, and thereafter might properly participate in securing the necessary consents; and hence it was not improper for the attorney for the receiver, having secured powers of attorney to that end, to represent and vote for creditors in favor of the composition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 586-588; Dec. Dig. § 377.*]

In Bankruptcy. In the matter of the bankruptcy of Norman D. McLellan. On application for confirmation of a composition. Granted.

F. L. Cubley, of Potsdam, N. Y., for bankrupt.

Crapser & Hanmer and G. A. Chase, all of Massena, N. Y., for certain creditors.

RAY, District Judge. All preliminaries having been complied with, the referee has heard the proofs on objections filed to the composition, and has reported that the composition should be confirmed. The powers of attorney given by creditors expressly authorize the several attorneys to accept any composition offered by the bankrupt. A large number of creditors accepted in writing the offer of compromise, and many others in writing, by their duly authorized attorneys, accepted the offer in writing. Such assenting creditors represent a majority in number of the creditors whose claims have been allowed, and represent a majority in amount of such claims. The money has been deposited.

The objecting creditors claim and allege that within four months of being adjudged a bankrupt said Norman D. McLellan, for the purpose of obtaining credit, made materially false statements in writing, in violation of subdivision 3 of section 14b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) as added by Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (U. S. Comp. St. Supp. 1911, p. 1496); also that within four months of the time of being adjudged a bankrupt the bankrupt paid two notes held by the Massena Banking Company and indorsed by the bankrupt's mother, amounting to some \$1,400, besides interest, while insolvent, which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

insolvency was known to said Banking Company and said indorser, and that such payments created and constituted a preference; also that the composition is not for the best interests of the creditors, and that the bankrupt has violated section 1293b of the Penal Law of the state of New York (Laws 1912, c. 340); also that the attorney for the receiver was allowed to represent and vote in favor of said composition, having secured powers of attorney to that end.

It is true that an offer has been made for the property of the bankrupt which, if accepted, will enable him to pay the 25 per cent. offered. It is claimed that a trustee can recover the alleged preference, and that, if recovered, the estate will net the creditors more than 25 per cent. of their claims.

[1] The court "shall confirm a composition if satisfied (1) that it is for the best interest of creditors; (2) that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises or acts herein forbidden."

[2] By subdivision 3 of section 14b of the act it is provided that a discharge shall be denied if the bankrupt has "obtained money or property on credit upon a materially false statement in writing, made by him by any person or his representative for the purpose of obtaining credit from such person." The objecting creditors have put in evidence certain written statements, but there is no substantial evidence that any money or property was obtained from any one on such statements, and it is not proved such statements were false when made.

[3] As to the alleged preferences, there is no sufficient evidence that the Massena Banking Company or the mother, who had indorsed the notes, knew or had reasonable cause to believe that the transfer of property by payment of the notes in question would effect a preference.

[4] The Bankruptcy Act does not make it a criminal offense to violate a law of the state, or deny a discharge to a bankrupt who has violated a law of the state. Neither does it provide that violation by the bankrupt of a criminal law of the state shall prevent a discharge. Subdivision 4 of section 14b provides that a discharge shall be denied if the bankrupt has "at any time subsequent to the first day of the four months immediately preceding the filing of the petition *transferred*, removed, destroyed or secreted any of his property with *intent* to hinder, delay or defraud his creditors." I find no evidence of a violation of this provision. A mere preferential payment does not defeat a discharge, or prevent the acceptance and approval of a composition.

The court, however, should refuse to confirm a composition when it clearly appears that there have been preferential payments and there is reasonable cause to believe they or any substantial part of same may be recovered by the trustee, and it also appears that the estate in hand, with such preferences recovered and added, will net the creditors a greater percentage than offered in the proposed composition. That is not this case. A *prima facie* case for the recovery of a

preference is not made. An offer has been made for the bankrupt's stock, and the referee gave every opportunity for obtaining a better offer, that he might know with reasonable certainty what action on his part and that of the court the best interest of the estate and creditors demanded.

[5] Ordinarily an attorney can properly represent but one of the parties to a controversy in court, and this is essentially true when there is a conflict of interest between two parties represented by the same attorney. But here the bankrupt was thoroughly examined, and no other person was examined. The bankrupt then proposed terms of composition which to a majority seemed best for the creditors. These assenting creditors and their attorneys then had an interest in common to secure an acceptance of such offer, and under such circumstances it was not improper for all such creditors and their attorneys to take part in securing the necessary consents, so long as no false statements were made, and there was no trickery or collusion between creditors and the bankrupt, and no fraud practiced. At such stage of the case it became substantially a question between the assenting and nonassenting creditors; that is, those who favored and those who opposed the composition.

As on the whole case I am satisfied it is, for the interest of the creditors that this composition be approved and confirmed in accordance with the report of the referee, it is so ordered.

UNITED STATES v. NORTHERN PAC. RY. CO. et al.

(Circuit Court, D. Montana. August 28, 1911.)

No. 979.

1. PUBLIC LANDS (§ 81*)—VALIDITY OF PATENTS—CONSTRUCTION OF STATUTE—CURATIVE EFFECT.

By Act May 1, 1888, c. 213, § 3, 25 Stat. 133, ratifying a treaty with the Gros Ventre and other tribes of Indians in Montana, it was provided that the lands ceded thereby should be a part of the public domain and open to entry under certain of the land laws specified, but not under any other laws. By Act March 3, 1911, c. 218, 36 Stat. 1080, such section was amended so as to provide that the lands should be opened to the operation of all the laws regulating the entry, sale, or disposal of public lands, and that "no patent shall be denied to entries heretofore made in good faith under any of the laws regulating the entry, sale or disposal of public lands if said entries are in other respects regular, and the laws relating thereto have been complied with." *Held*, that patents to lands so ceded, selected as lieu lands under a railroad grant prior to the amendment, which selections were approved, were validated by such amendment.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 250-282; Dec. Dig. § 81.*]

2. PUBLIC LANDS (§ 81*)—CONSTRUCTION OF STATUTES—"ENTRY" DEFINED.

The word "entry," as used in the public land laws, covers all methods by which a right to acquire title to public lands may be initiated, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

includes within its meaning the filing of selections of lieu lands under a railroad grant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 250-252; Dec. Dig. § 81.*

For other definitions, see Words and Phrases, vol. 3, p. 2417.]

In Equity. Suit by the United States against the Northern Pacific Railway Company and others. Decree for defendants.

Geo. W. Wickersham, Atty. Gen., and J. W. Freeman, U. S. Dist. Atty., of Helena, Mont.

C. W. Bunn and Chas. Donnelly, both of St. Paul, Minn., Wm. Wallace, Jr., and J. G. Brown, both of Helena, Mont., and R. F. Gaines, of Missoula, Mont., for defendants.

RASCH, District Judge. [1] Whether the lands involved in this suit were, prior to the act of May 1, 1888, c. 213, 25 Stat. 133, a part of the Gros Ventres, Piegan, Blood, Blackfeet, and River Crow Indian reservation, and, prior to the amendatory act of March 3, 1911, subject to entry and disposal only under the particular land laws mentioned in section 3 of the original act, which is one of the disputed questions presented, need not be determined, as, in my opinion, the approved selections of the lands in controversy and the patents issued therefor, now sought to be annulled, were, if defective at all, validated by the amendatory legislation of March 3, 1911. Under the law as originally enacted, the ceded portions of the reservation were made "a part of the public domain" and opened to the operation of the laws regulating homestead entry, except section 2301 of the Revised Statutes (U. S. Comp. St. 1901, p. 1406), and to entry under the town-site laws, and the laws governing the disposal of coal lands, desert lands, and mineral lands," but not "to entry under any other laws regulating the sale or disposal of the public domain." By the amendment they are opened to the operation of all of the laws regulating the entry, sale, or disposal of the public domain, and "no patent shall be denied to entries heretofore made in good faith under any of the laws regulating the entry, sale, or disposal of public lands, if said entries are in other respects regular and the laws relating thereto have been complied with." That the patents could not be successfully assailed if the selections had been made under the law as amended, and that no valid objections to the making and filing of such selections of the same lands and to their approval could now be urged if made and filed under the law as it now stands, is conceded. So that, if it were to be held that the amendment did not cure the alleged defects of defendant's title to the lands in question, the effect of such holding would simply be to require the defendant railway company to do over again what it did once before; that is, again file in the local land office its selection of the lands which were patented to it upon the selections made in 1908. A construction which would deny to the amended statute any curative effect as regards selections made and approved prior to its enactment, when, at the same time, the right to acquire the lands thereafter by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the very means of such identical selection is unmistakably conferred, thus imposing a burden which it does not seem reasonable to assume as having been intended by the lawmaking body, should obviously not be adopted, unless the words of the statute clearly demand it.

[2] They do not demand it. The doubt as to the operative effect of the amended statute, which has been suggested, arises from the use of the word "entries," with reference to which it is surmised, rather than asserted, that the selection of lieu lands to supply losses under the original grant does not constitute "entries," within the meaning of that term as used in the statute. It is said that "in the nomenclature of the public land laws a railway selection is not an "entry." It is usually termed a "filing," and public land legislation intended to validate selections or filings has usually designated them as such." But this is clearly not decisive; nor does the mere fact, if it be a fact, that a practice of that kind has been generally followed in the matter of land legislation furnish a proper or adequate test, by means of which the meaning of words used in the statutes relating to the public lands may in all cases be ascertained and determined. The established rule undoubtedly is that it must be assumed that, where the meaning of particular words, terms, or phrases has been judicially defined by the court, or by the departments of the government, the sense in which such word, term, or phrase was used in legislation was with the meaning which the courts and the departments had theretofore attached to the same.

Thus, as to the meaning of the word "entry," the Supreme Court of Kansas, in the case of *Goddard v. Storch*, 57 Kan. on page 717, 48 Pac. on page 16, said:

"The word is of generic signification, and includes all methods of the acquisition of the equitable title of public lands, prior to the passing of the legal title by the government patent, except under laws in which words of special signification, such as 'pre-empted,' are used. Our attention has not been called to a single case in which such a limited and special meaning as the plaintiff in error attaches to the word has been given. On the contrary, the officers of the United States Land Department allow it a much more extended meaning than we have done. 'An entry is that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim thereto with the proper land officer of the United States.' Secretary Chandler to Commissioner Williamson, *Thomas v. Railroad Co.*, 2 Copps' Pub. Land Laws 1882, p. 869. 'You hold that the word "entry" means a purchase with money, or a location under or by virtue of some kind of warrant or scrip. It undoubtedly has the meaning you give it; but I think, as used in said act, it should have a more general meaning, and be construed so as to include any and every lawful appropriation of lands. Lands certified to railroads in accordance with the terms of the grant are thus appropriated.' Acting Secretary Gorham to Commissioner Williamson, *State of Iowa v. Cedar Rapids & M. R. R. Co.*, 2 Copps' Pub. Land Laws 1882, p. 961."

And in *Denny v. Dodson* (C. C.) 32 Fed. on page 910, Judge Field defined it as follows:

"The term 'entry' covers a homestead and town-site entry as well as a private entry made by a settler after the close of the public sales. It is used to designate the *initiatary proceeding for the acquisition* of a portion of the lands of the United States which are open to private sale; or, as said in *Chotard v. Pope*, 12 Wheat. 588, 6 L. Ed. 737, 'it means that act by which

an individual acquires *an inceptive right* to a portion of the unappropriated soil of the country by *filing his claim* in the appropriate local land office."

The steps required to be taken for the acquisition of lands under the provisions of the New Madrid Act, approved February 17, 1815, c. 45, 3 Stat. 211, which entitled a person whose land had been injured by the earthquakes of December, 1811, "to locate the same quantity on any of the public lands in the Missouri territory, but not exceeding in any case 640 acres, on which being done the title to the lands injured should revert to the United States," were in a general way quite similar to those required in making selections for losses sustained under railroad grants. "The recorder of the land titles for the territory of Missouri was made the judge to ascertain who was entitled to the benefit of the act, and to what extent," and if the claim of right to make such selections was well founded "he was directed to issue a certificate to the claimant." Certificates having issued, "and a notice of location having been filed in the surveyor general's office, on application of the claimant the surveyor was directed to *survey the land selected*, make return to the recorder of land titles," and "the patent issued on the plat and certificate of the surveyor, returned to the recorder's office, and which was by him reported to the General Land Office." *Bagnell v. Broderick*, 13 Pet. 447, 10 L. Ed. 235. In speaking of the nature and requirements of the act and the effect of proceedings taken thereunder, the court, in *Lessieur v. Prive*, 12 How. on page 74, 13 L. Ed. 893, said:

"The act of Congress provides 'that in every case where such location shall be made, according to the provisions of this act, the title of the person or persons to the land injured, as aforesaid, shall revert to and become absolutely vested in the United States.' A concurrent vestiture of title must have occurred. The injured land must have vested in the United States at the same time that title was taken by the new location. * * * His *entry* was to be made by the principal surveyor, or under his direction. *It was to consist* of a plat of survey, and a certificate describing the lands, with the name of the claimant for whom the location by survey was made. This return the recorder had to examine, pass upon, and record; if the location and survey had been properly made, then the United States assented to the exchange, and not until then."

Now, if locations or selections (these terms are used interchangeably in *Bagnell v. Broderick*, *supra*), under the New Madrid Act, conditioned for their validity upon the approval of the recorder, were "entries," then, clearly, the selections of lieu lands made and filed by the defendant railway company, comprising the lands in controversy here, were likewise entries, and come within the meaning of the word as used in the amended statute of March 3, 1911. *Chotard v. Pope*, 12 Wheat. 588, 6 L. Ed. 737; *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761; *McGuire v. Brown*, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384.

Decree of dismissal may be entered.

GREENLEAF JOHNSON LUMBER CO. V. UNITED STATES.

(District Court, E. D. Virginia. February 20, 1913.)

1. NAVIGABLE WATERS (§ 39*)—LANDS UNDER WATER—OWNERSHIP AND CONTROL.

Under the law of Virginia, the ownership of lands in the bed of a navigable stream below low-water mark is vested in the commonwealth, subject to the public easement or servitude in the federal government to control the use of the waters of the stream, in so far as it may determine to be necessary in furtherance of commerce and navigation.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.*]

2. NAVIGABLE WATERS (§ 43*)—RIPARIAN RIGHTS—LAW OF VIRGINIA.

Under the settled law of Virginia, a riparian owner of land on a navigable stream has a fee-simple interest to low-water mark, and also the right to erect wharves or piers or bulkheads in the stream opposite his land, provided navigation be not obstructed nor the private rights of any person otherwise injured thereby; and his right is not a mere license, but constitutes property in the owner.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 104, 256-265; Dec. Dig. § 43.*]

3. NAVIGABLE WATERS (§ 7*)—IMPROVEMENT OF NAVIGATION—AUTHORITY OF SECRETARY OF WAR.

An act appropriating money for a specific improvement of a navigable stream is an assertion by Congress of the right of the federal government to make the improvement as an aid to commerce and navigation, and is sufficient authority to the Secretary of War, who is by statute vested with large general powers with respect to rivers and harbors, to proceed with the work.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 18; Dec. Dig. § 7.*]

4. EMINENT DOMAIN (§ 84*)—IMPROVEMENT BY UNITED STATES—DESTRUCTION OF PRIVATE PIERS—RIGHTS OF RIPARIAN OWNER.

Where the effect of the widening of the navigable channel of a river by the United States in aid of commerce and navigation is to change the line of navigability as previously established by state authority, and to partially destroy piers built to such line by a riparian owner under lawful authority, which were themselves constructed as an aid to commerce and under the law of the state constitute property, the result is a taking of such property within the meaning of the fifth constitutional amendment, and the owner is entitled to compensation therefor.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 227-230; Dec. Dig. § 84.*]

In Equity. Suit by the Greenleaf Johnson Lumber Company against the United States. On application by defendant for a mandatory injunction. Denied.

The complainant, Greenleaf Johnson Lumber Company, is the owner in fee of certain property bordering on the Southern branch of the Elizabeth river, opposite the government navy yard at Norfolk, Va. It is engaged in the manufacture and sale of lumber, and in the conduct of its business erected many years ago, in front of its highland, extending out into the river, a wharf and fill; the former being used for the shipment of the product of its mills, and the latter being used for the purpose of floating and holding rough logs prior to their manufacture. All of these improvements were made pursuant to authority obtained from the board of harbor commission-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ers of the port of Norfolk and Portsmouth, and the same, as originally constructed, extended out from the shore into the river to an imaginary line known in this harbor as the "Port Warden's Line," in effect the channel line, or line of navigability. At the time these improvements were made, and for many years subsequent thereto, the government had established no harbor line or line of navigability in this branch of the river, but in 1890, pursuant to an act of Congress, the Secretary of War established such a line, and as established it was coincident in all respects with the previously established state line, and the property in dispute here was entirely within, or inland of, the same, and the line so continued in force and operation until February, 1911, when, after due hearing, the Secretary of War changed its location, so that, as changed and re-established, it ran along the front of complainant's property some 200 and odd feet inland of the original line, the effect of which was to leave outside of such re-established line approximately an equal number of feet of complainant's wharf and fill.

Shortly after this, the Secretary of War gave notice to complainant to remove within 90 days its structures extending out beyond the re-established line, upon penalty of having them removed by the government, his action in this regard being, it is claimed, in accordance with Act Cong. March 4, 1911, c. 239, 36 Stat. 1265-1275, making appropriation for the widening of the channel of the Southern branch of the Elizabeth river opposite the property of the complainant. Complainant thereupon obtained from this court an injunction order restraining the Secretary of War, his agents and servants, from interfering with the possession of the complainant of the property which the government was seeking to destroy. The Secretary of War duly appeared through the district attorney, filed a demurrer to the bill of complaint, and by agreement of parties at the hearing it was stipulated that the demurrer should be considered as a petition under section 12 of the act of March 3, 1899 (chapter 425, 30 Stat. 1151 [U. S. Comp. St. 1901, p. 3542]), and should be treated by the court as an application on the part of the government pursuant to the terms of said section for a mandatory injunction to compel the removal of the obstruction complained of, in accordance with the notice of the Secretary of War hereinabove referred to.

Briefly speaking, therefore, the question which the court is now called upon to determine is the right and title of a riparian proprietor in a navigable waterway, as against the government, to improvements placed pursuant to lawful authority in the waterway in front of his high land, between low-water mark and the line of navigability, and the effect upon such right or title, if any, of a subsequent change in the line of navigability, the result of which is to leave a part of such improvements outside of the re-established line.

Starke, Venable & Starke and Jeffries, Wolcott, Wolcott & Lankford, all of Norfolk, Va., for complainant.

D. Lawrence Groner, U. S. Atty., of Norfolk, Va.

WADDILL, District Judge (after stating the facts as above). Several incidental questions arise upon the pleadings, which will be considered before passing to the merits, namely, the rights of riparian owners under the laws of Virginia in lands bordering on streams and under the waters thereof to the line of navigability, the ownership of the submerged lands, the rights of the federal government respecting the waters in question, and the status of the riparian owner as respects land below low-water mark.

[1, 2] The following may be conceded as the settled law in Virginia regarding these matters, recognized and acquiesced in by the parties to this proceeding, save the fourth proposition, as to which they are not agreed:

First. That riparian owners have a fee-simple interest to low-water mark in lands bordering on navigable streams,

Secondly. That the ownership of the lands in the bed of a navigable stream below low-water mark is vested in the commonwealth, subject to the public easement or servitude in the federal government in furtherance of the ends of commerce and navigation.

Thirdly. That the use of the waters in question is subject to the paramount power and authority of the federal government thereto, in so far as it may determine to be necessary to further the ends of commerce and navigation.

Fourthly. Riparian owners have the right to erect wharves, or piers, or bulkheads, in water courses opposite their lands, provided navigation be not obstructed, nor the private rights of any person otherwise injured thereby, and that this right in Virginia, within the limitations mentioned, is not a mere license, but constitutes property in the owner.

[3] A preliminary question is presented as to the power and authority of the Secretary of War to make the contemplated improvement, as well as of the lack of specific authority on his part to act, because of the failure of Congress to provide for the work by appropriate legislation. The act of Congress of March 3, 1899 (chapter 425, 30 Stat. L. 1151), confers large powers upon the Secretary of War respecting the rivers and harbors of the country, and the regulation of the navigation of the same, but whether in terms to do the specific work complained of need not be decided, since by the act of March 4, 1911 (chapter 239, 36 Stat. 1265-1275), provision is directly made for the improvement in question, namely, "for the purchase of land and widening of channel," and under this authority the executive branch of the government has the right to designate the hand that it will use to carry out and perform the directions of Congress. The act making the appropriation is a sufficient declaration of the will of Congress that the improvement is desired for the legitimate purposes of commerce and navigation, and hence there can be no legal objection made, either to the making of the contemplated improvement, or the instrumentality chosen to carry out the same, provided the rights of the riparian owner, if any, be properly safeguarded and protected. Here the act sufficiently fixes the location of the improvement, and the pleadings in this case admit that the complainant's lands are within the bounds of the same. *South Carolina v. Georgia*, 93 U. S. 4, 12, 23 L. Ed. 782; *Gibson v. United States*, 166 U. S. 269, 276, 17 Sup. Ct. 578, 41 L. Ed. 996; *Scranton v. Wheeler*, 179 U. S. 141, 157, 21 Sup. Ct. 48, 54 (45 L. Ed. 126). In the latter case, Justice Harlan, speaking for the court, and quoting from Chief Justice Fuller in the *Gibson Case*, said:

"The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of the right belonging to the government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes."

This brings us to the crucial question to be determined, namely, the status of a riparian owner, who has built a pier, or wharf, or bulkhead, in front of his land, by and with the assent of the constituted authorities, and within the established harbor lines, upon the

federal government's concluding, in the interest of commerce and navigation, to widen the channel, necessitating the cutting off from his wharf or pier some 200 feet; that is to say, can the same be removed, destroyed, or taken by the government, without just compensation therefor, as required by the fifth amendment of the Constitution? The right of the government, in furtherance of the ends of commerce and navigation, to change harbor lines, to take the pier in question, or cut off and shorten the same, is conceded. In *Gilman v. Philadelphia*, 3 Wall. 724, 18 L. Ed. 96, the court said:

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose, they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of the offenders. For these purposes, Congress possesses all the powers which existed in the states before the adoption of the national Constitution, and which have always existed in the Parliament of England." *Gibbons v. Ogden*, 9 Wheat. 1, 196, 197, 6 L. Ed. 23; *Gilman v. Philadelphia*, 3 Wall. 713, 724, 18 L. Ed. 96; *South Carolina v. Georgia*, 93 U. S. 4, 10, 23 L. Ed. 782; *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248; *Scranton v. Wheeler* (a decision of Mr. Justice Lurton in the Circuit Court of Appeals for the Sixth Circuit) 57 Fed. 803, 812, 815, 6 C. C. A. 585.

Whether, however, the government can exercise the authority thus claimed by and conceded to it, without making just compensation to those injuriously affected thereby, for damages sustained, under the facts and circumstances of this case, is vigorously contested and controverted by the riparian owner, the complainant here.

The government, on the one hand, claims that the contemplated work is with the view of widening a navigable stream, in the interest of commerce, in the performance of which it is not liable for damages arising to riparian owners, such damage being consequential and incidental to the necessary exercise of the power and authority vested in it, and which is *damnum absque injuria* certainly so far as the government is concerned, and that it is contrary to the spirit of the Constitution and laws of the United States, that the government should be hindered, or burdened, in making such public improvements by claims of riparian owners, whose property may be injuriously affected by what is being done.

The complainant, on the other hand, contends directly to the contrary, and insists, first, that the state holds the bed of a navigable stream merely as trustee for the use of the complainant and others; second, that its rights in the lands thus held as trustee by the state are not a mere license or privilege, as held in some of the states, but, under the laws of Virginia, constitutes property, and that in the exercise of those rights tangible property, constructed under authority and regulation of the trustee, is private property in the fullest sense, as stable and as fully protected as any other estate, and, like all other property of the individual, can only be taken for public use upon payment of just compensation therefor; third, that once recognized

and held as property, there is no exception made in the Constitution against its protection; fourth, that any physical invasion, whereby the owner is deprived of the possession or use of any portion of it, is a "taking" within the meaning of the Constitution; and, fifth, that in the exercise of its power and control over the waters in question, in the interest of commerce, the government of the United States possesses no higher or other power than the state held, or that the latter acquired from the crown, each sovereign being successively trustee for all the people, and that the structures in question proposed to be removed by the government, namely, wharves, piers, bulkheads, etc., built out into the stream, with the assent of the trustee, are recognized everywhere as being not merely for the benefit of the owner, but as in aid of navigation, and forming an essential part thereof, without which commerce could not be carried on.

In the view taken by the court, a correct determination of the issues thus presented by the pleadings will largely depend upon the character of the estate or interest held by the riparian owner under the laws of Virginia in the property involved in the pleadings, built out into navigable waters, pursuant to lawful authority, and the extent to which the government, in the interest of commerce and navigation, purposes to disturb the same; that is, whether what is proposed to be done amounts to a taking of property, or merely incidentally affects it injuriously. The statute of Virginia (section 944a [31]) is as follows:

"(31) Any person owning land upon a water course may erect a wharf on the same, or pier or bulkhead, in such water course opposite his land: Provided, navigation be not obstructed, nor the private rights of any person be otherwise injured thereby. * * *"

This act, and what may be termed the status of riparian owners, respecting waters on which their high lands border, has been the subject of frequent decisions by the Supreme Court of Appeals of Virginia, and the law may be said to be settled that such owners are not merely licensees in respect to their rights in the lands and waters in question, but that their interests constitute a property right of which they cannot be lawfully deprived without the payment of just compensation, if taken.

In *Norfolk City v. Cooke*, 68 Va. 430, 435, the leading case in Virginia on the subject, the Supreme Court of Appeals, especially citing the opinion of Mr. Justice Miller in *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, and relying on that decision and the cases there referred to, says, after quoting the Virginia statute above mentioned:

"This right of the riparian owner is not a mere license or privilege, but is property, property in the soil, up to the line of navigability, though covered by water; for a wharf, pier or bulkhead, can only be built on the soil. It is not a mere easement to pass over, or a privilege to use the surface, but property in the soil under the water, on which to fasten and build such structure; and for this purpose, and subject to the restriction that navigable waters shall not be obstructed, is as much property as the land above the margin of a navigable stream."

To the same effect are the decisions of Virginia to the present time, the most recent case having been decided within the last two years

(110 Va. 874, 67 S. E. 534). *Groner v. Foster*, 94 Va. 650, 27 S. E. 493; *Taylor v. Commonwealth*, 102 Va. 759, 771, 47 S. E. 875, 102 Am. St. Rep. 865; *Grinels v. Daniel*, 110 Va. 874, 67 S. E. 534. In all of the Virginia decisions, the case of *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, is referred to and relied on, and in the last two the court quotes therefrom approvingly the portion hereinafter set out.

The suggestion is made by counsel for the government that a remark made by the court in the case of *Taylor v. Commonwealth*, *supra*, that the doctrine enunciated in the *Cooke Case*, *supra*, was a broad statement of the law, which it was not called on to either criticize or approve, had the effect of modifying that decision; but such manifestly is not the case, as is clear from the court's language, and, besides, of the Virginia cases named, the *Taylor Case* was the only one that did not involve the question especially presented here, it pertaining more particularly to the right of a riparian owner as against the state to certain hidden property rights under water, namely, the right to bore an artesian well out in the stream in a portion of the soil as to which complainant had theretofore made no assertion of riparian rights. Moreover, in the much more recent decision of *Grinels v. Daniel*, 110 Va. 874, 67 S. E. 534, *supra*, more particularly in point here, the *Cooke Case* was especially relied on, and no suggestion intimated as to any qualification thereof.

In the judgment of the court, the cases, in effect, agree that where the interest involved is property, and the same is lawfully in the stream, and what is proposed is to take it, as distinguished from merely injuriously affecting it, it can only be done upon making just compensation therefor. The contrariety of views that apparently prevail grows out of the existence or nonexistence of some one of the conditions indicated, and arise generally in cases injuriously affecting the high lands, or resulting in incidental injury or damage to the same, or to the riparian owner's rights appertaining thereto.

The case of *Yates v. Milwaukee*, 10 Wall. 497, 504, 505, 19 L. Ed. 984, *supra*, is more like the present in its essential features than any federal case to which the court has been referred. There the owner of land fronting on the river in the city of Milwaukee, in the state of Wisconsin, had, pursuant to lawful authority, built over land covered by water of no use for the purposes of navigation a wharf extending to the navigable channel of the river. The city council, under a state statute, enacted before the wharf was built, was authorized thereby to establish dock and wharf lines on the banks of the river, and to restrain and prevent encroachments upon and obstructions in the river, and to cause the river to be dredged, in pursuance of which the city, without evidence that the wharf was an obstruction to navigation, or in any sense a nuisance, passed an ordinance declaring the same to be such, and ordered it to be abated. Whereupon *Yates* instituted proceedings to prevent the enforcement of the ordinance, or the removal of the wharf. The court held that a mere declaration of the city council that the wharf already built and owned by the plaintiff was a nuisance, did not make it such, or subject to removal by the city authorities; the court saying:

"But, whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use, or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be. This proposition has been decided by this court in the cases of *Dutton v. Strong*, 1 Black, 25 [17 L. Ed. 29], and *Railroad Co. v. Schurmeier*, 7 Wall. 272 [19 L. Ed. 74]. * * * This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary, that it be taken for the public good, upon due compensation."

In *Shively v. Bowlby*, 152 U. S. 1, 40, 14 Sup. Ct. 548, 38 L. Ed. 331, the Supreme Court of the United States indicated that much that was decided in the *Yates* Case was obiter, still it was the unanimous opinion of the court, rendered in a case strikingly like the one under consideration here, while the *Shively* Case was one of incidental or consequential damages, and not a taking of property.

The *Yates* Case was the subject of further review by the Supreme Court in the case of *Scranton v. Wheeler*, 179 U. S. 141, 158, 21 Sup. Ct. 48, 45 L. Ed. 126, which is strongly relied upon by the government, a much later case than that of *Shively v. Bowlby*, supra, and in which it is quite apparent to the court that upon a state of facts such as we have here it would have received the sanction and full approval of the court. Mr. Justice Harlan, speaking for the court, at page 158 of 179 U. S., at page 55 of 21 Sup. Ct. (45 L. Ed. 126), said:

"The decision in *Yates v. Milwaukee* cannot be regarded as an adjudication upon the particular point involved in the present case. That, as we have seen, was a case in which the riparian owner had in conformity with law erected a wharf in front of his upland in order to have access to navigable water. The city of Milwaukee attempted arbitrarily and capriciously to destroy or remove the wharf that had lawfully come into existence and was not shown, in any appropriate mode, to have been an obstruction to navigation. It was a case in which a municipal corporation intended the actual destruction of tangible property belonging to a riparian owner and lawfully used by him in reaching navigable water, and not, like this, a case of the exercise in a proper manner of an admitted governmental power resulting indirectly or incidentally in the loss of the citizen's right of access to navigation—a right never exercised by him in the construction of a wharf before the improvement in question was made by the government."

Assuming that what the government proposed doing constitutes a taking of the complainant's property, the court can but believe that the foregoing decisions, and those of like import, control, and that the property can only be secured upon payment of just compensation therefor.

The *Monongahela Navigation Co. Case* strongly sustains the view that if tangible property of the complainant placed in the navigable waters of a stream on which its property borders, pursuant to lawful authority, is to be taken for public purposes, it can only be done upon making just compensation. That case involved the taking of a dam and lock in the *Monongahela* river, placed there in the interest of commerce and navigation, and the Supreme Court held that inas-

much as the government's improvement involved the destruction of the lock and dam lawfully placed therein, with the consequent loss of business, including its franchises, it could only be done by paying proper compensation therefor. *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463.

Two cases have been cited by counsel for the complainant—*Weems Steamboat Co. v. People's Steamboat Co.*, 214 U. S. 354, 29 Sup. Ct. 661, 53 L. Ed. 1024, 16 Ann. Cas. 1222, and *Scranton v. Wheeler*, 57 Fed. 803, 6 C. C. A. 585, *supra*. These two decisions are of more than passing interest, in that the first named is a very recent decision of the Supreme Court of the United States, on the right of riparian owners in wharf property in Virginia, and the other an opinion of Mr. Justice Lurton, speaking for the Circuit Court of Appeals for the Sixth Circuit, considering the difference between cases in which the obstruction had been lawfully placed in the stream and those in which it had not. "The rights of a riparian owner upon a navigable stream in this country are governed by the law of the state in which the stream is situated. These rights are subject to the paramount public right of navigation. The riparian proprietors have the right, among other things, to build wharves out so as to reach the navigable waters of the stream. * * *" *Weems Steamboat Co. v. People's Steamboat Co.*, 214 U. S. 354, 355, 29 Sup. Ct. 663, 53 L. Ed. 1024, 16 Ann. Cas. 1222. "A distinction exists between those cases where, under authority of the state, a structure has been placed in a navigable stream, such as a bridge, or lock and dam, as an improvement to the navigation of a stream wholly within its borders, and which is sought to be removed under the authority of subsequent congressional legislation. In such case, the improvement, being by authority of law, can only be taken for public uses upon just compensation. This is the doctrine of the case of *Monongahela Navigation Co. v. United States*, 148 U. S. 312 [13 Sup. Ct. 622, 37 L. Ed. 463]. In that case it was held that, not only the actual property of the owner in the structure, but his franchise also, must be paid for. The plaintiff in the case before us has made no improvements for either public or private uses. No property of his has been invaded, none has been taken," *Scranton v. Wheeler*, 57 Fed. 803, 814, 6 C. C. A. 585 (meaning that no pier had been built where the government had erected its pier).

The case of *United States v. Lynah*, 188 U. S. 445, 458, 474, 479, 23 Sup. Ct. 349, 47 L. Ed. 539, while in some of its features similar, is not entirely like the one in hand. In many respects it is especially applicable, and strongly supports the complainant's view as to when and when not, and in what manner the government can take a citizen's property. The government cites many authorities in support of its views, among them *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. Ed. 23; *Martin v. Waddell*, 16 Pet. 410, 413, 10 L. Ed. 997; *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629; *Illinois Central v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; *Gibson v. United States*, 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996; *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126; *Chicago*

v. Illinois, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; Hannibal Bridge Co. v. United States, 221 U. S. 194, 31 Sup. Ct. 603, 55 L. Ed. 699; Philadelphia Co. v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570; Stockton, Attorney General, v. Baltimore (C. C.) 32 Fed. 9; Taylor v. Commonwealth, 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865; Cohn v. Boom Co., 47 Wis. 325, 2 N. W. 546; Black River Improvement Co. v. La Crosse Transp. Co., 54 Wis. 659, 11 N. W. 443, 41 Am. Rep. 66; Keator Lumber Co. v. St. Croix Corporation, 72 Wis. 82, 38 N. W. 529, 7 Am. St. Rep. 837; Sage v. New York, 154 N. Y. 61, 47 N. E. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592, and also an opinion of former Attorney General Griggs, 22 Op. Atty. Gen. 501. Undoubtedly the government has heretofore taken the same view now contended for, and it may be said that the Attorney General's opinion referred to contains a very able and exhaustive exposition of that position; but whether the same has been accepted or can be maintained is a very different proposition. In the view of the court, it will not be necessary to review the cases furnished by the government, further than to say that many of them are bridge cases, which involve different questions from the one under consideration. Others depend on an entirely different state of facts from this, and others still upon independent considerations from those properly applicable and controlling in this case. Special reference will only be made to three of the cases most strongly relied on by the government, namely, Gibson v. United States, 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996, *supra*, Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126, *supra*, and Philadelphia Co. v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570. The first two of these cases have to do directly with the rights and powers of the government in making river and harbor improvements in aid of commerce to take property in which riparian owners are interested; but a careful examination of both of the cases will show that they neither control, nor as a matter of fact materially affect, the crucial point involved in this case.

In the Gibson Case the government in improving the Ohio river, at a point off Neville Island, some nine miles west of the city of Pittsburgh, constructed a dike of considerable length in front of the plaintiff's, the riparian owner's, property, in order to concentrate the water flow in the main channel of the river, which resulted in injury to plaintiff's land, a market garden, and landing for the shipment of her products. Chief Justice Fuller, speaking for the court, said (166 U. S. at page 276, 17 Sup. Ct. at page 580, 41 L. Ed. 996):

"In short, the damage resulting from the prosecution of this improvement of a navigable stream, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which the property had always been subjected."

In the Scranton Case the government erected a pier in St. Mary's river, Mich., out into the river, across the front of the plaintiff's lands. The right of recovery arising from the damage to the riparian owner's property was denied; Mr. Justice Harlan, speaking for the

court, saying at page 158 of 179 U. S., at page 55 of 21 Sup. Ct., 45 L. Ed. 126, that it was "a case of the exercise in a proper manner of an admitted governmental power, resulting indirectly or incidentally in the loss of a citizen's right of access to navigation—a right never exercised by him in the construction of the wharf before the improvement in question was made by the government."

The case of *Philadelphia Co. v. Stimson* will be found to contain a full and very recent discussion of the general subject, but nothing especially inimicable to the views herein enunciated; as a matter of fact pages 624 to 636 of 223 U. S., pages 346 to 351 of 32 Sup. Ct. (56 L. Ed. 570), in many respects strongly support the same. The case more particularly involved the rights of riparian owners resulting from a change in their shore lines caused by the flow of water, whether sudden or gradual, and the right of the government to change the harbor lines in consequence thereof, among other causes, but it only incidentally applies here, as viewed by the court.

In this circuit the cases bearing particularly on the subject are entirely in consonance with the view here expressed. In the *Hawkins Point Light-House Case* (C. C.) 39 Fed. 77, 87, a controversy between the government and the riparian owner over the right to construct a lighthouse, Judge Morris, of the District Court of Maryland, in deciding in favor of the government, noted that in advance of the building of the lighthouse nothing had been done by the riparian owner to assert his rights as such to the land taken by the government. In the case of *Richardson v. United States* (C. C.) 100 Fed. 714, a decision of Judge Simonton in the United States Circuit Court for the Eastern District of Virginia, it was decided that the improvement made by the government out of which the litigation grew resulted in incidental damage and injury to the petitioner's property, and hence that no recovery could be had. It is not believed that in any of the cases involving damages arising from the taking of property of the riparian owner compensation has been refused except where they were either of merely incidental character, or where there had been no assertion of such right, or that the exercise of the same had been attempted without previous and proper authority, to extend piers or wharves out into and occupy navigable waters.

Is it proposed to take complainant's property here? On the correct answer to this inquiry largely depends the question at issue. If what they have is property, and the same is to be taken, then, confessedly, it can only be done, upon making due payment therefor to the owner (Const. art. 5); "nor shall private property be taken for public use, without just compensation." The counsel for the government, in the very able and learned argument made on its behalf, was driven to the alternative of maintaining that what was proposed was the destruction of and not the taking of the pier in question. This will not, in the court's judgment, answer, certainly in a case involving the right and title of a riparian owner to tangible property built out into the navigable waters, on which his lands border, by lawful authority. To all intents and purposes the destruction and taking are the same; one is tantamount to the other. In either event the complainants lose what they have, and the government gets what it desires. Whatever may

be the power of the government to destroy the property of a stranger, or a trespasser, or even a licensee, in furtherance of the ends of commerce, no such right and authority exists in dealing with the rights of those lawfully using and occupying the waters, such as a riparian owner. The language of Mr. Justice Brewer in *United States v. Lynah*, 188 U. S. 464, 23 Sup. Ct. 355, 47 L. Ed. 539, after referring to *Great Falls Mfg. Co. v. Attorney General*, 124 U. S. 581, 8 Sup. Ct. 631, 31 L. Ed. 527, and several other cases, in which the government had arbitrarily taken private property before condemning or otherwise lawfully acquiring the same, seems appropriate here: "The rule deducible from these cases is that, when the government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and, if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not), that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the fifth amendment guarantees that, when this governmental right of appropriation—this asserted paramount right—is exercised, it shall be attended by compensation." So far as the owner is concerned, the effect is precisely the same, whether property be appropriated for the government's uses or by force and violence destroyed, in order that it may encompass its ends and accomplish its purposes. As to just what constitutes a taking, the same learned justice quotes from the opinion of Mr. Justice Miller in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557, as follows:

"The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation. It would be a very curious and unsatisfactory result if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert

the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

What the pleadings admit is to be done in the case, as viewed by the court, clearly constitutes the taking of complainant's property, for which they are entitled to be remunerated. Reference may be had to the following authorities as supporting generally the views herein expressed: *Shively v. Bowlby*, 152 U. S. 40, 14 Sup. Ct. 548, 38 L. Ed. 331; *Stockton v. Baltimore, etc.*, R. Co. (C. C.) 32 Fed. 19; *Sullivan Timber Co. v. City of Mobile* (C. C.) 110 Fed. 190, 194; *Commonwealth v. Alger*, 7 Cush. (Mass.) 83; *Horner v. Pleasants*, 66 Md. 475, 7 Atl. 692; *Lewis v. City of Portland*, 25 Or. 133, 35 Pac. 256, 22 L. R. A. 736, 42 Am. St. Rep. 772; 1 *Farnham on Waters and Water Rights*, 50, 136, 510, 511, 551, 552, 569; 1 *Lewis on Eminent Domain*, §§ 76 (b), 78, 83.

In reaching the conclusion here, sight has not been lost of the fact of the importance of the case to the government, not only because of the amount involved in this and similar cases, but because of possible delays and inconveniences that may result therefrom in making contemplated improvements. But nevertheless the court can but believe that when, in the interest of commerce and furtherance of its ends, property of the character involved in this case itself being an instrument of commerce, lawfully placed by a riparian owner in navigable waters has to be taken, that loss arising thereby should not fall upon an innocent riparian owner exclusively, but upon the government, and thus be borne by the public generally.

It follows from what has been said that the mandatory injunction asked for by the government to remove the pier and its appurtenances should be denied, and it will be so ordered.

INVESTMENT REGISTRY, Limited, v. CHICAGO & M. ELECTRIC
RY. CO. et al.

(District Court, E. D. Wisconsin. April 19, 1913.)

1. RECEIVERS (§ 150*)—CLAIMS—ALLOWANCE—PAYMENT.

A judgment having been recovered for personal injuries against an electric railroad and the receiver of another railroad as joint tortfeasors, and having been assigned by the judgment creditor to petitioner at the instance of his father, evidence *held* to warrant a finding that such assignment had not been made in good faith, but with the intention of compelling payment by the receiver to the benefit of the other railroad company, and that petitioner was therefore not entitled to an order in the receivership proceedings requiring the receiver to pay the judgment.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 267, 268; Dec. Dig. § 150.*]

2. RECEIVERS (§ 174*)—FEDERAL COURTS—CONTROL—CLAIMS.

Judicial Code (Act March 3, 1911, c. 231) § 66, 36 Stat. 1104 (U. S. Comp. St. Supp. 1911, p. 155), in relinquishing to parties and to other courts the right to institute and entertain, without leave, proceedings against federal court receivers in respect to the conduct of their business,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

has reserved to the federal courts appointing the receivers sole power over the matter of satisfaction of the rights determined, so that the mere recovery of a judgment against a federal court receiver in another court did not entitle the judgment creditor or his assignee to an order requiring the receiver to pay the same as a matter of legal right.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 333-343; Dec. Dig. § 174.*]

In Equity. Suit by the Investment Registry, Limited, against the Chicago & Milwaukee Electric Railway Company and others. On exceptions by the receiver of the defendant's property to the report of a master on petition of Ira S. Lorenz for an order directing the receiver to pay a judgment rendered against the defendant and against the Milwaukee Electric Railway & Light Company jointly and severally as joint tort-feasors for personal injuries to one Kaminski, by whom the judgment was transferred to Lorenz. Exceptions sustained.

In the circuit court for Milwaukee county one Kaminski brought suit against the Milwaukee Electric Railway & Light Company, a Wisconsin corporation operating a street railway in Milwaukee, and the Chicago & Milwaukee Electric Railway Company, a like corporation, and the herein receiver of the above-named defendant Chicago & Milwaukee Electric Railway Company, he being in possession of the stock and property, and as such operating the railroad, of said Chicago & Milwaukee Electric Railway Company. Such proceedings were had therein that on January 6, 1912, judgment was rendered and entered in favor of the plaintiff, and against the defendants jointly, for the sum of \$5,193.95; the cause of action being for personal injuries, the liability of the defendants joint and several, without right of contribution. It further appeared that on January 8, 1912, two days after its rendition and entry, Kaminski executed an instrument in writing, which was delivered January 10, 1912, assigning said judgment to the petitioner, Ira S. Lorenz. Thereafter, but without advising the herein receiver of the assignment, Lorenz, as assignee, in the name of Kaminski, caused execution to be issued out of said circuit court, directed to the sheriff of Milwaukee county, commanding him to make the same out of property of the defendant Chicago & Milwaukee Electric Railway Company, in the possession of the receiver as aforesaid. The latter thereupon petitioned this court for an order restraining such levy, which was granted, without prejudice, however, to the right to file an application such as is now before the court.

The application being thus made by petition averring the rendition, entry, and the present force of the judgment, the receiver by answer thereto alleges, in substance, that Lorenz, the petitioner, acquired such judgment under and by virtue of an understanding with the state court codefendant, Milwaukee Electric Railway & Light Company, with funds furnished by said last-named defendant; for the purpose of relieving it from the obligations of such judgment, and with the design of making the amount thus paid to the plaintiff out of the receiver herein, or out of the company whose property was in his hands. In other words, it was claimed that the transaction of the petitioner was colorable, for the sole purpose of benefiting the codefendant, the Milwaukee Electric Railway & Light Company—that is, it amounted to a satisfaction of the judgment. Such issues were referred to a master, whose report is now before the court for review. The master's findings, which are the subject of attack, are as follows:

"That the funds in the said Merchants' & Manufacturers' Bank, upon which said check was drawn and out of which the said check was paid, were the sole property of the firm of Lorenz & Lorenz, and that the said check was drawn by the said Ira S. Lorenz and the said judgment purchased by him by and with the consent of F. C. Lorenz, the only other member of the said firm.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"That the said Ira S. Lorenz had, at the time of the purchase of the said judgment, no understanding, agreement, or contract of whatsoever kind or nature with the Milwaukee Electric Railway & Light Company, or with any of its officers or agents, in regard to the purchase of the said judgment, and that he was not at said time acting as the agent, trustee, or attorney for the said Milwaukee Electric Railway & Light Company in the purchase of the said judgment, but that he purchased said judgment solely for and in his own behalf.

"That the said Ira S. Lorenz has not sold, assigned, transferred, or set over unto any other person, firm, or corporation any of his rights, titles, and interest in and to said judgment, but that he is still the owner and holder thereof.

"That the said Milwaukee Electric Railway & Light Company has not in any manner or upon any account paid the said Stanislaus Kaminski or the said Ira S. Lorenz the full amount of the said judgment, with interest and costs, or any amount whatever, on account of judgment, but that said judgment is still wholly unpaid and unsatisfied."

The receiver, by way of exception to the master's findings, urges that the funds used for the purchase of the judgment were not the property of the law firm of which the petitioner is a member, but in fact belonged to Fred C. Lorenz, the father of the petitioner, at whose instance and on whose behalf the judgment was purchased; that the evidence shows the fact to be that some agreement of some kind was made by said Fred C. Lorenz, in regard to the purchase of the judgment, with the Milwaukee Electric Railway & Light Company, its officers and agents; that the master should have found the fact to be that Fred C. Lorenz and Ira S. Lorenz withheld and fraudulently and falsely concealed from the master the terms and conditions of such agreement, and that they were guilty of a fraud upon the court therein; that the master should have concluded against the granting of the petition.

Other facts, pertinent to the questions presented, are referred to in the opinion.

Quarles, Spence & Quarles, of Milwaukee, Wis., for receiver.
Lyman G. Wheeler, of Milwaukee, Wis., for petitioner.

GEIGER, District Judge (after stating the facts as above). The exceptions to the master's report, the contentions of the receiver respecting petitioner's right to relief upon facts not found, but disclosed in the evidence, necessitate a discussion of the evidence from two points of view:

First. Should the master, upon the whole evidence, have found the absence of an agreement or understanding such as is claimed to have existed between the petitioner, or his father, and the Milwaukee Electric Railway & Light Company? This involves the further question whether, if there was no agreement, the master was justified in not finding that the petitioner and his father purchased the judgment in view of circumstances and a situation to be regarded as the equivalent of an agreement or assurance that the Milwaukee Electric Railway & Light Company would stand as an indemnitor against any loss which might be sustained through the purchase of the judgment.

Second. Irrespective of any relations between Lorenz and the Milwaukee Electric Railway & Light Company, do the situation of Lorenz at the time of acquiring the judgment, his motive to acquire the same, and his manner of seeking to enforce it, disclose a purpose and a course of conduct calculated to harass and annoy the receiver here-

in, which in and of itself create a situation of disfavor in equity, barring relief at this time?

In considering the matter, I shall not analyze the evidence claimed to support the first exception, because whether the petitioner was a principal, agent, or associate in the transaction is immaterial. The facts are undisputed that he acted with and upon the prompting of his father, and the term "petitioner" is used as referring broadly to the transaction to which they were both parties, though the petitioner personally had rather a nominal participation therein.

[1] Considering the evidence, therefore, in the light of the two propositions above, it is in substance this: Fred C. Lorenz and the petitioner, Ira S. Lorenz, father and son, are practicing law in Milwaukee as Lorenz & Lorenz. The father testified that at or about the time of the rendition of the Kaminski judgment he learned thereof through one Rausch, a quite intimate social acquaintance, who is claim agent of the Milwaukee Electric Railway & Light Company. Such knowledge, however, was gained quite casually in conversation at the lunch table. Lorenz had never before purchased judgments of the kind in question, though he had purchased foreclosure judgments. He at once opened communications with the attorneys for the plaintiff, Kaminski, and within a day or two the assignment of the judgment had been prepared, followed on the fourth day after its rendition by the delivery of the written assignment to the petitioner herein. The consideration—the full amount of the judgment—was paid by the check of the law firm, the funds for that purpose being derived, about \$1,000 nominally firm funds, and \$4,000 additional credited to such firm account, the proceeds of a real estate mortgage placed by Fred C. Lorenz upon his homestead at that time. He made no examination of the record, the testimony, or proceedings in the Kaminski Case, and did not discuss with counsel for plaintiff, or for either of the defendants, the merits of the controversy, the likelihood or probable results of an appeal, but does testify that Rausch said to him that the Milwaukee Electric Railway & Light Company was probably "stuck," and negatived the probability of an appeal. The petitioner himself testified to little more than the routine matter of drawing the check and the formal receipt of the assignment of the judgment, although he denied the existence of any understanding such as was alleged by the receiver herein to have existed. His father, when asked to give the reasons for the purchase, claimed, rather indefinitely, that he intended to take an assignment of this judgment before it was entered, but was unable to state how, when, or under what circumstances such intention arose, excepting the casual meeting with Rausch. Negotiations were taken up with counsel for Kaminski, indirectly, but, as stated, without any examination whatever of the record in the case. But in his talk with Rausch, the latter told him of the situation between the two companies, intimating that the Milwaukee Electric Railway & Light Company had a right of way at the place where the collision resulting in the injury happened, and that the company represented by the receiver herein should pay, or should have paid, the claim involved in such suit. However, the judgment was purchased without any understanding re-

specting an appeal. Lorenz had but one talk with Rausch, and would not state that, excepting to the extent necessary to procure the assignment and pay the consideration, he had any further talk with anybody about the matter. His testimony respecting the occasion of the talk with Rausch is as follows:

"Q. And Mr. Mat. Rausch, then, is the only person in the employ of the defendant Milwaukee Electric Railway & Light Company with whom you talked in regard to this? A. That is my impression. Q. Did he request you to buy that judgment? A. No, sir. Q. Did he suggest it? A. No, sir. Q. He just simply gave out this general statement of it? A. I think it was a mere accident he gave it out. Q. It was just in casual conversation? A. Yes, sir. Q. Without any idea on his part, apparently, that you would found any action on this conversation—is that correct? A. I don't know. Q. He had no idea, at the time he so talked to you, that he was inducing you to buy this judgment? A. I could not say whether he had or not, but my impression is he didn't. If he did, he concealed it."

It further appears that, after procuring the assignment of the judgment, neither the petitioner nor his father gave notice thereof to the receivers, but claim to have given notice to the defendant Milwaukee Electric Railway & Light Company. When pressed to give additional reasons for purchasing the judgment, petitioner's father gave the following:

"In addition to the reasons I stated this morning, I have always heard that the Chicago-Milwaukee people were not honest with the people that lived on their line. In the first place, they promised to give us good service on First avenue. They are giving it to us every 15 or 20 minutes. I happen to have the pleasure of living on that line on the corner of First and Walker. If I go out in the morning and miss one car, I have to wait 15 or 20 minutes for another. If I am caught in the rain over town at 8 or half past 8, and miss one car, I got to wait 20 or 30 minutes to get another. They have practically confiscated my property on First avenue. The street is very narrow. A load of hay can't pass the street cars on that highway without a great deal of inconvenience. Though I am not a farmer, I have observed that. In addition to that, they operate on that line freight and express cars. I don't know about the freight, but I know they operate express cars, and stop right almost in front of my house, unload milk cans, and load them on. They go down that decline, sometimes two cars, two large Chicago inter-urban cars hooked together, and they go down that hill on Washington street at a lightning rate of speed, and especially at 1 or 2 o'clock in the morning. Not infrequently they wake my wife up, and occasionally myself, when they go down that street or up, and you will find big trails of dust there, and it always comes into our house. During this summer, when my wife was away, the dust piled up on the center table a quarter of an inch deep every week or ten days. We had our granddaughter staying at our house for a few nights, and it would awaken her every few minutes. They don't sprinkle the tracks, and they are a common nuisance on that highway. Besides that, we represented at one time a number of clients, I guess represent them now, clients and neighbors, and wanted some redress. We did threaten to commence some proceedings to compensate these people for the damage they have suffered, and their attorney came around one time with a story about the company being hard pressed and wanting to settle up the matter after a little time, and if we commenced proceedings it would complicate matters further, and I learned afterwards that was for the purpose to get us to hold back. Besides, they kill people down in the Polish district every few days; not every day, but frequently. And they are the same way with adjusting claims. They don't even pay men that they employ what they promise to pay, and I for one feel very unfriendly to the Chicago & Milwaukee Railroad, and I

would give them a check to-morrow for \$1,000 if they would get off that street, and I am willing to sell my property for \$1,000 less than it is worth."

He further testified that he considered all these grievances at the time he purchased, and that they influenced him in the acquisition of the judgment, that he never told any one whatever of his intention to buy it, and that he had no conversation with the petitioner personally until the time he told him to make out a check.

The president, general manager, counsel, and claim agent for the Milwaukee Electric Railway & Light Company, as witnesses, denied an agreement or understanding with Lorenz respecting the purchase of the judgment. There was testimony, given under objection, but alluded to by counsel for the petitioner upon argument before the court, disclosing rather strained relations between that company and the receiver herein respecting settlement of claims arising in collisions where, as in the Kaminski Case, both parties were adjudged to be liable—the Milwaukee Electric Railway & Light Company apparently feeling aggrieved over the unwillingness of the receiver to treat upon a fair basis for division of the amounts to be paid for the settlement of such liabilities.

If, in order to sustain the exceptions of the receiver, the court were obliged to spell out of the evidence definite terms of some agreement between the petitioner and the Milwaukee Electric Railway & Light Company, the task would, of course, be impossible of performance, because the existence of such, or the presence of any understanding, is denied by those who could, if they would, testify to it. This, however, does not necessitate overruling the exceptions. The court is not bound to believe the mere words stated by witnesses. On the contrary, their testimony must be judged in the light of the subject-matter concerning which they are called upon to speak, certainly in the light of ordinary probabilities.

"Admitted facts are sometimes just as potential to impeach a witness as positive testimony. A court is not bound to accept a statement as true because there is no direct testimony contradicting it. It may be inherently improbable, or it may be impeached by the attendant circumstances. Courts are never bound to accept the statement of a witness which is against all reasonable probability." *Zimmerman v. Bannon*, 101 Wis. 412, 77 N. W. 737.

That one situated as was the father of the petitioner, without the slightest information concerning the subject-matter of a contract subsequently entered into with Kaminski, without acquainting himself thereof, or making inquiry which the most careless would make, without endeavoring to ascertain or calculate (so far as that is ever possible) the hazards involved in the purchase of a judgment subject to appellate review, should mortgage his homestead to enable purchase of such judgment, resulting in no profit to himself—the testimony shows that \$4,000 of the purchase money was borrowed at 6 per cent.; that this ensued almost instantly upon acquiring *casual* knowledge of the rendition of the judgment; that it is to be justified solely by the desire to make a safe "investment" (which, as just noted, yielded nothing) or as a means (palpably ineffectual) to redress or avenge grievances of the character detailed by him—these considera-

tions must be accepted as reasonable, to the exclusion of the alternate view to be referred to, if the master's specific findings and general conclusion are to stand. I have no hesitation in rejecting them as unworthy of belief, and in lieu thereof to accept this as the only reasonable and just inference to be drawn from the evidence: that the judgment in question was purchased upon the suggestion of Rausch, acting for the Milwaukee Electric Railway & Light Company; that while the testimony respecting the absence of a formal, definite agreement or understanding may be literally true, it is equally true that the relations between Rausch and Lorenz, their unquestioned recognition of the strained relations between the two railway companies respecting the adjustment of liabilities such as this judgment, dispensed with the necessity of formal agreement. Each recognized what the other meant, and what was to be done, without such formality. They mutually recognized the situation as one justifying the faith, which Lorenz undoubtedly had, that the Milwaukee Company would, by failing to appeal, or in some other way, stand as indemnitor for any loss which might come to him through the hazards so obviously involved. The testimony given by the president, the manager, and the counsel of such company that they never authorized any agreement or understanding, that they were ignorant in every particular of the transaction respecting the purchase of the judgment, is believed to be absolutely true. But the meeting between Rausch and Lorenz accomplished *something*. The purchase of the judgment, the failure to take an appeal, the issuance of an execution against a receiver, the pressing of the claim before this court, when at all times there was at hand the means of satisfaction out of a solvent codefendant, are not to be regarded as mere successive fortuities, but as quite conclusive evidence of an effort to accomplish what was intended by Rausch and Lorenz to be accomplished in the interest of the former's principal. Even though proof of a formal understanding be wanting, the inference of a situation regarded by the parties as the equivalent is irresistible. Neither Lorenz nor the Milwaukee Electric Railway & Light Company can be heard to say that Rausch's knowledge of, intention, and undoubted participation in the matter should not be imputed to his principal. The master should have so found.

[2] Upon the other proposition, and independently of the foregoing, I am satisfied that the petitioner's prayer for relief should be denied, solely on the ground of his inequitable conduct. He was obliged to admit, as he did, that although he purchased this judgment, and caused execution to be issued against the receiver herein, simply because he thought he ought to pay the judgment, he knew that the Milwaukee Electric Railway & Light Company was perfectly solvent and would respond instantly to an execution. Notwithstanding that, and apparently for the mere purpose either to annoy or harass the receiver, and in that way to redress the grievances which he claimed had been suffered by himself and others through the operation of the road, or indirectly to give to the Milwaukee Electric Railway & Light Company the benefits of such agreement as it conceived should be

entered into for the adjustment of these joint and several liabilities, he presses his execution, and now his claim in this court. His counsel is in error in urging that he is asserting an undoubted legal right. The federal statute (Judicial Code [Act March 3, 1911, c. 231] § 66, 36 Stat. 1104 [U. S. Comp. St. Supp. 1911, p. 155]), in relinquishing to parties and to other courts the right to institute and entertain, without leave, proceedings against federal court receiver in respect of the conduct of their business, has reserved to the appointing courts sole power over the matter of satisfaction of the rights determined in such other courts. *Dillingham v. Hawk*, 60 Fed. 497, 9 C. C. A. 101, 23 L. R. A. 517; *St. Louis & S. W. Ry. v. Holbrook*, 73 Fed. 112, 19 C. C. A. 385; *Mo. Pac. Ry. v. Tex. Pac. Ry. Co.*, 41 Fed. 314; *Willcox v. Jones*, 177 Fed. 870, 101 C. C. A. 84; *Tex. & Pac. Ry. Co. v. Johnson*, 151 U. S. 81, 14 Sup. Ct. 250, 38 L. Ed. 81.

If the original plaintiff, Kaminski, were before the court asking satisfaction of a judgment obtained as indicated, satisfaction would not be withheld, except for good reasons pertaining to the administration of the estate, in view of the rights of other creditors. But the petitioner here has allowed his own inequitable conduct to intervene, and is in no position to ask the favor which Kaminski might otherwise ask and receive. He cannot ask the court to aid him in accomplishing the purposes which he says prompted him to come into relation with the receiver of this court, and he cannot complain if the court exercises its power to frustrate him in their accomplishment. The undisputed facts show conduct so grossly inequitable that relief should be denied upon such ground alone.

The exceptions to the master's report are sustained, and an order may be entered denying the prayer of the petition, with this reservation: If the petitioner, after exhausting his legal remedies, fails to obtain satisfaction of the judgment claimed to be owned by him out of the Milwaukee Electric Railway & Light Company, he may, if so advised, renew his application for satisfaction of the same by the receiver.

SIMPSON et al. v. GEARY et al.

(District Court, D. Arizona. March 4, 1913.)

No. 79.

1. COURTS (§ 276*)—JURISDICTION OF FEDERAL COURTS—DISTRICT OF SUIT—WAIVER.

A defendant in a suit in a federal court may waive the objection that the suit is not brought in the district of his residence or that of the plaintiff, as required by Judicial Code (Act March 3, 1911, c. 231) § 51, 36 Stat. 1101 (U. S. Comp. St. Supp. 1911, p. 150), and does waive it by entering a general appearance.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

2. COURTS (§ 328*)—JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.

Where the interests of the plaintiffs or complainants in a suit are separate and distinct, as shown by their pleading, although of the same

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

general character, their claims cannot be aggregated to make the requisite amount to give a federal court jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. § 328.*]

3. COURTS (§ 282*)—JURISDICTION OF FEDERAL COURTS—SUITS FOR PROTECTION OF CIVIL RIGHTS—"CIVIL RIGHTS."

The "civil rights" protected by section 1 of the fourteenth amendment to the Constitution, and to redress deprivation of which the federal courts are given jurisdiction by Judicial Code (Act March 3, 1911, c. 231) § 24, par. 14, 36 Stat. 1092 (U. S. Comp. St. Supp. 1911, p. 137), are only such rights as are derived from the Constitution or some statute of the United States, and rights not so derived are left exclusively to the protection of the states.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1199, 1200; vol. 8, p. 7603.]

4. CONSTITUTIONAL LAW (§ 206*)—RAILROADS (§ 230*)—PRIVILEGES AND IMMUNITIES—TRAIN CREWS.

The provision of Act Ariz. May 7, 1912 (Sess. Laws 1912, c. 16) § 8, requiring all flagmen on railroad trains to have at least one year's experience as brakemen, is not in violation of section 1 of the fourteenth constitutional amendment, as abridging the privileges or immunities of citizens, but is a valid exercise of the police powers of the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625-648; Dec. Dig. § 206;* Railroads, Cent. Dig. § 744; Dec. Dig. § 230.*]

In Equity. Suit by T. R. Simpson, K. R. Connors, T. E. Fugate, E. Nat Reynolds, H. Y. Murry, Wm. Johnson, Frank Carroll, J. D. Walton, and R. L. Taylor against W. P. Geary, F. A. Jones, and A. W. Cole, members of the Corporation Commission of Arizona, George P. Bullard, Attorney General for Arizona, Fred W. Nelson, County Attorney for Apache County, J. E. Crosby, County Attorney for Navajo County, C. B. Wilson, County Attorney for Coconino County, P. W. O'Sullivan, County Attorney for Yavapai County, Charles W. Hernden, County Attorney for Mohave County, Frank H. Lyman, County Attorney for Maricopa County, and Fred L. Ingraham, County Attorney for Yuma County, all in Arizona, and the Atchison, Topeka & Santa Fé Railway Company, a Kansas corporation. On motion by defendants to dismiss for want of jurisdiction. Motion sustained.

Wilson & Lewis, of Albuquerque, N. M., for complainants.

Chalmers & Kent, of Phoenix, Ariz., for defendant Atchison, T. & S. F. Ry. Co.

George P. Bullard, Atty. Gen. of State of Arizona, and Leslie Hardy, Asst. Atty. Gen., for other defendants.

Before GILBERT and MORROW, Circuit Judges, and DIETRICH, District Judge, convened under section 266 of the Judicial Code of the United States (Act March 3, 1911, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]).

MORROW, Circuit Judge. It is alleged in the bill of complaint that the complainants are citizens of the state of New Mexico; that the Atchison, Topeka & Santa Fé Railway Company is a corporation of the state of Kansas, and a resident and citizen of that state; that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the other defendants are each residents and citizens of the state of Arizona. It is further alleged that the complainants are, and have been for a number of years, employed by the defendant the Atchison, Topeka & Santa Fé Railway Company, as porters upon the defendant's trains, and that they are also brakemen and flagmen on said trains; that by an act of the Legislature of the state of Arizona (Act of May 7, 1912; Session Laws of Arizona, p. 31) it is provided (section 3) that all passenger, mail, or express trains, composed of six or more cars, and operated outside of the yard limits, shall be equipped with and shall carry a crew consisting of not less than one engineer, one fireman, one conductor, one baggage master, one flagman, and one brakeman; that by section 8 it is provided that all flagmen mentioned in the act shall have had at least one year's experience as brakemen; that the defendant railway company has notified complainants that under said law they were not eligible for the positions of brakemen or flagmen, and the said defendant would become liable to the penalties prescribed by said statute should it retain complainants in its employ, and has notified complainants that it would have to replace them by others on December 1, 1912. It is alleged in the bill that each of the complainants receives a salary of \$780 per year, amounting in the aggregate to \$7,020 per annum. Complainants seek by the present bill to enjoin the defendants, as officers of the state, from enforcing the penalties prescribed by the act of the Legislature complained of, against the defendant the Atchison, Topeka & Santa Fé Railway Company, if said defendant company does not discharge the complainants from its service, and to enjoin the railway company from discharging the complainants from their employment.

The Attorney General of the state of Arizona, appearing specially for all of the defendants other than the Atchison, Topeka & Santa Fé Railway Company, has interposed a motion to dismiss the bill of complaint on the ground that it appears upon the face of the complaint that this court has no jurisdiction of the cause.

[1] The jurisdiction of the court is invoked by the complainants on the ground of diverse citizenship, and also on the ground that the controversy is one arising under the Constitution and laws of the United States. The complainants are citizens of the state of New Mexico, and all the defendants (except the Atchison, Topeka & Santa Fé Railway Company) are residents and citizens of the state of Arizona. The defendant railway company is a resident and citizen of the state of Kansas. The action is therefore open to the objection that as against the defendant railway company the suit is not brought in the district where the defendant resides, as required by the statute, now section 51 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]); but that objection may be waived. *St. Louis & San Francisco Ry. Co. v. McBride*, 141 U. S. 127, 132, 11 Sup. Ct. 982, 35 L. Ed. 659; *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; *Western Loan Company v. Butte & Boston Min. Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; *Kreigh v. Westinghouse Co.*, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984; *Atchison, Topeka & Santa Fé Ry. Co. v. Gililand*, 193 Fed. 608, 610, 113 C. C. A. 476. And, having appeared

generally in the case, it must be held that the defendant railway company has waived the objection that the suit is not brought in the district of its residence.

[2] The diversity of citizenship required by the statute is, therefore, sufficiently stated; but is the amount involved sufficient to give the court jurisdiction? It is alleged in the complaint that the amount involved, exclusive of interest and costs, exceeds the sum or value of \$3,000. But this allegation is not so conclusive as to determine the matter in controversy. In *Vance v. Vandercook Co.*, 170 U. S. 468, 472, 18 Sup. Ct. 645, 647 (42 L. Ed. 1111), the Supreme Court said:

"In determining from the face of the pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case, as stated in the pleadings, there could not legally be a judgment for the amount necessary to jurisdiction, jurisdiction cannot attach, even though damages be laid in the declaration in a larger sum."

In *North America, etc., Co. v. Morrison*, 178 U. S. 262, 267, 20 Sup. Ct. 869, 871 (44 L. Ed. 1061), the Supreme Court held that:

"When the plaintiff asserts as his cause of action a claim which he cannot be legally permitted to sustain by evidence, a mere *ad damnum* clause will not confer jurisdiction on the Circuit Court; but the court, on motion or demurrer, or of its own motion, will dismiss the suit."

In *Newburyport Water Company v. Newburyport*, 193 U. S. 561, 576, 24 Sup. Ct. 553, 556 (48 L. Ed. 795), Mr. Justice White, in delivering the opinion of the court, said:

"If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit."

To the same effect was the opinion of this court in *McGivra v. Ross*, 164 Fed. 604, 606, 90 C. C. A. 398.

It follows that, unless complainants can be permitted to aggregate their several claims, the amount in dispute is not sufficient to confer jurisdiction. But the substantial matter in controversy, as appears upon the face of the complaint, is not the aggregate claims, but the individual claim of each complainant, which is separate and distinct each from the other, and they are only joined together in this suit because it is convenient to so combine them, and appears to give the court jurisdiction of the cause. There is no unity of interest in the separate claims, and the most that can be said is that they belong to a class having the same general character. This is not sufficient. In *Clay v. Field*, 138 U. S. 464, 479, 11 Sup. Ct. 419, 425 (34 L. Ed. 1044), Mr. Justice Bradley said:

"The general principle observed in all is that if persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together

for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone."

In *Troy Bank v. Whitehead & Co.*, 222 U. S. 39, 40, 32 Sup. Ct. 9, (56 L. Ed. 81), the court said:

"When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount."

As the demand of each of the complainants in this case is fixed by the complaint at the annual compensation of \$780, it is clear that the amount involved is not sufficient to give this court jurisdiction of the cause.

The jurisdiction of the court is also invoked upon the ground that the controversy is one arising under the Constitution and laws of the United States; but in such a case the amount in controversy must be the same as where the jurisdiction is invoked on the ground of diverse citizenship, and what has been said upon that subject is applicable to this ground of jurisdiction.

[3] But the complainants contend that their case comes within the jurisdiction of the court under the provisions of the fourteenth amendment to the Constitution of the United States, and the fourteenth subdivision of section 24 of the Judicial Code. The latter provides that District Courts shall have original jurisdiction—

"of all suits, at law or in equity, authorized by law to be brought by any person to redress deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

As the amount in dispute is not an element of jurisdiction under this statute, the complainants invoke the jurisdiction of the court without regard to that limitation contained in the first subdivision of section 24 of the Judicial Code.

If the case comes within this provision, it may be conceded that the limitation as to the amount in dispute does not apply. Does the case come within this statute? What are the civil rights here protected?

In *Holt v. Indiana Manufacturing Co.*, 176 U. S. 68, 72, 20 Sup. Ct. 272, 273 (44 L. Ed. 374) the Supreme Court, referring to the provision of the statute under consideration, which was then the sixteenth subdivision of section 629 of the Revised Statutes (U. S. Comp. St. 1901, p. 506), and also to section 1979 of the Revised Statutes (U. S. Comp. St. 1901, p. 1262), said:

"All these provisions were brought forward from the act of April 20, 1871, entitled 'An act to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes.' 17 Stat. 13, c. 22. Assuming that they are still in force, it is sufficient to say that they refer to civil rights only, and are inapplicable here."

That case was brought to enjoin the collection of certain personal taxes based upon an assessment upon the value of certain rights secured under letters patent of the United States. It was held by the Supreme Court that the Circuit Court did not have jurisdiction of the case. The term "civil rights" was not defined, nor was it necessary. The civil rights which it is the purpose of this statute to protect are

only those rights, privileges, and immunities secured by the Constitution of the United States, or some law of the United States passed in pursuance of constitutional authority. Rights, privileges, and immunities not derived from the federal Constitution, or secured thereby, are left exclusively to the protection of the states. *Slaughter House Cases*, 16 Wall. 36, 71, 21 L. Ed. 394; *United States v. Cruikshank*, 92 U. S. 542, 550, 551, 23 L. Ed. 588; *Presser v. Illinois*, 116 U. S. 252, 266, 6 Sup. Ct. 580, 29 L. Ed. 615; *Hodges v. United States*, 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65; *Logan v. United States*, 144 U. S. 263, 293, 12 Sup. Ct. 617, 36 L. Ed. 429.

The right to contract for and retain employment in a given occupation or calling is not a right secured by the Constitution of the United States, nor by any Constitution. It is primarily a natural right, and it is only when a state law regulating such employment discriminates arbitrarily against the equal right of some class of citizens of the United States, or some class of persons within its jurisdiction, as, for example, on account of race or color, that the civil rights of such persons are invaded, and the protection of the federal Constitution can be invoked to protect the individual in his employment or calling.

[4] The complainants' case is not within this protection. They have not been deprived of any of the equal rights of citizens or persons. The state law applies to all persons alike, without discrimination, whether citizens of the United States or persons within its jurisdiction, and it is plainly a regulation enacted under the police power of the state, having for its purpose the safety of passengers on the railways operating within the state.

In the late case of *Chicago, R. I. & Pac. Ry. Co. v. Arkansas*, 219 U. S. 453, 465, 31 Sup. Ct. 275, 279 (55 L. Ed. 290), the Supreme Court had before it what is known as the "full crew" act of the state of Arkansas. The act provides for the equipment of freight trains upon substantially the same general principles as the Arizona act provides for the equipment of passenger trains. The railroad in that case raised the question of the constitutionality of the act on the ground that it undertook to regulate interstate commerce. The Attorney General of the state defended the act on the ground that it was a rightful exercise of the police power of the state. The court, in sustaining the constitutionality of the act as within the police power of the state, held that it was not too much to say that the state was under an obligation to establish such regulations as were necessary and reasonable for the safety of all engaged in business or domiciled within its limits. The court said further:

"Local statutes directed to such an end have their source in the power of the state, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statutes is not to be questioned in a federal court, unless they are clearly inconsistent with some power granted to the general government, or with some right secured by that instrument, or unless they are purely arbitrary in their nature."

Under the authority of this case, it must be held that the Arizona statute is the rightful exercise of the police power of the state, and that this court has no jurisdiction of the case.

The temporary restraining order is therefore discharged, the motion for a temporary injunction denied, and the bill dismissed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.
HEMPHILL et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 199.

STREET RAILROADS (§ 49*) — LEASES — INSOLVENCY — INTEREST ON BONDS OF LESSOR COMPANY.

A lease of the property of a street railroad company to an insolvent provided that the lessee from time to time should pay all rents and other sums of money that might become due under or by reason of the lease and other contracts to which the lessor was a party, or to which any of the demised property was or might be subject, and that the lessee assumed all obligations of the lessor under such lease and contracts, and agreed to pay all interest and fixed charges on the lessor's funded debt, provided that the lessee should not be required to pay the principal of the lessor's funded obligations, except as provided in the contract, and that all rentals or other payments so made should be proportioned between the period preceding and succeeding the date of the lessee's taking possession under the lease. *Held* that, while a payment of interest on the lessor's funded obligations by the lessee was in the nature of rent, the lease did not constitute an absolute obligation on the part of the lessee to assume and pay such interest, without limit as to time, and it was only bound to pay the same up to the date of the termination of the lease.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

Appeal from the District Court of the United States for the Southern District of New York; E. Henry Lacombe, Judge.

Suit in equity by the Pennsylvania Steel Company and another against the New York City Railway Company and others. From an order (189 Fed. 661) confirming the report of a special master and disallowing a claim presented against the railway company by Alexander J. Hemphill and others, as holders of the first consolidated mortgage bonds of the Second Avenue Railroad Company, they appeal. Affirmed.

See, also, 198 Fed. 721, 117 C. C. A. 503.

The claim in question is similar to that presented against the estate of the Metropolitan Street Railway Company which was considered by this court in the case of the Second Avenue Bondholders' Appeal, 198 Fed. 747, 117 C. C. A. 503, to which reference may be had for a statement of the facts common to the two cases. The claim particularly as against the estate of the City Company is based upon a provision of the lease from the Metropolitan Company to the City Company which was examined in different phases in the series of appeals of which the case referred to was one. This provision reads as follows:

"The lessee shall also from time to time pay or cause to be paid, all rentals and other sums of money which are or may be or become due or payable under or by reason of any leases and other contracts to which the lessor is a party or to which any of the demised property is or may be subject, and the lessee hereby assumes all the obligations of the lessor under all such leases and contracts, and the lessee agrees to pay all interest upon the funded debt of the lessor and other fixed charges of the lessor, provided that the lessee shall not be required to pay the principal of any funded obligations of the lessor or of its subsidiary companies except as hereinafter provided. All rentals and other payments made, as in this and the preceding

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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article provided, shall be apportioned between the periods respectively preceding and succeeding the date of taking possession hereunder."

As shown in the Second Avenue Bondholders' Appeal, *supra*, the Metropolitan estate was liable to the bondholders of the Second Avenue Railroad Company—the owner of one of its leased roads—upon a guaranty of the interest upon its mortgaged bonds and the contention of the claimants in the present case is that the City Company, as the lessee of the Metropolitan Company, by virtue of the words in the above provision, "and the lessee hereby assumes all the obligations of the lessor under all such leases and contracts," became bound to an absolute and unconditional assumption of the contract of guaranty without regard to the continued existence of the Metropolitan City lease. The judge at circuit, however, ruled in respect of the last contention as follows:

"As to the various agreements of the New York City Company to pay all the various sums of money which its lessor, the Metropolitan, was obligated to pay from time to time in order to maintain possession of the various subsidiary roads which made up its system, and all other sums which it agreed to pay to persons designated by its lessor, I am very clearly of the opinion that, by whatever name called, they are in reality rental agreed to be paid for the use of the property leased, and, upon the termination of the lease, shall be treated accordingly."

The claimants have appealed to this court.

Davies, Auerbach, Cornell & Barry, of New York City (Brainerd Tolles and Julien T. Davies, both of New York City, of counsel), for appellants.

Dexter, Osborn & Fleming, of New York City (M. C. Fleming, of New York City, of counsel), for Ladd, as receiver, etc.

Byrne & Cutcheon of New York City (J. Byrne, C. Taylor, and C. M. Travis, all of New York City, of counsel), for Pennsylvania Steel Co.

G. N. Hamlin, M. J. O'Brien, and C. E. Rushmore, all of New York City, for contract creditors' committee.

Before COXE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). An agreement to assume a debt is undoubtedly an agreement to pay it. A promise by a grantee under an absolute conveyance to assume a definite obligation of the grantor imports an unqualified undertaking to pay. There is no uncertainty as to the promisor's interest or as to the extent of his obligation. So an undertaking by a lessee to pay an amount due upon a mortgage upon the leased property might be regarded as unconditional. Although the leasehold estate would be subject to termination the possibility of that event might not affect the fixed obligation. Conversely a promise by an absolute grantee to meet a continuing charge upon the property might be unqualified. The obligation might run but the promisor's interest would be fixed. Nothing could happen to render doubtful an intention to keep up the payments. But the present case is very different. The agreement of the City Company to assume the Metropolitan's obligation to pay the bond interest—including that in question—was an agreement to pay such interest but was indefinite as to how long it was to last. The intention of the parties was not clear. The language of the assumption provision taken by itself might—on the

one hand—import an obligation to pay the interest regardless of any use by the lessee of the property upon which it was a charge. But it would not necessarily mean this. In view of the very nature of a lease, the language might import no more than a duty running during its existence. There was an obligation to pay. But for how long a time? Resort must be had to the instrument as a whole.

In interpreting the instrument we must start out with the proposition stated by this court in the Metropolitan Stockholders' Appeal, 198 Fed. 764, 117 C. C. A. 546, that "an intention to hold a lessee for future payments after it has ceased to use and enjoy the thing leased—in the nature of a forfeiture—must be made very plain to be found." See, also, *Lamson Consolidated Store Service Co. v. Bowland*, 114 Fed. 639, 52 C. C. A. 335; *Jesup v. Illinois Central R. Co.* (C. C.) 43 Fed. 483; *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440. Is it then made very plain in this lease that the lessee is to pay this bond interest after it ceases to use the leased property? It is not so expressly provided and we think it cannot be implied. We find nothing in the different provisions showing that the parties contemplated any obligation continuing after the termination of the lease. The implication from the provision that no entry should impair the lessor's claims for payments due and unpaid, is rather the other way. The fact that the lessee did not assume the principal of the mortgage debts but confined itself to running obligations seems also indicative of an intention merely to place the lessee in the lessor's shoes so long as the lease should exist. Moreover no reasons appear—either within or without the lease—why either party should have wished to place a millstone about the lessee's neck—as the briefs express it—for the benefit of bondholders who had nothing to do with the execution of the lease. Furthermore no special equities are shown—as in some cases—in favor of these bondholders. It does not appear that they changed their position on account of the lease. Taking the lease as a whole we think that the failure to specify the duration of the lessee's obligation upon the assumption provision, did not indicate an intention that it should go on forever; that the payments stipulated to be made constituted part of the consideration for the use of the demised property, and that the promise to make them was, in its essence, a rent covenant limited to the existence of the lease.

We give due consideration to the contention that if the assumption of the interest payments amounts only to an agreement to pay rental, it adds nothing to the preceding express agreement to pay all rentals. Legal instruments, however, often cover the same subject twice. Precaution invites repetition. The rule that different provisions of a contract should be given different meanings is never carried so far as to do violence to the plain intent of the parties. And if there be a difference between an agreement to pay moneys to become due under a lease and an agreement to assume the obligations under such lease, it does not necessarily follow that the one runs longer than the other. An undertaking may not be a rent covenant in the strictest sense and yet terminate with the lease.

Holding, then, that the obligation to pay the interest coupons in question did not continue after the termination of the Metropolitan-City lease, we come to the inquiries: When did it terminate? What was unpaid when it terminated? The first coupon which was not paid fell due August 1, 1908, and it is practically conceded by all that the lease terminated not later than July 31, 1908. Consequently it must be held that no obligation against the City Company ever accrued. And this is not deciding the matter upon a technicality. Although there had been no formal action the lease was substantially terminated long before July 31st. Indeed we think that any idea that it would be continued was given up by all parties in interest even before February when the interest included in the August coupons began to run.

The order of the District Court is affirmed with costs.

EASTERN OREGON LAND CO. v. WILLOW RIVER LAND & IRRIGATION CO.†

(Circuit Court of Appeals, Ninth Circuit. March 3, 1913.)

No. 2,073.

1. EMINENT DOMAIN (§ 29*)—IRRIGATION COMPANIES—RIGHT OF EMINENT DOMAIN.

L. O. L. § 6525, provides that the use of water of lakes and streams of the state "for general rental, sale and distribution" for the purposes of irrigation, etc., is a public use, and that "a use shall be deemed general within the purview of this act when the water appropriated shall be supplied to all persons whose lands lie adjacent to or within the reach of the line of the ditch or canal or flume in which said water is conveyed without discrimination other than priority of contract upon payment of charges therefor as long as there may be water to supply." Section 6526 gives to a corporation organized to make an appropriation of water for such general use the right to condemn lands for reservoirs, ditches, right of way, etc. *Held*, that the fact that a corporation which meets all the requirements of the statute also has lands of its own which it purposes to irrigate from its system does not deprive it of the right to exercise the power of eminent domain thereby conferred.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 76; Dec. Dig. § 29.*]

2. EMINENT DOMAIN (§ 29*)—IRRIGATION COMPANIES—RIGHT OF EMINENT DOMAIN.

Nor is such a corporation debarred from that right because it purposes, when all of its water shall have been sold, to turn its system over to an operating corporation, the shareholders of which are to be the owners of the water rights, one share to be issued for each acre for which the right is purchased.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 76; Dec. Dig. § 29.*]

3. EMINENT DOMAIN (§ 186*)—IRRIGATION COMPANIES—CONDEMNATION PROCEEDINGS—CONDITIONS PRECEDENT—OREGON STATUTE.

The failure of an irrigation company in Oregon, which instituted proceedings for the appropriation of water in 1908 to file a map with the county clerk showing the general route of its canal or ditch, as required

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied May 19, 1913.

by L. O. L. § 6529, then in force, was a defect in procedure which was cured by section 7 of the Water Code of February 24, 1909 (Laws 1909, p. 342; L. O. L. § 6595), which provides that "where appropriations of water heretofore attempted have been undertaken in good faith, and the work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided in proceedings under this act, because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording or publication thereof," where the condemnation proceedings were commenced after such act went into effect and there was no question of the good faith or diligence of the company.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 500-504; Dec. Dig. § 186.*]

4. EMINENT DOMAIN (§ 181*)—IRRIGATION COMPANIES—CONDEMNATION PROCEEDINGS—CONDITIONS PRECEDENT—OREGON STATUTE.

By the provisions of L. O. L. §§ 6528, 6529, requiring an irrigation company intending to appropriate water to post a notice containing "a general description of the course of said ditch or canal or flume," and to file for record a map "showing the general route of said ditch or canal or flume," it is not intended that the appropriator shall define the precise line of its ditch in either notice or map to sustain condemnation proceedings, when it is for the first time required to be definitely fixed, and it is sufficient if the line as so fixed follows substantially that described in the notice and shown by the map.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 488, 490-492; Dec. Dig. § 181.*]

5. EMINENT DOMAIN (§ 181*)—IRRIGATION COMPANIES—PROCEEDINGS FOR APPROPRIATION OF WATER—NOTICE.

Such a notice is not invalidated by a manifestly clerical error.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 488, 490-492; Dec. Dig. § 181.*]

Morrow, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Condemnation proceedings by the Willow River Land & Irrigation Company against the Eastern Oregon Land Company. Judgment for petitioner, and defendant brings error. Affirmed.

Huntington & Wilson, Teal, Minor & Winfree, and W. A. Johnson, all of Portland, Or., for plaintiff in error.

Richards & Haga, of Boise, Idaho, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The parties herein will be designated as they were in the court below; the plaintiff in error here having been the defendant in the action. The action was brought by the plaintiff to condemn rights of way for canals, laterals, ditches, and siphon lines necessary for an extensive irrigation scheme over the lands of the defendant in Malheur county, in the state of Oregon. The several parcels so sought to be condemned comprised in the aggregate 67.3 acres. A jury trial was waived by stipulation of the parties, and the cause was heard before the Circuit Court. The court found in favor of the plaintiff on all issues involved, and a judgment

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was entered condemning the lands to its use on the payment to the defendant of the sum of \$2,375 and costs.

The issues raised by the pleadings involved two principal questions: First, whether the plaintiff was a corporation such as to be entitled to exercise the right of eminent domain; second, if it were such a corporation, whether prior to the commencement of the suit it had taken the steps which under the law it was required to take as preliminary to the exercise of that right. Upon these issues the trial court found for the plaintiff. In so far as the findings involve the decision of questions of fact, they are conclusive here, unless they are wholly unsupported by testimony.

The defendant, in support of its contention that the use to which the plaintiff proposes to devote the water is not a public use, cites the recent decision of the Supreme Court of California in *Thayer v. California Development Co.*, 128 Pac. 21. In that case the court held that the right acquired in California by appropriation and diversion of water from a stream is private property, unless, after appropriation, there is an additional act of dedication to the public use, and that an appropriation notice which claimed water for the appropriator and others for the purpose of developing power and for the irrigation of land "in the New River country" was not sufficient to show that it was claimed for use by the public; that the Constitution of California (article 14, § 1), which provides:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law"

—does not mean that water taken for the irrigation of a fixed tract is appropriated for public use, but that it was intended to regulate the use of water appropriated and dedicated generally for sale and distribution among an indefinite number of users. Accordingly the court ruled that the defendant corporation could not be compelled by mandamus to furnish water to the plaintiff, who owned lands in the vicinity of the lands irrigated by the corporation, and incidentally the court remarked that it would follow as a matter of course that the corporation possessed no power of eminent domain. The decision in that case requires no comment here, further than to say that it construes a provision of the Constitution of California, and does not aid us in determining what is the law of Oregon. What constitutes a valid appropriation of water to beneficial uses is a question of local law.

[1] The act of February 18, 1891 (Laws 1891, p. 52, § 1; section 6525, Lord's Oregon Laws) provides:

"That the use of the water of the lakes and running streams of the state of Oregon, for general rental, sale or distribution, for purposes of irrigation and supplying water for household and domestic consumption, and watering live stock upon the dry lands of the state, is a public use, and the right to collect rates or compensation for such use of said water is a franchise. A use shall be deemed general within the purview of this act when the water appropriated shall be supplied to all persons whose lands lie adjacent to or within the reach of the line of the ditch or canal or flume in which said

water is conveyed, without discrimination other than priority of contract, upon payment of charges therefor, as long as there may be water to supply."

The second section (Lord's Oregon Laws, § 6526) gives to the corporation described in the first section the right to condemn lands for reservoirs, ditches, rights of way, etc. Upon the evidence in the case the court below found as follows:

"Plaintiff is engaged in the general sale of water for irrigation and domestic purposes, and has sold water rights in said irrigation system for approximately 2,400 acres to divers and sundry persons."

But it is said that the plaintiff should have been denied the right to condemn lands for reservoirs and rights of way, for the reason that it has not complied with the statute; that it is not supplying water to all persons whose lands lie adjacent to or within reach of the line of its canal without discrimination other than priority of contract, upon payment of charges therefor; that the water is not for general rental, sale, or distribution; that the plaintiff does not propose to supply the same to persons whose lands lie adjacent to or within the line of its ditch; that the finding of the court in that respect is not supported by the evidence, and that about 4,500 acres of land belonging to that corporation will be supplied with water by its system.

We think that the evidence fully sustains the findings of fact of the court below. The fact that the plaintiff will irrigate 4,500 acres of land which it owns, does not, in view of the other purposes it has in view, render it any the less a public service corporation. *Walker v. Shasta Power Co.*, 160 Fed. 856, 87 C. C. A. 660, 19 L. R. A. (N. S.) 725; *Van Dyke v. Midnight Sun Mining & Ditch Co.*, 177 Fed. 85, 100 C. C. A. 503; *Matter of Niagara Falls & Whirlpool R. Co.*, 108 N. Y. 375, 15 N. E. 429; *Lake Koen Nav. R. & I. Co. v. Klein*, 63 Kan. 484, 65 Pac. 684; *Cole v. County Commissioners*, 78 Me. 532, 7 Atl. 397; *State ex rel. Harlan v. Centralia, etc., Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198; *State ex rel. Shropshire v. Superior Court*, 51 Wash. 386, 99 Pac. 3. The evidence shows, moreover, that the lands which were purchased by the corporation were not purchased to be used and farmed by it, but in order to create a market for its water by selling the land with water rights attached. The purpose of the purchase is fully explained in the testimony. The plaintiff had contracted to deliver to the Oregon Fruit Farmers' Company water at \$55 an acre for 5,000 acres of land. It found it could not afford to furnish the water at so low a price. Said Mr. Hibbard:

"We should very much have preferred to have sold the water at a fair price than to hold the land, as it took some \$200 an acre to buy this land, a bonus to these people who already owned it of just about twice what they had paid for it, the increased value owing to our improvements. I consider it would have been a loss to have sold water at \$55 an acre, a loss of \$50 in good round figures. It is going to cost us at least \$100 or more."

The president, Mr. Wayman, testified:

"There are also about 45 water users who take water from this system.
* * * The amount of lands for which water has been sold other than the

plaintiff is from 3,500 to 4,000 acres. * * * All the land of the plaintiff is for sale, and it has already sold some of it. * * * We anticipate that water will be supplied for irrigating eventually from 15,000 to 18,000 acres."

Mr. Brown, the secretary and treasurer of the corporation, testified:

"The intent of the company is to sell water for the lands under the canal as now constructed, just as rapidly as we can get customers for it. If it has water for more land than lies under the canal as now constructed, we will carry the water on down the valley for sale."

The assertion is made that the plaintiff has devised a scheme whereby it appropriates to itself, under the name of a water right, the entire value of the land to which the water is to be appropriated, whether the land is owned by itself or another. If this were true, it would be no ground for reversing the judgment. But such is not the evidence. The testimony is that the unimproved barren land in that region without water has but a nominal value of from \$1.25 to \$5 an acre; that lands which are "good tillable lands" are worth with the water \$125 to \$150 an acre; that the plaintiff is selling its lands, which without the water would be valueless, at \$200 an acre on 16 annual payments; that, while the charge for water is \$125 an acre, it is on the basis of 16 annual payments; that it would be sold for less for cash; and that it was offered to the defendant for cash at \$90 an acre, although the actual cost thereof to the plaintiff was \$100 per acre.

[2] But it is said that the plaintiff must be denied the right to condemn private property to its use, for the reason that it proposes, at some time hereafter, to turn its irrigation system over to an operating corporation, to be known as the Orchards Water Company, the stockholders of which are to be the purchasers of the water, each stockholder to have one share of stock in the operating company for each acre for which he shall have acquired the right to use the water; and cases are cited such as *Barton v. Riverside Water Co.*, 155 Cal. 509, 101 Pac. 790, 23 L. R. A. (N. S.) 331, and *Burr v. Maclay Rancho Water Co.*, 160 Cal. 268, 116 Pac. 715, in which it is held that a corporation engaged in procuring water for its stockholders and delivering it only to stockholders in proportion to their respective amounts of stock, to be used upon their respective tracts of land is not, under the laws of California, a public service corporation delivering water for a public use.

The same might perhaps be said to be true of corporations formed under the Oregon act of 1891 and the amendments thereto. But that proposition is not involved in the present case. In the first place, the Orchards Water Company is not a corporation formed for the purpose of procuring water, nor it is here seeking to exercise the right of eminent domain. It is not even before the court, and it is not proposed to transfer the system to that company until after all the water which the system is capable of furnishing shall have been sold, which it is testified will be "four or five" years hence. In the second place, the future transfer of the system by the plaintiff to an operating corpora-

tion, the shareholders of which are to be the owners of the water rights, will not absolve either corporation from any obligation which is now imposed upon it to observe the laws of the state of Oregon. The use of its water so long as either corporation shall have water to supply to others will still be a general use, and it will be required to supply such waters to all persons whose lands lie adjacent to or within reach of the line of the ditch or canal, without discrimination other than priority of contracts, upon payment of the charges. So far as the record shows, no landowner and no purchaser of water has ever objected to the proposed transfer. Doubtless all parties interested regard it as an advantageous scheme, a scheme which is in line with the ultimate purpose of the similar projects of the United States for the irrigation of arid lands. All the information which the record gives us of the Orchards Water Company is that it is a co-operative corporation, and "not a corporation for profit," and that it is formed on the theory that it affords a desirable and satisfactory plan by which the purchasers of the water may have the management and control of the system in their own hands.

Can any sound reason be suggested why a corporation formed under the laws of the state of Oregon for the appropriation of water for general irrigation purposes, after it has built its reservoirs, acquired its right of way, completed its system, and supplied all persons with water whose lands lie adjacent to or within reach of its canal, without discrimination other than priority of contract, so long as there may be water to supply, may not after it has done all of these things, and exhausted its capacity to supply water, turn over to an operating company, to be composed of the users of the water, with their consent, the system and the operation, maintenance, and care of the same? In *Mutual Irrigation Co. v. Baker City*, 58 Or. 306, 328, 113 Pac. 16, the court said:

"Though plaintiff furnishes water generally for irrigation only when there is a surplus in its ditches after supplying the needs of its stockholders, it is, in our opinion, a corporation impressed with a public character, and holds its property subject to an exercise of the police power of a state to a greater degree than a private person. It would be improper to conclude, because a corporation, for a consideration, provides the means of communication, or furnishes transportation, or supplies heat, light, power, or water to its stockholders only, that it is not engaged in performing a public service."

Counsel for the plaintiff present a forcible argument in support of the proposition that in 1909 the Legislature of Oregon adopted a new act, complete in itself, covering the entire subject of water rights and water appropriations, and repealing by implication all other laws on the subject, and thereby gave to any corporation organized for the purpose of conducting water for irrigation purposes the right to condemn rights of way therefor. The act was enacted on February 23, 1909 (Laws 1909, p. 133). It declares (section 6838, Lord's Oregon Laws) that a corporation organized for the construction of any ditch or flume for the conduct of water for irrigation or domestic purposes shall have the right to enter upon any land within the termini thereof or elsewhere for the purpose of examining, locating, surveying

lines, etc.; and section 6839 provides that any corporation mentioned in the preceding section may appropriate so much of said land as may be necessary for the line of such ditch or flume, not exceeding 200 feet in width, and the same section further provides that such corporation shall have the right to condemn lands for the sites of reservoirs for storing water and for rights of way for feeders for carrying water to such reservoirs, and for ditches, canals, flumes, and pipe lines carrying the same away. This act is foreshadowed by the act of February 25, 1907 (Laws 1907, p. 289), which provides that the use of the water of the lakes and running streams of the state of Oregon, for the purpose of developing the mineral resources of the state, is declared to be a public beneficial use, and a public necessity. The Legislatures of several of the states in the arid regions have made the individual use of water for irrigation purposes a public use, and such laws have been sustained by the courts. In *Ellinghouse v. Taylor*, 19 Mont. 462, 48 Pac. 757, the court said:

"What real distinction is there, so far as the term 'public use' is concerned, between the benefit that results to a state from the reclamation by artificial irrigation of 160 acres of agricultural land owned by one or two persons and the reclamation by the same means of thousands of acres owned by many different persons living together in one subdivision of the state. We do not think there is any in principle. The reclamation of one small field by means of artificial irrigation promotes development and adds to the taxable wealth of the state, as well as the reclamation by the same means of a number of fields."

Again, the court said:

"Persons have been allowed the right of eminent domain, on the theory of a public use, in the construction of dams for the operation of grist and sawmills, in the reclamation of swamp lands, and in other similar instances that might be enumerated, where the public had no direct interest in these operations, whose main end was mere private gain, and where the benefit to the people at large could result indirectly and incidentally only from the increase of wealth and the development of natural resources."

It is asserted by the plaintiff, and it is not denied, that the Oregon act of 1909 was adopted from the law of Utah, which in 1904 had been construed by the highest court of that state in *Nash v. Clark*, 27 Utah, 158, 75 Pac. 371, 1 L. R. A. (N. S.) 208, 101 Am. St. Rep. 953, 1 Ann. Cas. 300. In that case the court held that the taking of property for the purpose of obtaining water for the irrigation of a farm and to render the same productive is a taking for a public use, and hence the owner of a farm may condemn a right of way through another's ditch for the purpose of carrying the water to his land for irrigation. The judgment in that case was affirmed by the Supreme Court in *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171. The court, in view of the particular facts of the case, said:

"We are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained."

The act of 1909 above quoted has not been construed by any decision of the Supreme Court of the state of Oregon, and in the present case it is not necessary to consider whether, after its date, the rights of the parties hereto are ruled by that act, or by the prior act of 1891, for the reason that the plaintiff has clearly brought itself within all the requirements of either act, and it is a corporation authorized to condemn private property for the uses specified in its articles of incorporation.

[3] Did the plaintiff corporation, prior to commencing the action, take the necessary steps to acquire the water right, and to entitle it to condemn the property described in the complaint? At the time when the plaintiff initiated its proceedings to appropriate water for general rental, sale, and distribution for purposes of irrigation, which was in April, 1908, the statute which regulated such proceedings was that portion of the act of February 18, 1891, which is carried into Lord's Oregon Laws as sections 6528 and 6529. The first section requires that the corporation "shall post in a conspicuous place" at the point of diversion "a notice in writing, containing a statement of the name of the ditch or canal or flume, and of the owner thereof, the point at which its headgate is proposed to be constructed, a general description of the course of said ditch or canal or flume, the size of the ditch or canal or flume in width and depth, the number of cubic inches of water by miner's measurement, under a six inch pressure, intended to be appropriated, and the number of reservoirs" available; and the second section requires that, within 10 days from posting the notice, the corporation shall file for record in the office of the county clerk a similar notice "and at the same time shall file a map showing the general route of said ditch or canal or flume."

It is said that the plaintiff failed to comply with this law, in that it omitted to file with the county clerk the map which is required by section 6529. In answer to this it is sufficient to point to the fact that before the present action was commenced the "Water Code" of February 24, 1909 (Laws 1909, p. 319), had gone into effect. That act is entitled:

"An act providing a system for the regulation, control, distribution, use and right to the use of water, and for the determination of existing rights thereto," etc.

Section 7 of that act (section 6595, Lord's Oregon Laws) provides:

"Where appropriations of water heretofore attempted have been undertaken in good faith, and the work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in proceedings under this act, because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording, or publication thereof."

That act was intended to, and it does, cure all irregularities and informalities in proceedings taken to acquire appropriations of water under the previous laws, provided that the appropriations were undertaken in good faith, and construction in good faith had been commenced and diligently prosecuted. No question is here made of the good faith of the appropriation, or of the diligent prosecu-

tion of the work. It is not disputed that, aside from the expenditure for the purchase of land, the plaintiff has expended \$1,200,000 on the irrigation system.

[4] Without merit, also, is the contention that the plaintiff should be denied the right to condemn the right of way described in the complaint, for the reason that the route thereof varies from that which is described in the notice of April 7, 1908. It is not the intention of the law that the appropriator, when it resorts to condemnation proceedings, shall be held to the exact line of the route described in its notice, or in the map of its general route. The law of 1891 provides that the notice shall contain "a general description of the course of said ditch or canal or flume," and further provides that a map shall be filed "showing the general route." The statute, therefore, does not require that the corporation shall, in its appropriation notice, fix upon a precise line, from which it shall not thereafter deviate in the slightest degree. The very language of the statute shows that the law is complied with if the notice and map contain no more than a general description. The notice in this case complies with the statute. It gave what it declared to be the "general courses and direction." Having given such a general description of the course of its ditch, a corporation, when it comes into court in a condemnation suit for its right of way, is required for the first time to define the definite line of its ditch. That was done in the present case, and the defendant can claim no prejudice to it from the fact that the description in the notice was but the general description which is required by the act.

The evidence in the case shows that the line described in the complaint followed substantially the general route described in the notice, and that the deviations are not considerable. Such is the uncontradicted testimony of Collins, the engineer, who said in substance that the notice was posted at a point 200 feet northeast from the present outlet or headgate. He testified that there was some deviation, owing to a change or two of grade, but that in general the line for which the right of way was sought to be condemned follows the original line as it was located; that he saw the survey stakes of the preliminary survey, and that the line of definite location coincides with and follows it in places; that the canyon through which the canal passes for the first 4 or 5 miles varies from 200 feet to 500 feet on the bottom, and that the canal is located on the west side of the canyon. He testified that, while the notice provides that the canal shall run from the headgate through section 2, it does not run through section 2, but that it runs less than 500 feet therefrom; that the canyon runs through sections 2 and 3.

"The ditch does not run through section 11. It runs a distance of a few hundred feet from section 11, probably 500 feet. The ditch does not run through section 13. It runs about 500 feet or 600 feet of section 14."

By clerical mistake the notice says that the headgate to the upper reservoir is in the southwest quarter of the northwest quarter of section 27, when it should have said the southwest quarter of the

southwest quarter of that section. That this is plainly a clerical error, as any one on the ground could see, is shown by Plaintiff's Exhibit 6, a map which shows that the only portion of section 27 crossed or touched by the creek is the southwest quarter of the southwest quarter, and that the southwest quarter of the northwest quarter of that section is half a mile away from the creek. As was said by Judge Ross in *Osgood v. Water & Mining Co.*, 56 Cal. 571, 579:

"By all the authorities, the notices are to be liberally construed."

In *Beckwith v. Sheldon*, 154 Cal. 393, 97 Pac. 867, it was held that two notices, one of which was posted 200 feet distant from the place where another notice had been posted, both being intended for an extensive irrigation system, were posted substantially in the same place.

[5] The objection that the notice was defective for the misnomer of the appropriator is too technical and trivial to require extended discussion. It was passed by the court below as undeserving of attention. The notice begins by stating that the corporation, "the Willow River Land & Irrigation Company, has this day located," etc. Below, by clerical inadvertence, the word "River" is omitted from the corporate name of the "owner" of the water right, and the same clerical error is found in the signature to the notice by D. M. Brogan, the president. But in the certificate, which Brogan as president attached thereto, he declared that the attached notice "is a true copy of the notice of appropriation posted on behalf of the Willow River Land & Irrigation Company," and that certificate bears the signature of Brogan as the president of the "Willow River Land & Irrigation Company." The notice itself clearly shows by what corporation it was given, and it is identified by the amended complaint as the notice under which the plaintiff claimed its rights.

The plaintiff is engaged in constructing a large and comprehensive system to utilize waste waters of the state in the irrigation and reclamation of from 15,000 to 18,000 acres of arid and otherwise useless lands. In the development of its system it has expended large sums of money. It has sold to settlers water rights for the irrigation of more than 3,500 acres. It is the policy of the state, as expressed in its statute and the decisions of its courts, to encourage and favor such schemes of great public utility, and the plaintiff's project should not be stayed or defeated upon purely technical and unsubstantial objections such as are here presented.

We find no error. The judgment is affirmed.

MORROW, Circuit Judge (dissenting). I am of the opinion that the plaintiff is not a public service corporation and is not engaged in delivering water for public use. This opinion is based upon the limitations contained in the act of February 18, 1891 (Laws of Oregon, 1891, p. 52), as amended in 1899 (Laws 1899, p. 201), 1901 (Laws 1901, p. 136), 1905 (Laws 1905, p. 204), and 1909 (Laws 1909, p. 132), codified in Lord's Oregon Laws as sections 6325 to 6550. The act pro-

vides that a corporation organized for the construction and maintenance of a ditch or canal or flume for general irrigation purposes, or for supplying water for household and domestic use, and for watering live stock upon dry lands, may appropriate and divert water from its natural bed or channel and condemn rights of way for its ditch, canal, or flume, and may condemn rights of riparian proprietors upon the lake or stream from which such appropriation is made upon complying with the terms of the act.

The use of the waters of the lakes and running streams of the state for general rental, sale, or distribution for the purposes mentioned in the act is declared by section 1 (Lord's Oregon Laws, § 6525) to be a public use, and the right to collect rates or compensation for such use of said water is declared to be a franchise. It is provided further that a use shall be deemed general, within the purview of the act, when the water appropriated shall be supplied to all persons whose lands lie adjacent to or within the reach of the line of the ditch, canal, or flume in which said water is conveyed, without discrimination, other than priority of contract. In *Umatilla Irrigation Co. v. Barnhart*, 22 Or. 389, 30 Pac. 37, the Supreme Court of Oregon was called upon to construe this act, and held, among other things, that:

"It is an act the execution of which must be closely scrutinized by the courts, and all of its provisions construed strictly. Whoever claims anything by virtue of it must bring himself clearly within its terms."

It is contended by the defendant that the plaintiff is not a corporation organized for the construction and maintenance of a ditch or canal or flume for general irrigation purposes; that the water to be diverted by the plaintiff is not for general rental, sale, or distribution; that the plaintiff does not propose to supply the same to all persons whose lands lie adjacent to or within the reach of the line of the ditch, canal, or flume with which such water is conveyed, without discrimination other than priority of contract; and that the finding of the court in this respect is not supported by the evidence.

The objection makes it necessary to inquire into the purpose of the plaintiff, as declared in its article of incorporation, and as disclosed by the evidence in the case. The plaintiff was organized as the Willow River Land & Irrigation Company on the 28th day of March, 1908. It declared in its articles of incorporation that the objects for which the company was formed, and the enterprises, business, pursuit, and occupation in which the corporation proposed to engage, were among others the following:

"To build, establish, and construct, and, when established, to maintain and operate, dams, reservoir sites, irrigation ditches, channels, and flumes, together with laterals running therefrom, for the purpose of irrigating lands, and for the purpose of bringing under cultivation desert and unproductive land; to acquire a fee simple title to lands, or a lesser interest therein, and to water and irrigate same, and to lease, sell, or dispose of same, either in whole or in part; to operate and construct irrigation system or systems, and the business of furnishing water for irrigation purposes to others under contract or sale, or in any other manner whatsoever; to obtain, by purchase, lease, location, or otherwise, water rights and privileges and irrigation rights and privileges, and to maintain and operate a general system of irrigating lands for itself or for others, and to engage in the general business of de-

veloping and cultivating lands and handling the produce therefrom for itself or for others; to construct, maintain, improve, control, and superintend canals, reservoirs, water courses, ditches, flumes, laterals, canneries, curing and drying houses, water powers, and hydraulic and electrical works, and to engage in any other lawful enterprise, business, pursuit, or occupation which may seem conducive to any of the objects of the company, and to contribute to or otherwise take part in any such operation; to clear, manage, farm, cultivate, irrigate, plant, or otherwise work, use, or improve any of the land which the company may own, or in which it may be interested, either for itself or for others."

The evidence as to the purpose and business of the corporation introduced upon the trial of the case is more specific, and enters more in detail concerning its scope and character.

W. M. Wyman, the president of the plaintiff corporation, was called as a witness on behalf of the plaintiff, and, referring to the canals then being constructed for its irrigation system, said:

"Water will be supplied from that [plaintiff's] system for about 4,500 acres of land belonging to the plaintiff. There are also about 45 water users to take water from this system. The plaintiff owns over 5,000 acres of land that can be irrigated from the system. The amount of land for which water has been sold to others than the plaintiff is from 3,500 to 4,000 acres. * * * The plaintiff's canal was located as high up as possible, in order to cover the lands which the plaintiff owned at the time the canal was built; but I don't consider it was wisely located for general irrigation in the valley. It was located on the best location for a ditch to convey water to the lands which the plaintiff desired to irrigate, the location upon which this canal could be most cheaply built to cover these lands, the lands which the plaintiff owned at the time of the commencement of these proceedings. * * * Plaintiff's irrigation system was constructed to irrigate the extreme upper end of Willow Creek valley. * * * A large part of the lands of the defendant in section 15 and section 31 are susceptible of irrigation, and with the water supply are good agricultural lands. * * * The plaintiff is selling lands up there with the water right. It is offering lands with the water right at \$200 an acre on 16 annual payments, \$25 payment down, \$5 an acre per year for the first 5 years, \$10 an acre per year for the second 5 years, and \$20 an acre per year for the third five years. This takes two acre feet of water. The purchasers become shareholders in the system when it is completed and turned over to them, and do not have to pay any more for the water thereafter, but do have to pay their regular assessment charges for rental. The plaintiff is ready to enter into contracts to furnish water for lands owned by persons other than the plaintiff. It undertakes to furnish water for lands of others at \$125 an acre on 15 years' time, 16 annual payments. * * * The plaintiff estimates that it will require in the neighborhood of 30,000 acre feet to irrigate the lands which it owns, and which others own and which it contemplates to irrigate. * * * When a party buys a water right from the plaintiff, he acquires a particular share with every acre in the completed system. It is a co-operative plan, and he becomes an owner in the plant. Every one who owns an acre of lands owns a share in the system."

George F. Brown, plaintiff's secretary and treasurer, was called as a witness on behalf of the plaintiff, and testified that:

"The purchaser of the water becomes a stockholder in the operating company to which the system will be turned over upon completion, receiving one share of stock for each acre of land for which he purchases water, and when all the lands under the system have purchased water rights the system will belong to the owners of the land. Until the system has been turned over to the purchasers, the maintenance charge is \$1 a year per acre. After the system has been turned over, the maintenance charge is whatever may be fixed by the stockholders or the landowners, which is the same thing, and

not by the Willow River Land & Irrigation Company. * * * Plaintiff has offered for sale and desires to sell out of its irrigation system water for 15,000 acres. It is not the policy of the plaintiff corporation to farm its lands or to use the water for its own use. Its plan and policy is to sell these lands as rapidly as possible, sell them with the water right as rapidly as possible, that they may be developed and become productive. The intention of the company in buying these lands is to attach the water to them and sell the water with the lands, in that way find a market for the water. * * * The plaintiff in making water contracts requires an applicant for water to buy one share of stock in the Orchards Water Company, which is the company to which the plaintiff system is to be turned over when completed, for each acre of land it desires to irrigate. The Orchards Water Company is the water company which is to own this irrigation system. The plaintiff sells the water right to everybody at the same rate. It does not sell this water right to parties if they apply for it and do not desire to become interested in the water company. The plaintiff company has adopted this plan, and has assumed that it would be a fairly satisfactory plan, and a desirable plan for the purchasers of water. It is the present intention of the plaintiff to confine its sale of water to parties who become stockholders in the holding company. * * * The Orchards Company is what I would call an operating company, and is a company incorporated for the purpose of taking over the irrigating system, when completed, and of operating it; stockholders of the Orchards Water Company being the owners, the purchasers of water from the Willow River Company. When the system is turned over to that company, there will be no stock in that company which is not owned by water users. Each water user will have a share of stock in that company for each acre of water or for water for each acre of land which he owns, and each share of stock represents sufficient water for irrigation of one acre. It is not a corporation for profit. It is a co-operative corporation, having 50,000 shares, and no stock in that company is sold except to landowners, and not sold to landowners except as they buy water. They do not buy water independent of the stock. The stock represents a water right. Each stockholder gets his proportional part of the water in the system. The Orchards Water Company is not operating the system at this time. It is operated by the plaintiff, and will be until the system is completed and turned over. * * * Should the defendant want to irrigate its lands, it could get water from the plaintiff by purchasing it. It could get a share of stock in the operating company for each acre of land for which it purchased water."

The form of the water contract referred to by this witness was introduced in evidence. The material portion of the contract was as follows:

"That, for the consideration and upon the terms hereinafter stated, the company hereby sells and the purchaser hereby purchases certificate No. ——— for one share of the capital stock of the Orchards Water Company, a corporation organized under the laws of the state of Oregon, for the purpose of acquiring, maintaining, and operating an irrigation system for the irrigation of the lands above described and other lands; said irrigation system being more particularly described in the contract for the construction thereof bearing date the 19th day of March, 1910, between the said Willow River Land & Irrigation Company and the said Orchards Water Company, to which reference is hereby made. That each share of stock in said Orchards Water Company hereby purchased by the purchaser represents a storage and carrying capacity in said irrigation system sufficient to deliver from April 1st to November 1st in each year two (2) acre feet of water for the irrigation of the above-described land, and said shares of stock and water shall be inseparably appurtenant to said land."

John D. Hibbard was called as a witness for the plaintiff. He testified that he was president of the North American Securities Company of Chicago, and that this company was practically the owner of the

plaintiff—owned a large part of the stock. The original loans to the plaintiff were made by the Farwell Trust Company. The North American Securities Company is a subsidiary of the Farwell Trust Company, the stockholders and directors are the same, and the former took over the contracts of the latter with the plaintiff. The witness testified as follows:

"I had something to do with the purchase by the plaintiff of a large tract of land now under its system. There was presumably a contract which could be enforced on the part of the Oregon Fruit Farms Company, a land-holding and development company in the valley, with the Willow River Land & Irrigation Company, under which the previous management had contracted to deliver to the Oregon Fruit Farms Company water at \$55 an acre for 5,000 acres, which was made at the time of the original cost of this whole project, as represented by the Farwell Trust Company to us, was supposed to be \$500,000 at an outside amount, and at that amount \$55 an acre was presumed to be a fair and reasonable price for water. Under the exigencies of construction which always arise in every irrigation project that I ever heard anything about, litigation in buying up claims, lining four miles of the canal flume that would not hold water when it was built according to the original plans, on account of erroneous estimates, bad engineering advice, possibly—when we started in we found that we could not sell water at \$55 an acre and come out whole. This contract for 5,000 acres, which took a very large percentage of the entire amount of water at our disposal at \$55 an acre, was a menace, and to dispose of the \$55 water contract we bought 5,000 acres of land. We should have very much preferred to have sold the water at a fair price than to hold the land, as it took some \$200,000 to buy this land, and a bonus to these people who originally owned it of just about twice what they themselves had paid for it—increased value owing to our improvements. I consider it would have been a loss to have sold water at \$55 an acre—loss of \$50 an acre in round figures. It is going to cost us at least \$100 or more. By buying the land, we own the land and the contract, and canceled the contract."

It appears from this evidence that the plaintiff is engaged in organizing a mutual water company, and that its entire system of irrigation is to be turned over to this mutual company when all the water rights have been disposed of. The water diverted by the plaintiff is to be delivered to stockholders of this company, and to none others. This in law is not a public service corporation, but a corporation engaged in a private enterprise. Wiel in his *Water Rights in the Western States* has this to say of such companies, in section 1266:

"Mutual companies are usually such that shares of stock represent rights to specific quantities of water, and the stockholder's right to a supply rests upon his stock, and not upon his status as a member of the public; the company being formed to supply water to its stockholders only. * * * Because of this extensive prevalence of mutual companies in practice, it is very important to note that, being in private service only, they are not subject to the public control which obtains as to public service companies. The board of supervisors or other public body has no power to fix the rates or charges of mutual companies. Nor can a mutual company be forced to deliver water to others than its stockholders."

The author quotes from *Barton v. Riverside Co.*, 155 Cal. 509, 101 Pac. 790, 23 L. R. A. (N. S.) 331, concerning a similar organization in California, as follows:

"This company is not, strictly speaking, a public service corporation delivering water to a public use. It is engaged in procuring 350 inches of water for its stockholders, and delivering it only to stockholders in propor-

tion to their respective amounts of stock, for use on their respective tracts of land.' A mutual company (if a corporation) must obey the laws of the state relating to the internal workings of corporations, but otherwise its conduct toward its members is a purely private matter."

In the recent case of *Burr v. Maclay Rancho Water Co.*, 160 Cal. 268, 280, 116 Pac. 715, 721 (Ann. Cas. 1913A, 940), the Supreme Court of California has reaffirmed the doctrine of *Barton v. Riverside Co.* in language applicable to this case:

"The water taken by the defendants to supply the needs of the interveners is not taken for public use. It is not offered to the public generally, or to all who may want it within a certain territory. It is taken solely to fulfill the private contractual obligations of the defendants to deliver water to certain lots, which it has sold with a water right. This is a private use. *Hildreth v. Montecito Co.*, 139 Cal. 29, 72 Pac. 395; *Barton v. Riverside W. Co.*, 155 Cal. 518, 101 Pac. 790, 23 L. R. A. (N. S.) 331; *Gilmer v. Lime Point*, 18 Cal. 252."

See, also, *Garrison v. North Pasadena Land & Water Co.* (Cal.) 124 Pac. 1009.

It appears to me clear that under the act of February 18, 1891, plaintiff was not authorized to maintain this suit for the reason that it is not a corporation organized for the construction and maintenance of a ditch, canal, or flume for general irrigation purposes. The water to be diverted by the plaintiff is not for general rental, sale, or distribution, and the plaintiff does not propose to supply the same to all persons whose lands lie adjacent to or within the reach of the line of the ditch, canal, or flume with which said water is conveyed, without discrimination other than priority of contract. On the contrary, water is to be diverted for the purpose of supplying plaintiff's irrigation project, and for the beneficial use of the stockholders of the corporation to which plaintiff's entire system is to be transferred. It is true it is stated in the articles of incorporation that it is plaintiff's purpose "to maintain and operate a general system of irrigation of lands for itself and for others." How it will irrigate for others is described fully in the testimony. The plaintiff's witness W. M. Wayman, who, as before stated, was plaintiff's president, testified:

"The plaintiff is ready to enter into contracts to furnish water for lands owned by persons other than the plaintiff. It undertakes to furnish water for lands of others at \$125 an acre on 15 years' time, 16 annual payments. This is on graduated payments, \$2.50 an acre for a period of years, then increasing it so the larger payments will come during the latter end. * * * The purchasers become shareholders in the system when it is completed and turned over to them, and do not have to pay any more for the water thereafter, but do have to pay their regular assessment charges for rentals."

In other words, the plaintiff offers to landowners a water right on the payment of a sum which it fixes arbitrarily at \$125 per acre; but the purchaser in addition must pay the regular assessment charges as a rental for the use of the water. Referring to the defendant's land, the witness testified that the defendant's land in section 15, township 15 south, range 42 east, and section 31, township 15 south, range 43 east, was worth \$125 per acre with the water right; but he did not consider the land worth anything without the water right.

The plaintiff's project, then, is to sell to other landowners water rights at \$125 per acre, which, when purchased, will make the land worth \$125 per acre. In other words, it has devised a scheme whereby it appropriates to itself under the name of a water right the entire value of the land for which the water is appropriated, whether the land is owned by itself or another.

There is, however, a qualification to this selling price of a water right. The witness testified that the charge of \$125 per acre is upon the payment of that sum in 16 annual payments, "which," he says, "is different from a cash basis. If any one should want to buy water, and would come up with the cash, it would receive consideration."

Walter S. Martin, the president of the defendant company, testified that he had a conference with the officers and representatives of the plaintiff company at Salt Lake concerning the plaintiff's irrigation project. The upshot of the conference was that Martin was asked if his company would buy water for its land at the rate of (he thinks) \$90 or \$95 per acre. Martin thought the price was too high; but, whether it was high or not, it was a discrimination in favor of the defendant, based upon consideration other than that of priority of contract. Mr. Martin insisted that whatever offer was made to him should include also the land of the farmers on Willow creek who were members of the Water Users' Association. To this proposition plaintiff objected, and no agreement was reached.

In the recent case of *Imperial Water Co. v. Holabird*, 197 Fed. 4, 116 C. C. A. 526, we had occasion to consider certain features of the organization of the California Development Company and its charge for a water right under the irrigation laws of California. In that case the settler on public land within the project was compelled to take water from the company at a fixed and arbitrary price for a water right, which in that case was fixed at \$25 per acre, and following the doctrine of previous cases in this court we there held that an irrigation company appropriating water for sale under the statute had no authority to make private contracts for so-called perpetual water rights, and that such contracts were void.

In *Thayer v. California Development Co.*, 128 Pac. 21, this same irrigation company was before the Supreme Court of the state of California. The scheme had been organized upon substantially the same plan as that of the plaintiff in the present case. It included an irrigation company, which had appropriated water from the Colorado river to irrigate a certain designated territory, and subsidiary corporations for the purchase of land in that territory, with water rights to be attached to the land purchased from the irrigation company. The question was whether the water appropriated from the Colorado river for distribution in accordance with this scheme was dedicated to a public use. The Supreme Court of California held that it was not, and that neither the irrigation company nor any of its subsidiary water companies possessed the power of eminent domain. I see no reason why the law of the California case is not applicable to the present case.

But, assuming that the plaintiff is entitled under the laws of Oregon to condemn private property for a private use, there is still further objection to these proceedings that the appropriation of water by the plaintiff was not in accordance with the requirements of the statute. Section 4 of the act provides:

"When a point of diversion shall have been selected, such corporation shall post in a conspicuous place thereat a notice in writing containing a statement of the name of the ditch or canal or flume and of the owner thereof, the point at which its headgate is proposed to be constructed, a general description of the course of said ditch or canal or flume, the size of the ditch or canal or flume, in width and depth, the number of cubic inches of water by miner's measurement under a six-inch pressure intended to be appropriated, and the number of reservoirs, if any."

It appears from the evidence that no notice of appropriation of water was posted by the plaintiff at the point of diversion, as required by the statute, and as alleged in the amended complaint. A notice was posted, signed by the Willow Land & Irrigation Company, and not by the plaintiff, the Willow River Land & Irrigation Company; and in the body of the notice it was stated that the canal conveying the appropriated water should be known as the Mountain Side canal, and that the name of the owner was the Willow Land & Irrigation Company, and not the Willow River Land & Irrigation Company. It is not alleged in the amended complaint that this difference in name in the notice was a clerical mistake, or a mistake at all, or that the name of the plaintiff was intended to be signed to the notice and stated in the body thereof, instead of the name of the Willow Land & Irrigation Company. For all that appears in the record, no notice of appropriation of water was ever posted by the plaintiff, and the proposed canal was not owned or to be owned by the plaintiff, and there is nothing in the record to show that the Willow Land & Irrigation Company is in fact the Willow River Land & Irrigation Company. Furthermore, the notice states that there were to be two reservoirs to be used for storage purposes in connection with the operation of the canal. The headgate of the upper reservoir was to be located in the southwest quarter of the northwest quarter of section 27, township 14 south, range 42 east. The headgate of the lower reservoir was to be located in the northeast quarter of the southwest quarter of section 2, township 15 south, range 42 east. It appears from the evidence that the site of the upper reservoir was located on the southwest quarter of the southwest quarter, instead of the southwest quarter of the northwest quarter, of section 27, township 14 south, range 42 east. This section is claimed by the defendant, but the plaintiff does not seek to condemn any part of it in these proceedings.

It is certified that the notice of location and appropriation was posted in a conspicuous place at the point of diversion, to wit, at the point of the headgate of the reservoir situated in the southwest quarter of the northwest quarter of section 27, township 14 south, range 42 east; but as no reservoir was located on that particular subdivision of the section, and the river did not touch it, no notice was in fact posted at the point of diversion, and, as no reservoir was

in fact located on section 2, township 15 south, range 42 east, there was no location of a point of diversion at any place where water could be taken from Willow creek. In the notice the general course and direction of the canal was stated to be from said headgate in a southwesterly direction through section 2, township 15 south, range 42 east; but no reservoir or headgate was in fact located in section 2, and how or in what manner or through what land the canal was to be carried from the supposed point of diversion in section 27, township 14 south, range 42 east, in a southwesterly direction for the distance of more than a mile to section 2, township 15 south, range 42 east, was not stated in the notice. But the evidence and the map showing the project of the Willow River Land & Irrigation Company, introduced in evidence upon the trial of this case, shows that the line of the canal as projected passes through section 34, township 14 south, range 42 east, not mentioned in the notice, thence south through section 3, township 15 south, range 42 east, land owned by the defendant, but not mentioned in the notice, instead of through section 2, township 15 south, range 42 east, as stated in the notice; the line of the canal at this point passing some distance to the west of the line stated in the notice. The notice also stated that the general course and direction of the canal from the headgate in section 2 was to be in a southwesterly direction through sections 11 and 14. The evidence does not show that the canal passes through sections 11 and 14, and in fact does not, but does pass through other sections to the west and south, among others, through sections 21 and 31 in township 15 south, range 42 east, lands belonging to the defendant, but not mentioned in the notice.

The substantial objection to these differences between the posted and recorded notice and the line of the canal as actually projected and shown by the map introduced in evidence is the fact that the canal as projected passes through lands of the defendant in sections 3, 21, and 31, in township 15 south, range 42 east, concerning which no notice was ever posted or given, and this suit is to condemn lands belonging to the defendant concerning which no proceedings have ever been taken as required by the statute.

Section 5 of the act of 1891 required further that:

"Within ten days from the date of the posting of such notice [notice required by section 4] such corporation shall file for record in the office of the county clerk or recorder of conveyances, as the case may be, of the county in which said ditch or canal or flume, distributing ditches, reservoirs and feeders, are situated, a similar notice, and at the same time shall file a map showing the general route of said ditch or canal or flume. * * *

A notice purporting to be a notice similar to the posted notice was filed with the county clerk of Malheur county, and a certified copy of this record was introduced in evidence over the objection of the defendant that the paper was incompetent and immaterial, because the instrument purported to be filed by a corporation other than the plaintiff (referring to the difference in name heretofore stated), and because the instrument was defective and inaccurate in the particulars heretofore mentioned and others of the same character. There was no

evidence that at the time the notice was filed with the clerk of the county, or at any time, a map had been filed with the clerk showing the general route of the canal, ditch, or flume, and in fact no such map was ever filed with the clerk. But in lieu of such a map the plaintiff introduced in evidence a map which plaintiff's engineer testified had been prepared under his direction in March, 1911, nearly three years after posting the notice as claimed by the plaintiff. This map the engineer testified had been prepared from the notes obtained from the engineers who had charge of the work. It showed the direction and course of the ditch and canal, differing from the notice in the matters hereinbefore referred to; that is to say, the map does not show a canal or ditch following the general course and direction stated in the notice, but it does show a canal or ditch passing through other sections and other lands, among others, certain lands of the defendant which the plaintiff now seeks to condemn in this action, notwithstanding the posted and recorded notice did not refer to these lands, and no map was ever filed with the county clerk showing the general or any course of the canal.

Reference has been made to the act of February 22, 1905 (Laws Or. 1905, p. 401). This act was passed in aid of, and in co-operation with, the United States in dealing with arid lands for irrigation purposes in certain states including Oregon under Reclamation Act June 17, 1902, c. 1093, 32 Stat. 388 (U. S. Comp. St. Supp. 1911, p. 662). The act of 1905 does not purport to repeal the prior act of 1891, and a repeal will not be implied unless there is an irreconcilable conflict between the two acts. *Beals v. Hale*, 45 U. S. (4 How.) 37, 11 L. Ed. 865. The first section of the Oregon act of 1905 is general in its terms, and provides a method of procedure whereby any person, association, or corporation thereafter intending to acquire a right to a beneficial use of any waters for the reclamation of arid lands is required to—

"post in a conspicuous place at the proposed point of diversion a written or printed notice containing the name of such applicant and the stream or other source of supply of such water, a brief description of the point of diversion, and the nature of the beneficial use to which such waters are to be applied, and the exact date of posting, and shall within fifteen days thereafter file in the office of the clerk of the county in which such notice is posted, a duplicate thereof so attested."

This is substantially the requirement of section 4 of the act of February 18, 1891. Section 5 of the latter act further requires that:

"Within ten days from the date of posting such notice, such corporation shall file for record in the office of the county clerk or recorder of conveyances, as the case may be, of the county in which said ditch or canal or flume, distributing ditches, reservoirs and feeders, are situated, a similar notice."

The substantial difference in the two statutes down to this point is this: Under the act of 1905 a "duplicate" of the posted notice must be filed with the clerk of the county within "fifteen days" after posting, while in the earlier statute a notice "similar" to the posted notice must be filed with the clerk of the county "within ten days of the date of posting such notice." This difference is not material; but, as we

shall presently see, the two sections relate to two separate and distinct subjects. Section 5 of the act of 1891 requires that:

"At the time [plaintiff] shall file a map showing the general route of said ditch or canal or flume."

Section 1 of the act of 1905 provides:

"And [plaintiff] shall within thirty days thereafter file in the office of the state engineer a certified copy of such duplicate as filed in the office of the county clerk, which shall be accompanied by such information, maps, field notes, plans and specifications as may be necessary to show the method of construction" at the point of diversion.

That these two sections of the acts of 1891 and 1905 have a very different purpose is plain. The first is to give notice to the public in the locality where the ditch, canal, or flume is to be situated, through the county clerk or recorder of conveyances, as to the proposed general course of the canal, ditch, or flume, so that all parties in interest in that locality may be fully advised and have an opportunity to protect their rights in any manner in which such rights may be involved. The second requires the appropriator to furnish such information to the state engineer by maps, field notes, plans, and specifications as may be necessary to show the method of construction at the point of diversion. It is further required that:

"All such maps, field notes, plans and specifications shall be made from actual surveys and measurements and shall be retained in the office of the state engineer."

This information is to enable the state engineer to perform the duties of his office under the statute with respect to the appropriation of water for a beneficial use in the reclamation of arid lands under the federal act. It does not purport to deal with ditches, canals, or flumes connected with systems of irrigation organized and carried on by corporations exclusively under the state law. The two acts are inconsistent and irreconcilable only in this: They relate to two different subjects.

But it is contended by the plaintiff that the act of 1891 was repealed by the act of February 24, 1909 (Laws Or. 1909, p. 319 et seq.; Lord's Oregon Laws, §§ 6594 to 6672). Concerning this contention it can be said, as has already been said with respect to the act of 1905: The act of 1909 does not purport to repeal the act of 1891. And there is this further answer to the contention: The Legislature of Oregon has declared in effect that it was not so repealed by amending sections 2 and 4 of the act of 1891 by an act passed February 23, 1909 (Laws Or. 1909, pp. 132 and 135; Lord's Oregon Laws, §§ 6526 and 6528). The amendments are stated to be amendments to sections 4994 and 4996 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon. These two sections are the Bellinger & Cotton codifications of sections 2 and 4 of the act of 1891.

It is further contended that the act of 1909 has cured all defects in the appropriations of water arising out of any irregularity or insufficiency of the notice required by law to be posted and recorded. The provision referred to is contained in paragraph 7 of section 70 of

the act of February 24, 1909 (Laws Or. 1909, p. 342; Lord's Oregon Laws, § 6595), as follows:

"And where appropriations of water heretofore attempted have been undertaken in good faith, and the work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in proceedings under this act, because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording, or publication thereof."

This section in and of itself recognizes the existence of the act of 1891 and amends it, but does not repeal it. The Supreme Court of the state of Oregon had held that the act of 1891 must be strictly construed, and that whoever claimed anything by virtue of it must bring himself clearly within its terms. *Umatilla Irrigation Co. v. Barnhart*, 22 Or. 389, 392, 30 Pac. 37. The same rule must necessarily be observed in construing the later act, which provides only for the exercise of the right of eminent domain in behalf of a public use. As we have seen, the plaintiff's irrigation project is not organized to serve the public generally, but for its own use and benefit, and for others who may become stockholders in the corporation it has formed to construct and maintain the proposed irrigation system. The defendant in this case is not seeking in its defense to this action to avoid or set aside plaintiff's appropriation of water for its private project. What it is seeking to do, and has a right to do, is to require that plaintiff shall show in this action a legal right to condemn and take defendant's land for that project, and the curative act is only for the benefit of corporations and persons seeking to acquire property rights for a public use. In our opinion the plaintiff does not come within the provisions of this statute and cannot claim its benefits.

There is a further objection that the only purpose of the statute was to cure irregularities and insufficiencies in the notice, while the objection here is that there was no notice posted or recorded, irregular or otherwise, relating to defendant's lands in sections 3, 21, and 31, in township 15 south, range 42 east, and no map was filed in the clerk's office as required by the statute relating to any lands, and this omission has not been cured by the statute.

As before stated, the plaintiff amended its complaint on the 15th day of March, 1911. In addition to the matters heretofore stated, plaintiff alleged that on the 23d day of June, 1909, it had filed in the office of the state engineer its application for a permit to store the waters of Willow creek and Cow creek to the amount of 36,500 acre feet in a reservoir situated on Willow creek, in township 14 south, range 41 east; such water to be used for irrigation and domestic purposes, and to be distributed and carried and conducted through the canals described in the complaint for the irrigation of lands susceptible of irrigation therefrom. It was further alleged that at the time plaintiff filed with the state engineer maps and field notes in duplicate showing the location of the irrigation works and the lands to be irrigated therefrom; that said application was held by the state engineer until July 30, 1910, when it was returned to the applicant for correction, and said application was thereupon duly corrected and completed by the plaintiff to conform to the requirements of said state engineer and the

state board of control; that such corrected application was refiled in the office of the state engineer on August 23, 1910, and that said application was numbered 147 in said office.

The court found that an application was made by the plaintiff to the state engineer for a permit to store water as alleged in the amended complaint, but did not find that the plaintiff had filed with the state engineer maps and field notes in duplicate showing the location of the irrigation works and the lands to be irrigated therefrom, and did not find that the permit applied for had been granted by the state engineer. In the absence of a permit from the state engineer, plaintiff's claim to a right to divert water under the act of 1909 has not been established.

In Cooley's Constitutional Limitations (7th Ed.) p. 760, the author, speaking of the right to appropriate private property to public use, says:

"When, however, action is had for this purpose, there must be kept in view that general as well as reasonable and just rule that, whenever in pursuance of law the property of an individual is to be divested by proceedings against his will, a strict compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceedings will be ineffectual. Those provisions must be regarded as in the nature of conditions precedent, which are not only to be observed and complied with before the right of the property owner is disturbed, but the party claiming authority under the adverse proceeding must show affirmatively such compliance. * * * So high a prerogative as that of divesting one's estate against his will should only be exercised where the plain letter of the law permits it, and under a careful observance of the formalities prescribed for the owner's protection.'

As I understand the opinion of the majority of the court in this case, it holds, in effect, that under the laws of the state of Oregon relating to irrigation projects, private property may be condemned and taken for a private use. If this is so, it cannot be that a less strict rule is required in observing the statutory requirements than where private property is being taken for a public use. It therefore seems to me that, even upon the theory of the majority opinion, the plaintiff in this case should be held to a strict compliance with all the provisions of law regulating such proceedings, and should be required to show affirmatively that it has complied strictly with all such requirements.

I think I have shown this has not been done, and that the facts found are not sufficient to support the judgment.

CARPENTER STEEL CO. v. NORCROSS.

(Circuit Court of Appeals, Sixth Circuit. April 11, 1913.)

No. 2,285.

I. MASTER AND SERVANT (§ 37*)—CONTRACT OF EMPLOYMENT—BREACH—DISCHARGE—MISCONDUCT.

In an action for breach of a contract of employment by discharging plaintiff for alleged misconduct, it is a sufficient defense that plaintiff had been guilty of the misconduct alleged, and that it was such as to justify a discharge, though the employer did not know of the misconduct

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

alleged at the time of the discharge, or other misconduct was made the basis thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 43; Dec. Dig. § 37.*]

2. MASTER AND SERVANT (§ 30*)—CONTRACT OF EMPLOYMENT—BREACH—DISCHARGE—MISCONDUCT.

Misconduct to justify a servant's discharge must be misconduct in the service, or misconduct prior to service, and proof of moral fraud on the part of the servant in concealing it from the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 30-36; Dec. Dig. § 30.*]

3. MASTER AND SERVANT (§ 30*)—CONTRACT OF EMPLOYMENT—DISCHARGE—MISCONDUCT.

While conduct of an employé involving moral turpitude, willful insubordination, or habitual neglect will justify a discharge, the general rule is that the servant owes the master the duty of faithfulness, whether expressed in the contract of employment or not, and that any conduct on the servant's part which amounts to unfaithfulness, or which witnesses an unfaithful disposition, or a disposition which is likely to issue in unfaithfulness, is misconduct justifying a discharge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 30-36; Dec. Dig. § 30.*]

4. MASTER AND SERVANT (§ 43*)—CONTRACT OF EMPLOYMENT—BREACH—DISCHARGE—MISCONDUCT—QUESTIONS FOR JURY.

Where plaintiff was employed as manager of defendant's branch warehouse in Cleveland, Ohio, maintained for the sale of high-grade steel in large part to the automobile trade, and was given a bank account from which to pay the expenses of his branch warehouse, etc., evidence that in entertaining purchasing agents in the trade at an automobile show in New York he was guilty of excessive drinking, visiting a gambling resort, consorting with lewd women, and committed other acts of dissipation, and that he made advances out of his deposit account to employées under him and to customers, and also at times used portions thereof for his own benefit in paying life insurance premiums, etc., did not show such misconduct as warranted his discharge as a matter of law; such question being one of fact for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 57, 58; Dec. Dig. § 43.*]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Action by George B. Norcross against the Carpenter Steel Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. D. Turner and M. B. & H. H. Johnson, all of Cleveland, Ohio, for plaintiff in error.

Carpenter, Young & Stocker, W. H. Boyd, and D. C. Westenhaver, all of Cleveland, Ohio, for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. This suit was brought in the lower court by defendant in error, George B. Norcross, against plaintiff in error, the Carpenter Steel Company, to recover \$43,600 as damages for breach of a contract of employment by wrongfully discharging him therefrom. It resulted in a verdict and judgment for \$3,000.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The sole error assigned is the refusal by the court, at the close of all the evidence, to give a peremptory instruction to the jury to find for defendant, to which refusal it duly excepted.

The company is a corporation engaged in the manufacture and sale of the higher grades of steel at Reading, Pa. A large portion of its output is sold to manufacturers of automobiles, and of parts thereof. Norcross was in its employ in the dual capacity of salesman for the states of Ohio, Michigan, and Indiana, possibly the most important territory covered by the company, with headquarters at Cleveland, Ohio, and of manager of its branch warehouse located at that place. In both positions he had a number of employes under him. At the time of his discharge he had been in its employ for over four years, under three successive contracts of employment. The terms of the first two were for two years each, the first beginning January 1, 1906, and the second, January 1, 1908. The third and last one, then in course of performance, was for five years, beginning January 1, 1910. It was entered into November 10, 1909. The discharge took place January 15, 1910, in the middle of the first month after the beginning of this term. At first Norcross's position was that of salesman merely. He became manager, also, during the first term, to wit, on July 7, 1907, when the branch warehouse was first established. On the occasion of each renewal he received an increase in salary. His salary during the second term was \$350 per month. By the last contract it was provided that he should receive \$5,000 per year, payable monthly, and 3.20 of 10 per cent. of the net annual income of the company, to the extent of \$25,000, which, if it amounted to that, and there was a reasonable probability that it would, would yield him additionally \$3,750, payable semiannually. He received, in addition to his salary, his personal expenses; reimbursement for each month's expenses being made on the tenth day of the succeeding month. The last contract, in its enlargement of the term of employment and its increase of compensation, bespoke that his services were regarded as highly valuable. It was testified that during his employment he had brought business to it amounting to as much as \$1,250,000.

The defense to the suit was that he had been guilty of such misconduct as to justify his discharge; the particular misconduct relied on as constituting the justification being specified in defendant's pleadings. That relied on in its original answer, filed May 6, 1910—the suit having been brought March 2, 1910—happened subsequent to the beginning of the then contract of employment and just previous to the discharge. In an amended answer, filed nearly a year afterwards and just before the trial, to wit, on April 29, 1911, it set up, in addition, misconduct that happened prior to the beginning thereof, but during the previous terms, mainly during the second or immediately preceding one. The former misconduct was the sole basis of the discharge. The claim was that the latter was not then known.

To entitle plaintiff in error to a reversal, it is essential that, under the evidence, it was not possible for a fair-minded man to find that the defendant in error had not been guilty of the particular misconduct alleged or that it was not such as to justify his discharge.

[1] It is not important that the company did not know of the mis-

conduct at the time of the discharge, or that other misconduct was made the basis of the discharge. It is sufficient that he had been guilty of the misconduct alleged, and that it was such as to justify his discharge. This is well settled. Main, if not sole, reliance is had on the misconduct which it was alleged in the amended answer Norcross had been guilty of prior to the beginning of his then contract of employment, which it is claimed was not known at the time of his discharge, and was not made the basis thereof, and which the company was somewhat belated in bringing to the attention of the court by amended answer, and to only a portion thereof. It is assumed that it is not possible for the fact that this misconduct did not happen under the contract of employment in force at the time of the discharge, but under the previous ones, to affect the matter. It was stated in oral argument that it was well settled that it could not. But I find no authorities dealing with just such a situation. Authorities may be found which determine the effect of misconduct prior to any service.

[2] They lay down that the general rule is that misconduct to justify a discharge must be misconduct in the service, and that, in order to justify a discharge on the ground of misconduct prior to service, the servant must have been guilty of a "moral fraud" in concealing it from the master when entering into the service. Wood, Master and Servant, p. 212.

Possibly the same rule, and none other, should apply where the misconduct relied on happened under a prior contract of employment of which that then in force may be said to be a renewal. The necessities of this case, however, do not call for a decision of this question, and it will be disposed of on the basis that this consideration does not affect its disposition.

[3] But, before dealing with this misconduct, that set up in the original answer and the other portion of that set up in the amended answer, which is of a similar character to that set up in the former, should be noticed. There is sufficient uncertainty as to whether reliance is not also had thereon to require that it should be. And preliminary thereto a word or two should be said as to the nature of the misconduct which the law makes a justification for a discharge. It is certain that conduct involving moral turpitude, willful insubordination, or habitual neglect is such misconduct as to justify a discharge. An early case limited justification thereto. But it is now well settled that any conduct which is prejudicial or likely to be prejudicial or injures or has a tendency to injure the master is misconduct that warrants a discharge. 20 A. & E. Enc. of Law, p. 27; 26 Cyc. pp. 988, 990.

In Wood, Master and Servant, p. 208, the law is stated thus:

"Misconduct prejudicial to the master's interests, although not exhibiting moral turpitude, is a good cause for the discharge of a servant. And conduct exhibiting moral turpitude, although productive of no damage to the master's interests, is a good ground for terminating the contract. Mere misconduct, not amounting to insubordination, or exerting a bad influence over other servants, or producing injury to the master's business, or members of the master's family, is not enough to warrant the discharge of a servant. The misconduct must be gross or such as is incompatible with the relation, or pernicious in its influence, or injurious to the master's business."

And again on page 220 the matter is put thus:

"In order to justify a master in discharging a servant the servant must have been guilty of conduct that amounts to a breach of some express or implied provision of the contract of hiring. Anything less than that will not amount to a legal justification or excuse. The mere fact that he has been guilty of improper or unbecoming conduct, or that he has, in some slight matters, been guilty of a violation of his master's orders, will not warrant his discharge; but his conduct must have been such as to involve moral turpitude and his insubordination must have been willful and such as is inconsistent with the relation which he holds to the master and the duties he owes him."

Possibly the matter may be put thus: The servant owes the master the duty of faithfulness, whether expressed in the contract of employment or not. It is an implied, if not an express, term thereof. It follows that any conduct on his part which amounts to unfaithfulness or which witnesses an unfaithful disposition, or better, perhaps, a disposition which is likely to issue in unfaithfulness, is misconduct calling for a discharge. It is, no doubt, because conduct involving moral turpitude witnesses such a disposition that it is such misconduct as to justify a discharge. It is in the light of these general principles that this case is to be disposed of.

[4] The misconduct relied on in the original answer consisted of dissipation and insubordination in the city of New York on the occasion of an automobile show held there, beginning Saturday evening, January 8, 1910, and ending Saturday evening, January 15th, on which day the discharge took place.

At that show the company had a small booth and made an exhibit of the articles, not very many, which it had for sale to the automobile trade. The insubordination complained of was, not attending at the booth pursuant to direction, and not keeping an appointment with its general manager at its New York office on the afternoon of Tuesday, the 11th. If it be assumed that such insubordination was sufficient to justify the discharge, there was such contrariety in the testimony as to whether Norcross had been in fact directed to attend at the booth, and such an explanation of his failure to keep the appointment as to require a submission of the matter of insubordination to the jury. It is not contended otherwise. The real complaint as to his conduct on this occasion has to do with his dissipation. It took the form of excessive drinking, association with loose women, and visiting a gambling resort. The conduct, of a similar character to this, relied on, in the amended answer, as having happened under the previous term of service, consisted of drinking to excess. That he so conducted himself on the occasion of this show and that he had at times during the previous term of service indulged in excessive drinking was admitted. The only question is as to whether such misconduct justified his discharge. It was to such an extent that possibly, ordinarily, it would have to be held that it amounted to a justification. Norcross' position in regard thereto was this: He so conducted himself in furthering the business of the company. It helped it along for him to furnish entertainment, and entertainment of this character, to the purchasing agents of its customers in the automobile trade. He could not do this without

taking part. And it was expected of him by the company that he should furnish such entertainment. He had been in the habit of attending automobile shows with no other purpose in view than this, and that was what took him to New York on this occasion. In his answer to the letter notifying him of his discharge, written by the president, he gave this account of his presence and course there:

"My principal object in going to the New York show was to meet my friends, the company's friends from out here, at a time when they would be free, and to entertain them in such manner as would best suit them. Now I know these people, otherwise we would not be doing the business that we are. I knew what these people wanted to see, and I showed it to them and there were not six hours during my stay that I was not with some good customer. That I can prove. Perhaps I overdid the thing, in which case I am sorry."

There was substantial evidence—evidence fit to induce conviction in support of this position. In view of it, it cannot be said that it was the duty of the lower court to hold as a matter of law that the company had a right to discharge him. If his position was true, such conduct was regarded by it as beneficial and not prejudicial to it, and it was indulged in at its instance, and could not, therefore, justify his discharge. That he seems to have liked to so conduct himself, and that at times he was unable to stand up, and had to resort to 'Turkish baths, and a six weeks' stay at Muldoon's, the latter with the company's consent, but, possibly, without its knowledge as to the true cause thereof, to keep himself in condition, did not make it otherwise. Possibly had he indulged more moderately he could have done better by the company, but everything points in the direction that, as it was, he was doing quite well by it. Possibly, also, had he continued in its service, a time might have come when his ability to serve it would have been so impaired by such a course of life that it would have been under no obligation to continue him in its employ. As to this no opinion is expressed. It is certain that it cannot be said as a matter of law that such a time had arrived when he was discharged. Until then, at least, the company had no right to discharge him, without first changing its attitude towards such conduct, and notifying him thereof. It is due to the company, perhaps, to say that there was substantial evidence to the effect also that this method of securing business—i. e., by entertaining the purchasing agents in such ways—is largely resorted to in the automobile trade, and, further, that, whilst the evidence was to the effect that it was approved by certain of its officers and agents, superior in authority to Norcross and for whose actions it was responsible, the evidence does not trace knowledge thereof home to its president and board of directors. It is probable that it was because the president first became aware of such conduct on the part of Norcross on the occasion of the New York show, and was so shocked thereby that he came to be discharged, though, according to Norcross' uncontradicted testimony, on his return from Muldoon's the president took him to dinner in New York and ordered champagne, as he had done at other times, when entertaining him at

luncheons or dinners in that city. It is clear, therefore, that the company was not entitled to the peremptory instruction on this ground.

The misconduct mainly, if not solely, relied on and set forth in the amended answer was of a different character. It had to do with a \$1,000 fund placed in his hands as manager of the Cleveland warehouse to meet its expenses. He was informed of its establishment and of his appointment as manager thereof by letter of July 5, 1907, inclosing a check for \$1,000, payable to his order as manager. By the letter he was directed to open an account in a certain Cleveland bank in the name of "the Carpenter Steel Company, by George B. Norcross, Manager," and to deposit to the credit of the account remittances from it and such payments as he might receive in actual currency from customers, to use the funds placed at his disposal "to pay the expenses of conducting the warehouse," and to render a monthly account in such form as might thereafter be prescribed by the accounting department. He so deposited the check and subsequent remittances. There seem to have been no currency payments by customers. He made payments on account of warehouse expenses and rendered monthly accounts down to and including January 1, 1910. These accounts showed the remittances and warehouse expenses during the month, and gave the balance after deducting the latter from the former, which was always termed "balance on hand." Shortly after the receipt of each account, almost always on the 10th of the month, the company remitted to him the amount of the expenses of the preceding month, which, added to the balance reported on hand, would bring the amount up to \$1,000. The misconduct complained of in relation to this fund was that he at times used portions thereof for his own benefit in paying life insurance premiums, and otherwise, and out of it made advances to employ  s under him and to customers and made no report of such use and advances. It followed from this, it is claimed, that he was guilty of insubordination, embezzlement, and untruthfulness. The insubordination consisted in not adhering to the direction contained in the letter of July 7, 1907, establishing the warehouse and creating the fund; the embezzlement, in appropriating portions thereof to his own and others' uses; and the untruthfulness, in stating that he had certain balances on hand which he did not in fact have.

In valuing this conduct—determining the effect to be given to it several things are to be taken into consideration. Norcross' position was one of high grade, and much was left to his discretion and judgment. He was but slightly hampered by directions. That contained in the letter of July 5, 1907, is the only direction which the record discloses that was ever given to him during the course of his employment. In the case of *Park Bros. & Co., Ltd., v. Bushnell*, 60 Fed. 583, 9 C. C. A. 138, it was held that misconduct which would justify the discharge of a mere clerk or workman might not justify the discharge of a servant of a much higher grade. The letter contained no express prohibition against the use of the fund for any other purpose than paying the expenses of conducting the warehouse. The amount provided for that purpose, to wit, \$1,000, was nearly twice as much as was

really needed; and, notwithstanding his monthly reports showed this, no diminution of the fund ever took place. In only one of the thirty months in which it was in existence did the monthly expenses exceed \$500, and that month the excess was only \$21.35. In only six other months did they exceed \$400, and frequently they did not exceed \$300. In his answer to that letter acknowledging receipt of the \$1,000, dated July 8, 1907, seemingly he rose above it and made himself the judge as to its wishes as to the disposition of the fund. He did not say that he would follow the directions contained therein, but expressed himself thus: "I think I know exactly how you wish this matter handled and will be governed accordingly." This passed unnoticed. During the 30 months, on 14 different occasions, he restored moneys to the fund, amounting in all to the sum of \$1,163. At all times the company was indebted to him on account of salary and personal expenses incurred by him in its service in excess of what he used for his own benefit. At least it does not appear that it was not, and it is more probable that it was. Indeed, it cannot be said under the evidence that the company's running indebtedness to him did not exceed both what he used himself and what he advanced to customers and employes. He looked upon what he used out of this fund as advances to himself, similar to advances to customers and employes, and regarded himself as personally bound for the latter as well as the former. It cannot, therefore, be said that there was the slightest danger of the company's losing anything by the appropriation of portions of this fund, in the manner stated, to the use of himself and those others. The considerations thus far alluded to make certain that Norcross had no wicked intent to deprive the company of one cent of the fund thus intrusted to his care. If it were otherwise uncertain, it is made certain by the consideration that he claimed no credit for payment on account of the warehouse that was not a just one, and was therefore accountable to the company for no greater sum than the balance which he reported as being on hand. Nor can it be said that he had such intent to conceal from the company that he was making such uses of portions of the fund. The fact that they were not entered in the monthly statements may be accounted for by the desire of the company to keep separate the expenses incurred on account of the warehouse. He had been told to put in each month's statement, not only the expenses paid on this account during that month, but those incurred, whether paid or not, so that it might be advised at all times as to the monthly expenses. And though the words "balance on hand" in each report, in a strict sense, meant that so much was either in the bank or in cash, they were his words, and it cannot be said that it was unreasonable for him to think as he did, that they meant no more than that the balance shown was the amount for which he was accountable. According to his testimony he was not conscious of wrongdoing in relation to this fund, in either of the particulars in which his conduct is open to criticism. The company became aware of certain particulars thereof long before the discharge, and of it fully upon his discharge, in settling with him as to this fund, and its atti-

tude towards what it so became aware of is, at least, evidential of the fact that his view of the conduct was not unreasonable. On April 20, 1908, he advanced to an employé under him named Woodworth \$155 out of this fund. Subsequently after Woodworth had paid back all of the advance but \$90, he was transferred to another territory. Thereupon Norcross spoke of the matter to the company's general manager. His language was that he was "in the hole" to that amount. Clearly the company, thus early, knew from this that Norcross was going beyond the letter of July 5, 1907, in so far as it limited him to using the fund in paying warehouse expenses, and that the statement in his reports of balance on hand did not mean amount in bank or in cash. It made no complaint of his so doing, but, upon his request, collected the balance of \$90 for him out of Woodworth's salary.

Again, as already intimated, the accounting department, in prescribing the form of the monthly statement, directed Norcross to take credit for each month's warehouse expenses, whether paid or not. Pursuant to this direction, he frequently so did. The vouchers for such credits were sent in when they were paid and they gave the date of payment thereof. Often the dates of payment so shown would be after the company had remitted that month's expenses and just after they were received by Norcross. To an observant person this would suggest the possibility, if not indicate the fact, that until the receipt of the remittance, notwithstanding the statement as to balance on hand might indicate otherwise, that Norcross did not in fact have enough on hand to meet the credits.

It must be accepted, therefore, that the company knew that Norcross was using the words "balance on hand," not in their strict sense, but in the sense of what he was accountable for, and that he was using this fund for other purposes than paying warehouse expenses, at least, in making advances to employés under him. This it knew whilst these things were transpiring. It made no complaint thereof, and, notwithstanding it, it engaged him for the additional and enlarged term at the increased salary. The only thing which it can be said that it did not then know is that he was making advances of portions of the fund to himself. Thereby, as to the particulars of which it was aware, it condoned the past and authorized him to continue to act as he had done. But its conduct goes further than this: It is evidential that Norcross in the first instance did not do wrong in these particulars in acting as he did. Upon the discharge and the settlement of this account, it became fully aware of his conduct in relation to this fund. It made no complaint thereof at that time, and it was nearly a year before it set it up as a defense. So setting it up was purely an afterthought, and most likely came from counsel rather than from it. Its delay in so doing is likewise evidential of the fact that there was nothing in Norcross' conduct in relation to this fund that was a justification for his discharge. The one thing in his conduct in relation thereto that is most subject to criticism was his advancing portions thereof to himself for his own use. We would not be understood as viewing lightly the use by a servant of funds intrusted to his care by

its master, for his own purposes, without the latter's knowledge or consent. All we hold is that, under the facts and circumstances of this case, it cannot be said as a matter of law that such use as Norcross made of this warehouse fund for his own benefit justified his discharge. We feel quite sure that the company would not have discharged him because of it if it had become aware of it in the course of his employment. Indeed, it is not unlikely that it would not have directed him to cease so doing. This being so, we certainly ought not, because of it, justify a discharge made on another and untenable ground.

The judgment of the lower court is affirmed.

HAVANA CENT. R. CO. v. CENTRAL TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. March 31, 1913.)

No. 158.

1. CORPORATIONS (§ 423*)—OFFICERS—BREACHES OF TRUST.

Rules for following trust funds apply for the protection of corporations against breaches of trust by their officers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1692-1695; Dec. Dig. § 423.*]

2. CORPORATIONS (§ 430*)—OFFICERS—MISUSE OF CORPORATE FUNDS.

One who receives from an officer of a corporation corporate obligations for his individual use, drawn by himself in his own favor, or who receives from such an officer money or securities of the corporation in payment of the officer's personal debts, does so at his peril, and is put on inquiry to determine whether the officer had authority to make such use of the corporation's property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1740, 1741; Dec. Dig. § 430.*]

3. BANKS AND BANKING (§ 138*)—DEPOSITS—RELATION OF BANK WITH CORPORATE DEPOSITOR.

A bank in which corporate funds are deposited is not a trustee, quasi trustee, factor, or agent of the corporation, but its debtor only, and, though the bank is bound to satisfy itself that the officer of the corporation signing checks is authorized to do so, it is not the corporation's agent to determine whether a check drawn conforms to the contract between them, but determines the question at its peril.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 398-405; Dec. Dig. § 138.*]

4. CORPORATIONS (§ 430*)—CORPORATE DEPOSITS—MISUSE BY CORPORATE OFFICERS—DUTY TO INQUIRE.

The treasurer of a corporation having an active deposit account in defendant bank drew checks against the deposit, signed by himself as treasurer, payable to himself or another, and, having indorsed them, deposited them to his individual account in another trust company, which presented them to defendant, which paid them without question. The treasurer had no right to the checks, and his action in drawing them amounted to a criminal appropriation of the corporation's funds. So far as defendant was concerned, however, there was nothing suspicious about the checks, except that they were drawn by the corporation's general fiscal officer to his own order and indorsed by him, and other similar checks had been drawn and paid before, and defendant had no knowledge that the checks were being used for the treasurer's personal

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

benefit. *Held*, that defendant was not charged with notice, from the mere fact that the checks were drawn to the treasurer's own order, that they were being improperly used, and hence was not liable to repay the amount to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1740, 1741; Dec. Dig. § 430.*]

5. CORPORATIONS (§ 430*)—CORPORATION DEPOSITOR—MISUSE OF FUNDS BY CORPORATION OFFICER—BANK'S LIABILITY.

Where a bank has knowledge that an officer of a corporation depositor is using a check on the corporation's funds for his personal benefit, e. g., to pay his own debt to the bank, or to deposit it to his personal credit, the bank is then put on inquiry, and, if it fails to make it, pays at its peril, not because it is agent of the corporation, but because the bank cannot discharge its debt to its depositor, except on the depositor's authorized order.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1740, 1741; Dec. Dig. § 430.*]

6. CORPORATIONS (§ 429*)—BY-LAWS—NOTICE.

While a bank in which a corporation had a deposit account is charged with notice of the provisions of the corporation's charter with reference to the authority of its officers to withdraw moneys, it is not charged with notice of a by-law requiring a counter-signature on all checks drawn against the corporation's deposit account, not brought to the bank's notice by the corporation; especially where for a considerable period checks had been issued, and paid without question, bearing only the signature of the corporation's general fiscal officer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1720-1723, 1725; Dec. Dig. § 429.*]

In Error to the District Court of the United States for the Southern District of New York; Julius M. Mayer, Judge.

Action by the Havana Central Railroad Company against the Central Trust Company of New York. From a judgment in favor of defendant on the verdict, plaintiff brings error. Affirmed.

The following is an outline of the facts particularly relevant to the principal questions of law discussed in the opinion:

On February 23, 1906, C. W. Van Voorhis, treasurer of the plaintiff, the Havana Central Railroad Company, opened a deposit account in its name with the defendant, the Central Trust Company. The account became active, further deposits were made and checks were drawn upon it signed "Havana Central Railroad Company, C. W. Van Voorhis, Treas." Among the checks so drawn and signed were three upon which this action is based. These checks were for \$26,461.81, \$21,944.55 and \$15,000, respectively and were payable to W. M. Greenwood or C. W. Van Voorhis. They were indorsed by said Van Voorhis and not by said Greenwood; were deposited in the individual account of the former in the Knickerbocker Trust Company; were presented by that Company to the defendant and were paid by it. Said Van Voorhis had no right to such checks and his acts in drawing them amounted to a criminal misappropriation of funds. The action was based upon an alleged breach of duty upon the part of the defendant in paying the checks.

Heyn & Covington, of New York City (G. B. Covington, of New York City, of counsel), for plaintiff in error.

Joline, Larkin & Rathbone, of New York City (L. H. Freedman and A. Stickney, both of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). Upon the trial the plaintiff claimed that the form, face and contents of the checks were, as a matter of law, such as to put the defendant upon inquiry. The trial court ruled that the question was one of fact for the jury and the assignment of error based upon this ruling brings up the primary question in the case; a question which, as affecting the duties of banking institutions, is of far-reaching importance.

[1, 2] The rules for following trust funds apply for the protection of corporations from the breaches of trust of their officers and these rules have heretofore been carried to their fullest extent by the courts of the state of New York. It has been said that one receives at his peril from an officer of a corporation the securities of such corporation in payment of his personal debts. And it has likewise been established that where a person receives from such an officer for his individual use corporate obligations drawn by himself in his own favor, such person is put upon inquiry to determine whether the officer has the right to so use such obligations. *Ward v. City Trust Company*, 192 N. Y. 61, 84 N. E. 585; *Squire v. Ordemann*, 194 N. Y. 394, 87 N. E. 435; also the very late case of *Niagara Woolen Co. v. Pacific Bank*, 141 App. Div. 265, 126 N. Y. Supp. 890. Moreover, upon the facts in this very case, the Appellate Division for the First Department held that the Knickerbocker Trust Company which, as shown in the statement of facts, received and collected the checks in question was bound to account for their proceeds. The court said that the checks on their face charged the Knickerbocker Company with knowledge that the treasurer of the plaintiff corporation was converting its money to his own use because they were drawn to his order and deposited to his credit; that having been put upon inquiry and having failed to make it, the Knickerbocker Company was liable (*Havana Central R. Co. v. Knickerbocker Trust Company*, 135 App. Div. 313, 119 N. Y. Supp. 1035). Upon the appeal in the Knickerbocker Case, 198 N. Y. 422, 92 N. E. 12, however, the Court of Appeals approached the subject from a different point of view and—as we construe its decision—materially altered the underlying rules. The court assumed that the Knickerbocker Company was put upon inquiry by the checks and their deposit, but said that it was not bound to look beyond the bank upon which they were drawn—the defendant in this case; that the defendant was the agent of the plaintiff “to make representations to third persons as to the validity of checks drawn upon the plaintiff’s account”; that the defendant as agent might be liable to the plaintiff as depositor for its mistakes, but that the plaintiff was estopped to charge the intermediate holder after its agent by paying the checks had represented that they were “all right.”

It is impossible to give the decision of the Court of Appeals a narrow interpretation. It was based upon the assumption that the Knickerbocker Company was put upon inquiry because the checks were drawn by the treasurer to his own order and were deposited to his personal credit. The inquiry involved two questions:

- (1) The authority of the treasurer to draw checks of that kind.
- (2) His authority to draw these checks and use them for his own purposes.

An answer to the first question would not have relieved the holder put upon inquiry. The defendant might well have answered that the treasurer was authorized to draw checks to his own order provided they were to be used for corporate purposes. The question would have remained whether he was authorized to use these checks for his personal benefit and unless the defendant was the agent of the plaintiff to make representations as to the validity of the checks in this respect, it was not—in the language of the opinion referred to—"the agent of the Havana Central Railroad Company to determine whether the checks in controversy were properly payable or not." We think it clear that the decision holds that a banking institution is the agent of its depositors to make representations to holders of corporate checks drawn upon it whether such checks are "all right," i. e., whether in respect of matters concerning which a holder is reasonably put upon inquiry, they are valid instruments properly payable.

Manifestly, the decision curtails in marked degree the doctrine of following trust funds as applied in favor of corporations in the case of breaches of trust by their officers. In the absence of bad faith a bank which takes for deposit to the personal credit of an officer of a corporation a corporate check drawn by such officer to his own order and which, on account of such circumstance, is put upon inquiry, has—it is held—only to present it to the bank upon which it is drawn, and if it is paid, then the former bank is relieved of responsibility to the corporation. But as it would not be liable at all if the check were not paid, it is difficult to see under what conditions it would be responsible.

If, then, we accept the decision referred to, we must carry the principles involved to their legitimate conclusion. If a bank of deposit be the depositor's agent to make representations as to the validity of his checks to third persons who are put upon inquiry and to relieve thereby such persons from doing more than to present them for payment, then the bank must be held to assume the responsibility of obtaining information concerning the history of the checks. We think that the decision necessarily leads to the conclusion that a bank undertakes in the case of corporation depositors to answer (1) whether an officer drawing a check has general authority, and (2) with respect to checks to his own order which may be used for either proper or improper purposes whether particular ones are used in the one way or the other. Otherwise the bank does not stand in the shoes of the intermediate holder put upon inquiry and the defrauded depositor is remediless.

But notwithstanding the results which seem to follow the Court of Appeals decision, the authority of that court is so high and our respect for its opinion so great, that we hesitate to depart from it. But we are constrained to do so. The underlying proposition that a bank is the agent of its depositors to the extent stated is so contrary to the

principles which we regard as established in the law of banking, that we are unable to accept it.

[3] The relation existing between a bank and its customers growing out of the general deposit and the withdrawal of moneys is that of debtor and creditor and the courts, both in England and in America, have uniformly resisted all efforts to hold the bank as trustee, quasi trustee, factor or agent.¹ 1 Morse on Banks and Banking (4th Ed.) § 289. The parties deal at arms' length. This is true with respect to the nature of the deposit. It is well settled that all sums paid into a bank by different depositors form one blended fund and that the depositor has only a debt owing to him by the bank and not a right to any specific moneys. So, on the other hand, when the deposit is made, nothing short of payment will discharge the bank; the loss of the specific moneys deposited is immaterial. And in respect of the payment of checks, it is the duty of the bank when a properly drawn check is presented to pay it if there are sufficient available funds. But the bank does not make payment because it is the trustee or agent of the depositor. It makes it to discharge pro tanto the simple debt which it owes the depositor who by his check gives acquittance for it. When a corporation opens a deposit account with a bank the latter must be satisfied that the officer signing checks is authorized to do so and if it pay without question it takes the risk of being held still liable for the amount irregularly paid away. But the bank assures itself of the authority of the corporate officers for its own protection in discharging its indebtedness to the depositor and not as the agent of the latter. We think that it is not correct to say that a depositary bank is the agent of the depositor to determine whether a check drawn conforms to the contract between them. It rather determines the question at its peril.

[4] Not accepting then the proposition that the obligation of the defendant bank to the plaintiff was that of an agent, and looking at the case without regard to the previous litigation, we come to the inquiry whether, upon the facts and circumstances of this case, the defendant was put upon inquiry by the checks in question. So far as this defendant was concerned there was nothing suspicious about the checks except that they were drawn by the general fiscal officer to his own order and were indorsed by him; other similar checks had been drawn and paid before. The defendant did not know the history of the checks. It did not have the knowledge of the Knickerbocker Company that the treasurer was using the checks for his personal benefit. That which it knew was that which appeared on the checks themselves when presented for payment. It appeared that the treasurer might have been guilty of a breach of trust and have been attempting to misappropriate the moneys of his corporation. On the other hand there might have been no breach of trust. The checks might have been drawn in favor of the treasurer for entirely legitimate corporate purposes. Transactions were disclosed which might or might not have

¹ Of course a bank by particular contract may assume the functions of an agent and it is generally an agent for collection purposes. But these exceptions have no bearing upon the present case.

been breaches of trust according to circumstances unknown to the defendant. In such circumstances, we think that it was not the duty of the defendant to question the checks and that the language of Judge Hammond in *Walker v. Manhattan Bank* (C. C.) 25 Fed. 247, 255, upon an analogous subject, is applicable:

"At all events the bailee must know that the contemplated appropriation is a breach of trust, not merely that a certain transaction is about to be consummated, which may or may not be a breach of trust, according to circumstances unknown to him."²

[5] It must be observed that we are far from holding that a bank is free under all circumstances to pay without question checks drawn by corporate officers to their own order. While a bank may deal with its depositors at arm's length, it must take care to pay out their moneys only upon authorized orders. If it fail to use due care it may be required to pay again. Consequently while in case of a corporate check signed by an officer with express or implied authority, the mere fact that it is drawn to his own order and therefore may be improperly used will not require the bank to question it. But if the bank have knowledge that the officer is using the check for his personal benefit, e. g. to pay his debt to the bank or to deposit it to his personal credit, then the bank is put upon inquiry and if it fail to make it, pays at its peril. But the bank owes this obligation not because it is the representative of the depositor but because it has no right to discharge its debts to its depositors except on their authorized orders and a check misused by a corporate officer cannot be regarded by a bank having notice of its misuse as an authorized order.

It must also be observed, from another point of view, that to relieve a bank from questioning the validity of checks in the form un-

² In the case referred to the court was considering the established rule that a banker cannot refuse to pay a check merely because he is aware of an intended breach of trust. Thus he is not justified in refusing to honor the checks of a depositor acting in a fiduciary capacity because he has reason to believe that the depositor is misappropriating funds. *Gray v. Johnston*, L. R. 3 H. L. 1; *Keane v. Robarts*, 4 Madd. 356; *Merchants', etc., Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406; *Goodwin v. American National Bank*, 48 Conn. 550; also *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693. Of course these principles are only analogous to those involved in the present case. They have been placed upon the ground that the bank is not called upon to make itself a party to the inquiry between the trustee and his beneficiary—a third person—while here the corporation whose funds were misappropriated was not a third person but was itself the bank's customer. Still the treasurer of a corporation is its trustee. When he is authorized to draw checks the bank holding available funds is bound to honor them. And, in the absence of knowledge, this is true with respect to checks drawn to his own order because such checks may be for legitimate purposes. Certainly if a bank is not justified in refusing a trustee's check by incidental knowledge that he plans a misappropriation of funds, it is not required to question corporate checks by the mere fact that their form is adapted to permit a misuse of funds. On the other hand, as a bank is affected with knowledge of the misuse of trust funds when a depositor seeks to pay his own debt to the bank with funds to his credit in a fiduciary capacity, so it is proper that a bank should be put upon inquiry by information that an officer is using a corporate check for his own benefit. But there is nothing in the analogy which should push the bank's liability further.

der consideration, works no real injustice to corporation depositors. Corporations may protect themselves by requiring counter-signatures provided they notify the bank of the requirement. If they do not choose to do so it may fairly be presumed that they prefer the risk to the inconvenience. In such circumstances, it is not unfair to the depositor to say that if the bank have notice or knowledge of wrongdoing it must make inquiry, but that if nothing wrong in the history of a check is brought to its attention, it is not called upon to inquire about it; that a bank is not bound to question every corporate check regardless of amount—and manifestly no line can be drawn—merely because it is drawn by a corporate officer to his own order.

For these reasons, we think that as a matter of law upon the undisputed facts the defendant was not put upon inquiry by the face, form and contents of the checks and that the trial court, in submitting the question to the jury, gave the plaintiff more favorable instructions than it was entitled to. This conclusion disposes of the principal question in the case and renders unnecessary the consideration of the subsidiary questions relating to the defendant's duty if put upon inquiry and to the plaintiff's negligence. It also deprives of any prejudicial effect the rulings upon the examination of one of the plaintiff's officers.

[6] Only one more question need be considered. The by-laws of the plaintiff corporation were offered in evidence for the purpose of showing that two signatures were required upon all checks drawn upon its bank accounts and were not admitted. But there was no evidence offered to show that the defendant had any knowledge of this requirement or that it was customary. In the absence of such additional proof we think that the by-laws were properly excluded. A bank is undoubtedly held to a knowledge of all that the charter of a corporation depositor discloses as to the authority of its officers to withdraw moneys. It is also bound to know what the general laws under which the corporation is organized provide upon the subject. So, perhaps, it may be charged with notice of by-laws particularly authorized by the charter or general laws. But with respect to an ordinary by-law like the one in question, we think it the better view that it is incumbent upon the corporation to bring the by-law to the notice of the bank rather than for the bank to inquire whether such a by-law exists. Besides such by-laws may be waived, and they were undoubtedly waived in this case. The plaintiff knew for a considerable period before the time of the checks in question, that its checks were being paid upon one signature—that of its general fiscal officer—and made no objection. If there had been error in the ruling it would not have been prejudicial.

The judgment of the District Court is affirmed.

W. A. GAINES & CO. v. TURNER-LOOKER CO.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1913. On Petition for Rehearing, May 8, 1913.)

No. 2,270.

1. TRADE-MARKS AND TRADE-NAMES (§ 85*)—VALIDITY OF TRADE-MARK—FALSE STATEMENT FOR REGISTRATION.

A trade-mark, consisting of a word registered on a statement that it had been continuously used as a trade-mark by the applicant and its predecessors in business since a date more than 35 years previously, is not invalidated by the fact that during a part of that time the word was used as a part of a more extended trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. § 85.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 59*)—INFRINGEMENT—IMITATION OF NAME.

Complainant and its predecessors for many years have sold a brand of whisky in bottles bearing a label with the trade-name "Hermitage" printed conspicuously thereon in large script, and under such name the whisky has acquired a wide and favorable reputation. Defendant commenced the sale of a different and cheaper brand of whisky in bottles having the name "Golden Heritage" on the labels; the word "Heritage" being printed in large script closely similar to complainant's, while the word "Golden" was in much smaller script in an oblique position. *Held*, that there was such similarity between the two labels as was calculated to deceive the public, and as to constitute an infringement of complainant's trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68-72; Dec. Dig. § 59.*]

Misleading or false labels, see notes to *Raymond v. Royal Baking Powder Co.*, 29 C. C. A. 250; *Holeproof Hosiery v. Wallach Bros.*, 97 C. C. A. 265.]

3. TRADE-MARKS AND TRADE-NAMES (§ 65*)—"INFRINGEMENT"—EVIDENCE TO ESTABLISH.

To constitute an "infringement" of a trade-mark that will entitle the owner to relief by injunction, it is not necessary that willful intent to deceive be shown; but it will be presumed that defendant intended the natural consequences of its acts, and where it has put its goods on the market under a name so nearly like complainant's as to enable dealers to palm them off as complainant's, and at a price which makes it an object to do so, an invasion of complainant's rights is shown.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 64; Dec. Dig. § 65.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3590-3594.]

4. TRADE-MARKS AND TRADE-NAMES (§ 85*)—RIGHT TO PROTECTION—FRAUDULENT REPRESENTATIONS ON LABEL—"PURITY" OF WHISKY.

A statement on the label of whisky bottled in bond that its "purity" was guaranteed by the United States government, while not technically true, was not such a fraudulent misrepresentation as should bar the distiller from relief in equity against infringement of its trade-mark, since the stamp may be taken as a guaranty that it is such as is permitted to be bottled by the statute, that it has not been subjected to adulteration or admixture, but is in the same condition as when manufactured,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

except for the process of aging and reduction to 100 proof, and in such condition it may be considered pure for bottling purposes.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. § 85.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 85*)—INFRINGEMENT—RIGHT TO RELIEF—FALSE REPRESENTATIONS ON LABEL.

Untrue statements on labels that the whisky contained in the bottles was manufactured "in the sour mash fire copper way, being singled and doubled in copper stills over open wood fires," and untrue or misleading statements on labels on "bonded" whisky that "this bottling in bond * * * insures to the customer the highest grade of whisky made in this country," are material and misleading representations which under the rule of "unclean hands" deprive the distiller of the right to relief in equity against infringement of its trade-mark used on such labels, until such practice is discontinued.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. § 85.*]

Appeal from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by W. A. Gaines & Co., a corporation, against the Turner-Looker Company. Decree for defendant, and complainant appeals. Affirmed.

J. L. Hopkins, of St. Louis, Mo. (D. W. Lindsey, of Frankfort, Ky., and Clore, Dickerson & Clayton, of Cincinnati, Ohio, of counsel), for appellants.

Simeon Johnson, of Cincinnati, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. The complainant, which is a corporation engaged in the manufacture of whisky, at Louisville, Ky., filed its bill to restrain defendant from selling whisky under the name of "Golden Heritage," which complainant alleges infringes its trade-mark "Hermitage"; unfair competition, especially by the use of said infringing name, being also alleged. Upon final hearing on pleadings and proofs the bill was dismissed, and the case is here on appeal from that decree.

Several reasons are urged in support of the decree of dismissal:

[1] 1. It is denied that complainant has any valid, technical registered trade-mark. While the existence of a technical trade-mark is unnecessary to sustain a bill for unfair competition, we think complainant shows valid ownership of a technical trade-mark. The trade-mark relied upon is the word "Hermitage." Complainant alleges that this trade-mark has been used by it and its predecessors since 1868. It shows a registration in 1870, a later registration April 11, 1882, and a third, September 13, 1904. The validity of the 1870 registration is assailed because the act of 1870 (Act July 8, 1870, c. 230, 16 Stat. 198), under which it was made, was unconstitutional. Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550. That of 1882 is challenged as not registering the trade-mark "Hermitage," because that word was only part

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of a registered trade-mark (apparently designed for stamping upon a barrel head), containing, among others, the words "Hermitage Distillery Copper Distilled Whisky." The distillery of complainant and its predecessors has been long known as "Hermitage Distillery." The only objection made to the validity of the 1904 registration, which embraces only the word "Hermitage," is that the registration statement falsely asserts that the trade-mark "Hermitage" has been continuously used by the said W. A. Gaines & Co. and its predecessors since the year A. D. 1868." We see no merit in this criticism. Its use appears to have been continuous and in good faith; and neither the fact that it was in earlier years used only as part of a more extended trade-mark, nor the possible failure to show effective legal conveyance to complainant of the right to the trade-mark, renders the assertion in the 1904 statement fraudulent.

[2] 2. Infringement of complainant's trade-mark is denied. Complainant's Hermitage brand is confessedly a high-grade whisky, and complainant has built up a large and valuable business in its manufacture and sale. The trade-name and trade-mark are valuable. Complainant's whiskies are bottled "free" and in bond. The word "Hermitage," as used on complainant's labels, is sometimes printed in ordinary capital type, but one of its prominent forms is in script. Defendant uses script alone for the name of its whisky. Complainant's script mark, as used on its labels, and defendant's script mark, as likewise used, are here reproduced:



Complainant's Script Mark.



Defendant's Script Mark.

The similarity in appearance is obvious. Defendant's mark differs from complainant's only in that it omits the letter "m" and has the word "Golden" in much less conspicuous type, obliquely set. On some of defendant's earlier labels the name was followed by the device of

a stork carrying an infant; but the label generally used omits all pictorial design and contains (following the trade-name) only the words: "Bottled in Bond. Straight Pennsylvania Whisky."

[3] We think defendant's mark is calculated to deceive the public, and to enable the palming off of defendant's goods as those of complainant. It is true that defendant's whisky is sold at a much lower price than complainant's: that it is sold largely under mail orders to the direct consumer, or for sale over bars, while complainant's "Hermitage" is sold usually to jobbers, and that defendant's goods are labeled as "Straight Pennsylvania Whisky," while complainant's Hermitage whisky is known to the dealers generally as made in Kentucky; complainant's script labels containing its name, the name and location of its distillery as in Franklin county, Ky., as well as a picture of the manufactory or distillery, all of which, to careful observers, distinguish it in fact from defendant's label. But these differences are not such as to effectively prevent imposition upon the ultimate consumer. Defendant disclaims any attempt to imitate complainant's trade-mark, and presents explanatory testimony of the history of the adoption of its mark. Without attempting to account for this situation, we content ourselves with saying that the similarity is too striking to make the explanation convincing. However, it is not essential that willful intent to deceive be shown. The defendant must be presumed to have intended the natural consequence of its acts, and having put the goods on the market under a name so nearly like complainant's as to enable dealers to palm them off as complainant's and at a price which makes it an object to do so, an invasion of complainant's rights is shown. *Tarrant & Co. v. Hoff* (C. C. A. 2) 76 Fed. 959, 22 C. C. A. 644; *Fairbank Co. v. Luckel, etc., Co.* (C. C. A. 9) 102 Fed. 327, 42 C. A. 376.

[4] 3. It is urged that if it be conceded that complainant has a valid trade-mark, and that defendant has infringed it, yet complainant has itself been guilty of misleading representations in the business use of its trade-mark, and therefore is not in position to obtain relief from a court of equity, as coming into court with unclean hands. The misleading representations relied upon are:

(a) That the label on complainant's whisky bottled in bond contains these words:

"Caution: Be sure that the internal revenue stamp over cork and capsule is unbroken, as this guarantees the genuineness, purity, and age of the contents of this bottle."

(b) That complainant's label on its whisky bottled in bond bears this further legend:

"This bottling in bond at the distillery under the supervision of the officers of the internal revenue insures to the consumer the highest grade of whisky made in this country, with guarantee of the United States government as to its age and purity."

(c) That certain of complainant's labels bore these words:

"Bottled at the distillery in bond under supervision of the officers of the internal revenue and guaranteed by the United States government pure and of age indicated by stamp over cork and capsule."

(d) That certain of complainant's labels on "free" bottled whisky contain this statement:

"Distilled at the Hermitage distillery, Franklin county, Kentucky, this whisky is bottled at the distillery under our personal supervision and guaranteed absolutely pure and unadulterated."

(e) That certain of complainant's labels bore the statement that the whisky was manufactured—

"in the sour mash fire copper way, being singled and doubled in copper stills over open wood fires."

The representations contained in (a), (b), and (c), above, may be considered together. The criticisms of these three forms of labels are, first that the government does not guarantee the purity of the whisky; and, second, that the bottling in bond does not insure to the consumer the highest grade of whisky.

The court below was of opinion that the representations contained in statements (a) and (b) were misleading, and dismissed the bill for this reason, and because it was of opinion that any one desiring Hermitage whisky, and being accustomed to the way it had been labeled, would not be deceived by defendant's label. It is true that the government does not guarantee the purity of whisky bottled in bond in the commercial sense, as being merchantable and free from any element of commercial unsoundness; for example, it is established that whisky may be unsound, that is to say, made from an impure grain and so be unmerchantable, also that the same may result from bad cooperage, and that the internal revenue officers pay no attention to such conditions. The presence of the stamp does, as we understand the record, practically guarantee the age and the genuineness of the whisky, because it identifies the date of manufacture and of bottling, and gives assurance that the whisky as bottled is the same as when manufactured, except as aged and to the extent that water may be added to reduce to 100 proof. The question in this connection turns, then, upon the definition of purity. The act which allows the bottling of distilled spirits in bond (Act March 3, 1897, c. 379, 29 Stat. 626 [U. S. Comp. St. 1901, p. 2150]) forbids "any mingling of different products, or of the same products of different distilling seasons, or the addition or the subtraction of any substance or material or the application of any method or process to alter or change in any way the original condition or character of the product except as herein authorized," the exceptions not being here material. In the report of the committee which submitted to the House of Representatives the draft of the statute in question, it is said that:

"The obvious purpose of the measure is to allow the distilling of spirits under such circumstances and supervision as will give assurance to all purchasers of the *purity of the article* purchased, and the machinery devised for accomplishing this makes it apparent that this object will certainly be accomplished." (Italics ours.)

This report may properly be resorted to for the purpose of determining the scope of the statute passed on the strength of it. *Binns v. United States*, 194 U. S. 486, 24 Sup. Ct. 816, 48 L. Ed. 1087. We

think it a reasonable interpretation that whisky is to be deemed pure for bottling purposes if it is free from the faults referred to in the statute; in other words, if it is in the condition as manufactured, changed only by the process of aging and the reduction to 100 proof. While it is not, strictly speaking, true that the government guarantees anything, yet the distinction between a guaranty by the government and a guaranty afforded by the stamp affixed by government authorities is not so great as to suggest intentional fraud. Statements contained in labels which are not strictly accurate, but are entirely immaterial, are not such false misrepresentations as will deprive a manufacturer using such labels of the right to injunction against infringement. *Tarrant v. Hoff*, supra; *Jacobs v. Beecham*, 221 U. S. 263, 31 Sup. Ct. 555, 55 L. Ed. 729. And if the defense rested alone on the references to purity, contained in statements (a), (b), and (c), we should not be disposed to hold them sufficient to justify a denial of relief to complainant.

The same considerations apply to the suggestion that at the time this suit was begun complainant was using barley malt, and that therefore its rye whisky was not pure rye. There is evidence, as we construe the record, indicating that dealers generally did not understand that the use of barley malt made an otherwise rye whisky impure. It is not easy, however, to justify the assertion in statement (b) that "this bottling in bond * * * insures to the consumer the highest grade of whisky made in this country," because, first, complainant itself seems to have made a higher grade; and, second, its mere bottling, under supervision of the revenue officers, furnished no assurance of high grade, except as involved in age, purity, and proof.

[5] As to statement (d): Free whisky is not bottled at a distillery. Complainant's free whisky was in fact bottled in a building remote from its distillery, and under complainant's orders, but by rectifiers who (except in one instance named) served complainant only. This representation would seem immaterial, except as it may induce a belief that the whisky is 100 proof, as whisky bottled in bond must be, while free whisky is usually bottled at from 90 to 95 per cent. proof. It would seem not improbable that one who knew that whisky bottled in bond must be 100 proof would naturally know also that whisky so bottled must bear the government stamp, and, as free whisky bears no stamp, would not be misled by this representation; and it may be that, if this representation stood alone, we would not think it sufficiently important to justify denying relief to complainant.

As to representation (e): The terms "singled" and "doubled" refer to the first and second boilings. It is established that the first boiling is done by steam, and that the second boiling is done over a wood fire, not open, but in a closed furnace. We cannot say that this is an immaterial misrepresentation. While whisky singled and doubled over open wood fires may not be superior to that obtained by the processes employed by complainant, the record indicates that many users of whisky think that the open fire process is superior, and so might well be misled and deceived by this misrepresentation.

Taking the whole case together, we are impressed that the mis-

statements complained of are not so trivial as to bring the case within *Jacobs v. Beecham*, where the representations held harmless were said to be "small survivals from a time when they were literally true," and that the case is thus brought within the rule of "unclean hands."

We are not satisfied that complainant had discontinued all the misleading representations, and the decree of the Circuit Court must therefore be affirmed. But, the trade-mark not being itself fraudulent, the affirmance should be without prejudice to the institution of a new suit for injunction whenever complainant shall have put an end to the misleading representations.

On Petition for Rehearing.

But one matter seems to call for special mention: In the opinion filed March 7th last, it is said (speaking of the representation that complainant's whisky was "singled and doubled in copper stills over open wood fires") that:

"The record indicates that many users of whisky think that the open-fire process is superior, and so might well be misled and deceived by this misrepresentation."

A reference to the record now made fails to disclose such evidence, and the statement in that regard is apparently an error. This mistake does not, however, justify a rehearing, because, first, the representation in question was not the only respect in which complainant was held to offend; and, second, in the absence of evidence to the contrary (and we find no such evidence), it is to be presumed, from the fact that the representation was made, that a portion at least of the public was expected to regard it as material, and, if so, we cannot say, upon this record, that it was immaterial.

On careful consideration of the petition, we think a rehearing is not justified.

FAY et al. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. April 21, 1913.)

No. 966.

1. UNITED STATES (§ 55*)—TRUST PROPERTY—USE.

Defendant's ancestor conveyed certain shore lands to trustees for the use of the United States Commission of Fish and Fisheries, and for the use of such other departments of the United States government as might from time to time during the continuance of the trust be designated by the Secretary of the Treasury, with authority, on request of the United States Commissioner of Fish and Fisheries, or of the Secretary of the Treasury, to convey the same to the United States, provided that, if the premises were not used for the purposes of the Commission of Fish and Fisheries, "nor by the United States" the same should revert to the grantor's heirs. *Held*, that the United States was not limited in the use of the land to the development of the fish and fisheries of the United States, but was entitled to devote the same to any kind of useful public purpose.

[Ed. Note.—For other cases, see *United States*, Cent. Dig. § 38; Dec. Dig. § 55.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. UNITED STATES (§ 55*)—DONATED PROPERTY—POWER TO TAKE.

The United States has power to accept a grant of land as a donation or gratuity for a public purpose, to hold the property so donated, and to maintain suits for the protection of its rights therein.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 38; Dec. Dig. § 55.*]

3. UNITED STATES (§ 55*)—ACQUISITION OF PROPERTY—"USE."

Defendant's ancestor conveyed certain shore land to trustees, to hold for the use of the United States Commission of Fish and Fisheries, and for the use of such other departments of the United States government as might from time to time be designated by the Secretary of the Treasury, provided that, if the premises were not used for the purposes of the Commission nor by the United States, the same should revert to the grantor's heirs. The government maintained a fish commission station near the land, where a hatchery and a biological laboratory were erected, and the cultivation of cod, flat fish, and lobsters was carried on, together with wharves, docks, and a coalhouse. Though no buildings were erected on the property in question, public notices asserting title of the United States and warning the public against interfering with the uses of the grant were posted in 1890, and in 1893 the United States drained the land, and in 1894 negotiations were had concerning permission to maintain a float stage in waters near the land, tending to show that the government was using its right for protective purposes. *Held*, that the term "use" was used in the sense of property of a thing rendering it suitable for a purpose, adaptability to the attainment of an end, usefulness, availability, utility, serviceability, service, convenience, and position, and that the facts were sufficient to show that the United States had not forfeited its right to the land by a failure to use the same.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 38; Dec. Dig. § 55.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7226, 7227.]

4. DISTRICT AND PROSECUTING ATTORNEYS (§ 8*)—GOVERNMENT LAND—TITLE—ADMISSION OF UNITED STATES ATTORNEY.

The rights of the United States in certain shore land under the provisions of a trust deed could not be affected by an admission of the United States attorney in a proceeding in a state court with reference to the land, to which the United States was not a party.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 34, 35; Dec. Dig. § 8.*]

In Error to the District Court of the United States for the District of Massachusetts; Arthur L. Brown, Judge.

Writ of entry by the United States against Henry H. Fay and others. Judgment for the United States, and the tenants bring error. Affirmed.

John L. Hall, of Boston, Mass. (Edmund S. Kochersperger, of Boston, Mass., on the brief), for plaintiffs in error.

Asa P. French, U. S. Atty., of Boston, Mass. (William H. Garland, Asst. U. S. Atty., of Boston, Mass., on the brief), for the United States.

Before PUTNAM and DODGE, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. We are concerned here with a writ of entry in which the United States demands possession of a certain tract

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of shore land situated at Woods Hole, in Falmouth, Mass. The defendants are the heirs at law of Joseph S. Fay.

Since 1871 there has been a station of the United States Fish Commission at Woods Hole, and work incident to such an establishment has been carried forward there. At the station there has been a large residence building, which serves as summer headquarters for the Bureau of Fisheries. There is a hatchery building, which includes a biological laboratory; and the work is the cultivation of cod, flat fish, and lobsters, and the study of problems connected with the fisheries of the coast. There are wharves, docks, a coalhouse, and a reservoir. There are also at this station two regular steamers, a steam launch, small boats, and an auxiliary steamer.

[1, 2] In 1882, Joseph S. Fay, who was a wealthy man and owner of considerable land on the shore and thereabouts, conveyed to Charles F. Choate and J. Malcolm Forbes, trustees, a certain parcel of narrow shore land particularly described, which they were to hold primarily for the use of the United States Commission of Fish and Fisheries, under the general direction of the United States Commission of Fish and Fisheries, and, secondly, for the use of such other departments of the United States government as might from time to time during the continuance of the trust be designated by the Secretary of the Treasury, with authority, upon request of the United States Commissioner of Fish and Fisheries, or of the Secretary of the Treasury, to convey the same to the United States. The conveyance and trust were subject to a proviso in the following words:

"Provided, however, that if hereafter the premises hereby conveyed are not used for the purposes of the said Commission of Fish and Fisheries, nor by the United States, the same shall revert to the said Joseph S. Fay, his heirs and assigns."

A perpetual right of landing for Mr. Fay was reserved to himself and his heirs.

In 1883 the trustees conveyed the land to the United States, subject to the same proviso in respect to reversion.

The grant was a donation or gratuity, and was for a public purpose; and we have no doubt of the power of the government to receive and hold property thus donated, and to maintain suits for the protection of its rights.

It must be observed that the terms of the grant are explicit, and that the reservation is in the broadest possible language, in that it fixes no time limit in respect to nonuser operating as a reversion; and the language with respect to the kind of uses is equally broad:

"Not used for the purposes of the United States Commission of Fish and Fisheries nor by the United States of America."

[3] It was unquestionably open to the United States, under the broad language quoted, to devote the land to any kind of useful public purposes; but the government's only contention is that it has been used in connection with the fisheries station, and again here the language is very broad:

"Used for the purposes of the United States Commission of Fish and Fisheries."

It does not express buildings or wharves or structures of any kind; and we think it follows that the parties contemplated any beneficial use, either for structures or incidental, auxiliary, beneficial uses.

We accept the established rule that grants of this character should be liberally construed, with a view of upholding the purpose of the grant, as well as the proposition that, upon questions of reversion or forfeiture in respect to conditions subsequent, the rule of strict construction obtains.

Under these rules of construction, the government had a fair and reasonable question for the jury upon the evidence in respect to active, substantial, beneficial uses. It is true the land has not been used for building purposes, or for permanent structures; but the uses were such practical, incidental, beneficial uses as are often applied to open land connected with public and private structures and enterprises.

At the trial considerable importance was attached to the protective features of this narrow strip of shore land as bearing upon the question whether the government had used it for the purposes of the Fish Commission establishment within the meaning of the condition; and, as explained to the jury, for the protection that was supposed to result from the fact that the ownership might be used to prevent encroachments and uses inconsistent with the purposes of a fish hatchery, like drainage, which, in connection with the currents of the harbor, might affect the propagation of fish.

Under the established rules of construction, which require liberal considerations in support of grants of this character, and strict considerations with reference to reversions and forfeitures, we see no error in permitting the protective feature of the land and its control to be considered among the other uses upon the question whether the condition was reasonably performed.

A public-spirited man, whose purpose was to promote a government work like the one in question, might well have contemplated that the ownership and control of a nearby strip of shore land would be so exercised as to operate usefully and beneficially to such a government enterprise in the interests of the general public, through protecting the waters against pollution and other conditions damaging to the general work of food fish propagation.

The fact that the narrowness of the strip rendered it not especially suitable for the erection and maintenance of structures lends force to the proposition that it was reasonably within the contemplation of the parties that its control and incidental and auxiliary uses might be beneficial to the general enterprise.

It is well understood among men that oftentimes the leading incentive for the acquisition of title to nearby lands resides in the idea of protection against drainage, surface flowage, interruption of view, and other uses which might be inconsistent with the greater success and the better enjoyment of the main or principal right.

"Used for the purposes" is a very general and sweeping expression of a general intent to promote the interests of the plant in question in all useful ways, and while the popular acceptance of the word "use" suggests the act of employing, the word "use" has another meaning

which may properly be applied, we think, to this situation, which is the property of a thing which renders it suitable for a purpose; adaptability to the attainment of an end; usefulness; availability; utility; serviceableness; service; convenience; position.

Aside from the actual and more active incidental uses disclosed by the record, and as bearing upon the protective use through the instrumentality of ownership and control, we think the government's acts of dominion pertinent and important.

We think the position of the government, that ownership and control afforded a useful protection to the work of the Fish Commission, a sound one, and that it is reasonable to infer that the parties contemplated that ownership, accompanied with assertion of right, would operate to that end.

In May, 1883, the government, through its attorney, George P. Sanger, filed a plan of the land in question with the Secretary of the Commonwealth of Massachusetts, stating the government's title, and that the same was necessary for the use of the United States Fish and Fisheries Commission.

In 1893 it exercised drainage control over the strip of land in question.

Public notices, asserting the title of the United States and warning the public against interfering with the waters of the ground, were posted in 1899.

Negotiations were had in 1894 with respect to permission to certain parties to maintain a float stage in waters near the land in question, and there were other acts of dominion and control tending to show that the government was using its right for protective purposes.

There are numerous assignments of error, many of which were not touched upon in argument. There are many others which are inferentially disposed of by the general propositions which we have adopted for the purposes of decision.

[4] We do not deem it necessary to take up the assignments of error seriatim, and will only refer to the questions raised in respect to the admission of the United States attorney, in a certain proceeding in the state court of Massachusetts, and the effect of the result of that case upon the questions involved here.

There may be slight or technical error in some of the assignments of error; but, having considered the weight of the subject-matter involved in the incidents to which they refer, we find no sufficient ground for disturbing the verdict.

In *Williamson v. United States*, 207 U. S. 425, 451, 28 Sup. Ct. 163, 52 L. Ed. 278, it was reasserted that courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused. In view of this rule, we have no hesitation in saying that there is no reason to think that practical injustice resulted from any of the technical errors pointed out.

Now, as to the proceedings in the state court which were offered in this case for the purpose of showing that the defendants' possession is rightful. We think it clear in respect to that contention that ques-

tions as to the government's title could not be concluded in the proceedings in the state court to which the United States was not a party. Indeed, Chief Justice Knowlton expressly says, in the course of his opinion (*Fay v. Locke*, 201 Mass. 387, 390, 87 N. E. 753, 755 [131 Am. St. Rep. 402]):

"Of course, a judgment for the demandants against the tenant does not affect the title of the United States under its deed; that is open for further litigation, if there is a dispute about it."

We think it equally clear that a statement or admission by a United States attorney in a case in which the United States was not a party would not be such an authoritative admission as to make it affirmative evidence upon the question of title involved in this case.

Judgment of the District Court affirmed, with costs of this court.

PUTNAM, Circuit Judge (concurring). I am not prepared to hold that a mere acquiescence in a natural condition of the property in question that was conveyed by Mr. Fay was covered by the word "used," as found in the conditions of the deed; but it is so clear that the property has been beneficially used by the United States that any error of the District Court in this particular is wholly unimportant. Therefore I agree that the judgment should be affirmed.

MANCHESTER LINERS, Limited, v. VIRGINIA-CAROLINA
CHEMICAL CO.

(Circuit Court of Appeals, Fourth Circuit. March 11, 1913.)

No. 1,123.

1. SHIPPING (§ 47*)—CONSTRUCTION OF CHARTER PARTY—"PORT OF DISCHARGE."

Where the "port of discharge" designated in a charter party at which the vessel is to discharge at her expense is one at which there is a custom house, the word "port" is to be construed in its ordinary and commercial sense as meaning the particular place named, and not as permitting a discharge at any place within the revenue port or district for which the place is the port of entry.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 182, 183; Dec. Dig. § 47.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5456, 5457.]

2. SHIPPING (§ 34*)—CHARTER PARTY—LAW GOVERNING CONSTRUCTION.

A charter of an English ship, owned by an English company, to a German company, for the carriage of a cargo from Germany to the United States, made in Germany, *held* governed as to its construction by the law of Germany, where the general presumption that such was the intention of the parties is strengthened by an express provision to that effect in the bill of lading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 120; Dec. Dig. § 34.*]

3. SHIPPING (§ 47*)—CONSTRUCTION OF CHARTER PARTY—COST OF LIGHTERAGE—GERMAN LAW.

Under the admiralty and maritime law as administered in Germany, a clause in a charter party requiring the ship to discharge at a port

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

named "or as near thereunto as she can safely get" relieves the master from proceeding with his ship and cargo to the port where the water is not of sufficient depth, but not from his obligation to deliver the cargo at his expense in the port of destination, unless a contrary intention appears, and the vessel is liable for the expense of necessary lighterage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 182, 183; Dec. Dig. § 47.*]

Appeal from the District Court of the United States for the Eastern District of North Carolina, at Wilmington; Henry G. Connor, Judge.

Suit in admiralty by the Manchester Liners, Limited, owner of the steamship Manchester Miller, against the Virginia-Carolina Chemical Company, claimant of the cargo of the said Manchester Miller. Decree for respondent, and libellant appeals. Affirmed.

For opinion below, see 194 Fed. 463.

J. P. K. Bryan, of Charleston, S. C., for appellant.

George Rountree, of Wilmington, N. C. (J. O. Carr, of Wilmington, N. C., on the brief), for appellee.

Before GOFF, Circuit Judge, and WADDILL and ROSE, District Judges.

WADDILL, District Judge. This is an appeal from a decree in admiralty of the United States District Court for the Eastern District of North Carolina, sitting at Wilmington, rendered on the 24th day of January, 1912. The facts of the case material to the controversy, briefly are as follows:

The appellant, libellant in the lower court, Manchester Liners, Limited, a corporation created and organized under the laws of Great Britain, was, on the 27th day of May, 1908, the owner of the steamship Manchester Miller, and on that date, acting through a representative at Hamburg, Germany, entered into a contract of charter party, partly printed and partly written, with the Hamburg-American Liners of Hamburg, Germany, whereby it was agreed that the steamship should receive on board at Hamburg, from the charterers, a cargo of 2,855 tons of manure salt, and that:

"The steamer being so loaded, after being dispatched by the charterers, shall therewith proceed immediately to Wilmington, N. C., or so near thereunto as she can safely get, and, on right and true delivery of the cargo according to the bill of lading signed by the captain, be paid freight," etc.

The charter also contained the following:

"The steamer to be discharged at one of two wharves at her expense, as ordered by the consignees within 24 hours after the steamer has been entered at the custom house, consignee guaranteeing a sufficient depth of water, if at Wilmington, N. C., including factories outside the city limits."

By an indorsement in writing on the margin of the charter party, the steamer was authorized to fill up with 3,395 tons for Pensacola. Pursuant to the charter party, the charterers furnished to the steamship the cargo, and the bill of lading was duly signed for the ship's master on the 30th day of June, 1908, and delivered to the charterers, whereby receipt of the cargo was acknowledged from Kalisyndapat

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

G. B. M. H. Filiate, Hamburg, in apparent good order and condition, "discharge and all other conditions as per charter party dated May 27, 1908, * * * to be delivered in like good order and condition at a place within the jurisdiction of the custom house of Wilmington, N. C., unto order of G. Amsinck & Co., or to his or their assigns, freight to be paid at Wilmington, N. C.," with the further proviso that:

"All questions arising under this bill of lading are to be governed and decided by the laws of the empire of Germany as administered in Germany."

Thereafter the steamship sailed from Hamburg and proceeded on her voyage, reaching the outer bar or mouth of Cape Fear river on the night of the 23d of July, 1908, where she anchored, and waited until the following morning at 5 o'clock, and at high tide crossed the bar and proceeded up the river, and anchored off the town of Southport, a short distance up the river, and about 30 miles below Wilmington. The draft of the steamer in salt water was 24' 5", and off Southport, where the water was partly fresh, 24' 8". Being advised that it was unsafe and impossible to proceed up the river without lightering the cargo, the average depth of water between Southport and Wilmington being only between 21' 6" and 22', the master came to Wilmington, leaving his ship off Southport, and there, on the 24th of July, entered her arrival at the custom house, and the cargo was likewise on the same day entered by the claimant company. Notice was given to the Virginia-Carolina Chemical Company, the consignee, and claimant herein, of the arrival of the cargo at Southport, and the ship's master offered to deliver the cargo there, as it was as near Wilmington as the ship could safely get. This delivery consignee refused to accept, and demanded that the master deliver the cargo at Smallbones wharves, in the upper part of the city, and a wharf at Navasaw, a factory of the claimant, outside the city limits, and in the port of Wilmington. This the master declined to do, because it was impossible for a ship drawing 24 feet of water to proceed up the river from Southport to said wharves, without being lightened some 17 or 18 inches. It was thereupon agreed between the master and the ship's agent at Wilmington, and the agent of the consignee, with a view of avoiding demurrage, to lighten the ship, and leave the question of liability, and the cost and expense incurred, for subsequent adjustment; and following out this arrangement, tugs, lighters, and laborers were employed by the ship's agent, and 660 tons of cargo removed from the ship, and thereafter, on the 26th of July, she proceeded up the river to the wharves mentioned, and duly discharged her cargo, the portion taken by the lighters being likewise discharged at the wharves. The expense incurred in this lightering was \$1,071.82, which was paid by the ship, as was also \$100 for towing the steamer from Southport to Wilmington, and \$150 from Wilmington to Navasaw and return, and upon demand being made upon the consignees for payment of the same, and refusal thereof, the libel was filed.

After maturity of the case, the questions at issue were referred to a commissioner, who took the evidence and reported adversely to the libelant, which report was duly confirmed, the libel dismissed, and this appeal taken.

[1] The case turns almost entirely upon the interpretation to be given to the language used in the charter party, namely: (a) "The steamer being so loaded, after being dispatched by the charterers, shall proceed therewith immediately to Wilmington, N. C., or so near thereunto as she can safely get, and, on the right and true delivery of the cargo according to the bills of lading signed by the captain, be paid freight," etc.; (b) the steamer is to be discharged at one of two wharves at her expense as ordered by the consignees within 24 hours after the steamer has been entered at the custom house, consignees "guaranteeing sufficient depth of water, if at Wilmington, N. C., including factories outside of city limits"; (c) what law should be applied in the interpretation of the charter party and bills of lading, especially in determining the meaning of the language in the charter party to proceed "to Wilmington, N. C., or so near thereunto as she can safely get"; (d) the effect of the provision in the bill of lading that "(15) all questions arising under this bill of lading are to be governed and decided by the law of the Empire of Germany, as administered in Germany; and (e) incidentally, the construction to be given the phrase in the charter party "to proceed to Wilmington, N. C., or so near thereunto," etc., in the light of the terms in the bill of lading as to the delivery of the cargo, namely, that the same was to be delivered "in like good order and condition at any place within the jurisdiction of the custom house of the aforesaid port of Wilmington, N. C., to consignee's order or his or their assigns," etc.—the appellant and libellant's contention being that the ship's arrival at Southport brought her within the terms of the last-named provision of the bill of lading, and entitled them to deliver the cargo there.

The questions thus presented were elaborately and fully considered by the commissioner to whom the case was referred, and the judge of the lower court, and the conclusions of the latter were, briefly:

First. That the arrival at Southport, while a place within the Wilmington customs district, was not the arrival as contemplated in the charter party and bill of lading; the meaning of the contract of affreightment being that the ship should bring the cargo to the harbor or port of Wilmington, as distinguished from merely into the customs district, and deliver the same at its wharves, and not down the river 30 miles below Wilmington.

[2] Second. That the contract having been made in Germany, by a German company, for delivery of a cargo from Germany to a place in the United States, should be construed, especially in the light of the provision in the bill of lading, according to German law, and not of either the laws of the United States, where the cargo was delivered, or those of Great Britain, where the ship's owners resided.

[3] Third. That whatever may be the interpretation placed upon the language "or as near thereunto as she can safely get," under the law of Great Britain, as to which there seems to be some contrariety of view, under the admiralty and maritime law as administered in Germany, the master is not relieved by the use of such language from delivery of the cargo at the ship's expense to the final point of destination, although the ship itself may not be able to proceed thereto, un-

less the contrary intention appears in the agreement, as, for instance, lighterage, if any, to be at the expense of the receiver of the cargo, which provision did not exist in this case.

The results thus arrived at in the last three paragraphs are conclusive of this case, unless the provision of the charter party respecting the guaranty of a sufficient depth of water brings about a different result.

Fourth. The decision of the lower court on this subject was that the guaranty by the consignee as to the depth of water did not apply to the waters of Cape Fear river between Southport and Wilmington, but to the waters at the wharves within the harbor of Wilmington, and that there was nothing to indicate lack of sufficient depth of water there.

Upon full consideration by this court of the questions presented in the record, and by the assignments of error, viewed in the light of the clear and exhaustive arguments of proctors for the respective parties, we have reached the conclusion that the judgment of the lower court is in all respects free from objection, and there was no error committed in any ruling in the case, or upon any of the points especially enumerated. To the decision of the lower court, found in 194 Fed. 463, special reference is here made, as containing a comprehensive statement of the facts of the case, as also an able and interesting review of the law applicable thereto, and with the conclusion reached we are in full accord, particularly as respects the points hereinbefore specifically referred to, which are conclusive of the merits of the controversy.

The decree of the lower court will be affirmed, with costs.

Affirmed.

HOME POWDER CO. et al. v. GEIS et al.

In re LINCOLN MIN. & MILL. CO.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1913.)

No. 3,674.

1. BANKRUPTCY (§ 63*)—ACTS OF BANKRUPTCY BY CORPORATION—POWER OF BOARD OF DIRECTORS.

Whether the board of directors of a corporation has the authority to admit its inability to pay its debts and its willingness to be adjudged a bankrupt, which constitutes an act of bankruptcy under Bankr. Act 1898, c. 541, § 3a (5), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), depends on the laws of the state in which it is incorporated. If, as is the case in Arizona, the state law is silent on the subject, the directors, under the general law, have authority to make a general assignment of the property of the corporation for the benefit of its creditors, which carries with it the power to consent to its bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 63.*]

2. BANKRUPTCY (§ 63*)—CORPORATIONS—ADMISSION OF INSOLVENCY.

The fact alone that two of the directors of a corporation, who voted for a resolution admitting its inability to pay its debts and its willingness to be adjudged a bankrupt, and whose presence was necessary to make a quorum, were creditors of the corporation, does not invalidate the action of the board.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 63.*]

3. BANKRUPTCY (§ 76*)—CORPORATIONS—DIRECTORS AS PETITIONERS.

Nor were such directors disqualified from joining in a petition as creditors based on their action as directors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 50, 56, 97, 99, 100; Dec. Dig. § 76.*]

4. BANKRUPTCY (§ 16*)—JURISDICTION—"PRINCIPAL PLACE OF BUSINESS" OF CORPORATION.

A mining company, incorporated in Arizona, and licensed to do business in Missouri, acquired a lease of a mine in the latter state, where all of its mining business was transacted, although its managing officers resided in Chicago, and its directors' meetings were held there. *Held*, that its principal place of business" was in Missouri, within the meaning of Bankr. Act July 1, 1898, c. 541, § 2 (1), 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421), and that the court of that district had jurisdiction to adjudge it a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5559-5560.]

Appeal from the District Court of the United States for the Western District of Missouri; Smith McPherson, Judge.

In the matter of the Lincoln Mining & Milling Company, bankrupt. The Home Powder Company and others appeal from an order of adjudication. Affirmed.

Hiram W. Currey and George Vest Farris, both of Webb City, Mo., for appellants.

Hugh McIndoe and A. W. Thurman, both of Joplin, Mo., for appellees.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

SMITH, Circuit Judge. The Lincoln Mining & Milling Company was incorporated under the laws of Arizona in October, 1907, and in October, 1908, it was licensed to do business in Missouri. The company acquired a lead and zinc mine by lease and constructed a mill at Duenweg, Jasper county, Mo., and the management of this mine and mill constituted the sole business of the company. The company was engaged in carrying on these lines of business from its organization until about June, 1910, when it closed down. Shortly thereafter its property was attached by certain of its creditors, including the Home Powder Company. Later, and on August 16, 1910, a called meeting of its directors, of which meeting all the directors were notified, was held in Chicago, Ill. It was attended by five of the eight directors, and a preamble was adopted stating that the company was unable to pay its debts and had been obliged to shut down its plant at Duenweg, and by a resolution, which was entered at large on the company's records, it admitted its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground. August 27, 1910, Albert J. Geis, A. W. Van Hafften, and Herman B. Meyers filed a petition as creditors of the company, alleging that it had admitted in writing its inability to pay its debts and its willingness to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be adjudged a bankrupt on that ground, and asking that it be so adjudged. The company answered, admitting the allegations of the petition; but certain creditors, including the United Iron Works and the Southwest Supply Company, answered, contesting the proceedings upon numerous grounds. The whole matter was referred to a master, who reported in favor of the petitioners. Exceptions were filed by the Home Powder Company, the United Iron Works, and the Southwest Supply Company. The court confirmed the report of the master, adjudged the company a bankrupt, and the Home Powder Company, the United Iron Works, and the Southwest Supply Company appeal.

Geis and Van Hafften were directors, and attended the meeting in question of the board, and as only a bare quorum was present, counting them, if they or either of them were disqualified, there was no quorum present.

[1] It was originally contended that there was no power in the board of directors, as distinguished from the stockholders, to commit the act of bankruptcy by admitting the inability of the corporation to pay its debts and its willingness to be adjudged a bankrupt. The law requires that the corporation admit in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, and in every case the question is one of authority of the agent, which must be determined by an examination of the special charter or the general laws of the state of the residence of the corporation and the articles of incorporation and the by-laws lawfully adopted. The residence of the corporation is always the state where incorporated. Thompson on Corporations (2d Ed.) § 490. The question, therefore, is whether the directors were authorized to make the admission for the corporation by the laws of the state of the residence of the corporation. In this case that was Arizona.

While all the authorities agree to this, it has been held that the laws of Massachusetts and Oregon do not confer such authority upon the board of directors. In *re* Bates Machine Co. (D. C.) 91 Fed. 625; In *re* Quartz Gold Mining Co. (D. C.) 157 Fed. 243, affirmed under the title of *Van Emon et al. v. Veal*, 158 Fed. 1022, 85 C. C. A. 547. On the other hand, it has been held that by their laws New York, Pennsylvania, Wisconsin, New Jersey, and Rhode Island authorize the board of directors to make these admissions. In *re* C. Moench & Sons Co., 130 Fed. 685, 66 C. C. A. 37; In *re* Lisk Mfg. Co. (D. C.) 167 Fed. 411; *Cresson & Clearfield Coal & Coke Co. v. Stauffer*, 148 Fed. 981, 78 C. C. A. 609; In *re* T. L. Kelly Dry Goods Co. (D. C.) 102 Fed. 747; In *re* Mutual Mercantile Agency (D. C.) 111 Fed. 152; In *re* Marine Machine & Conveyor Co. (D. C.) 91 Fed. 630.

While there is thus a disagreement between the courts as to the conclusion, there is no difference of opinion as to the principle which governs in such cases. The question in every case is: What authority had the directors, as distinguished from the stockholders, in the home of the corporation? *Loveland on Bankruptcy* (4th Ed.) § 136. It is not to be presumed that there will be found in the gen-

eral laws of the state, or in the articles of incorporation or by-laws, any express provision authorizing such admission; but under the general law the board of directors or trustees of a corporation have the power to authorize execution of an assignment of all property of the corporation for the benefit of its creditors, when such a step is advisable, unless such an assignment is prohibited by law, the articles, or by-laws. Clark & Marshall on Private Corporations, par. 691; Thompson on Corporations (2d Ed.) § 6138.

There is no law in Arizona prohibiting such an assignment, and the power to make such transfer carries with it the power to admit the corporation's inability to pay its debts and declare its willingness to be adjudged a bankrupt. In re C. Moench & Sons Co., 130 Fed. 685, 66 C. C. A. 37; Loveland on Bankruptcy (4th Ed.) § 158. There being no law of Arizona prohibiting a board of directors from making a general assignment, it follows such board may without consent of the stockholders make the admission that the corporation is unable to pay its debts and express its willingness that the corporation be adjudged a bankrupt.

[2] It is manifest that, of the five members of the eight who constituted the board who were present when the resolution was adopted, Van Hafften and Geis, who subsequently became petitioning creditors, were necessary to constitute a quorum. The action of the board was unanimous, with a quorum present, and the mere fact that two of those present were creditors, and at the time intended to file a petition, would not disqualify them to vote upon the resolution. The company was hopelessly insolvent, and the resolution had no direct bearing upon the claims of Van Hafften and Geis. It does not appear why the other directors, who were notified, did not appear. It may be that the board thus made up was disqualified to act upon the claims of Van Hafften and Geis. That we do not determine; but there is nothing in the fact that these two men were or claimed to be creditors to disqualify them from voting on a resolution that the company could not pay its debts and was willing to be adjudged a bankrupt. The board of directors was authorized to adopt the resolution and legally did so.

[3] It is next contended that Van Hafften and Geis were disqualified to act as petitioners in an action dependent on their action as directors; but this position seems without force. If the effect of their conduct was to give them a preference, there would be some merit in this suggestion; but many of the authorities say it is not only within the power, but it is the duty, of the directors to make an assignment when the corporation is hopelessly insolvent, and so it may well be said it was not only within the power, but was the duty, of the directors to adopt the resolution in question, and thus secure a sequestration of the property of the corporation for the equal benefit of all the creditors, as distinguished from the exclusive application of it to the payment of some one or more creditors. This company owed more than \$60,000, besides all that is claimed by the petitioners and interveners, and about \$7,000 in claims as to which there is not a suggestion of fraud; and if this petition was not filed the Home

Powder Company and others not parties of record would have secured a prior lien upon all its property.

[4] It is next contended that the court erred in holding that there was jurisdiction in the United States District Court for the Western District of Missouri to adjudge the company a bankrupt. It is provided by section 2 of the bankruptcy act that the proper court has jurisdiction to "adjudge persons bankrupt who have had their principal place of business * * * within their respective territorial jurisdictions for the preceding six months or the greater portion thereof," and it is provided by the first section that the word "persons" shall include corporations. It thus becomes a question of fact as to whether the mining company had its principal place of business in the Western district of Missouri for the greater portion of the six months next preceding August 27, 1910.

From a time long prior to the six months next prior to this application up to in June, 1910, all of the tangible property of the corporation was in Jasper county, in the Western district of Missouri. It there had and conducted the mining business for lead and zinc, and there had its reduction works or mill. It is not even contended its principal place of business, within the meaning of the second section of the bankruptcy law, was in Arizona. There is nothing to indicate it had any authority to do business, except in Arizona and Missouri; but it is claimed that its principal place of business was in Chicago, Ill., and reliance is placed upon *In re Mathews Consolidated Slate Co.* (D. C.) 144 Fed. 724, and *Burdick v. Dillon*, 144 Fed. 737, 75 C. C. A. 603. On the other hand is cited *Tiffany v. La Plume Condensed Milk Co.* (D. C.) 141 Fed. 444.

The managing officers lived in Chicago, and there sold considerable stock in the company; but manifestly this was not the principal business of the mining company in a legal sense. The directors' meetings were held at Chicago, except one, which was held at the mine. The work at the mine and mill was doubtless largely under the direction of the officers, who resided at Chicago, who were the principal owners of the company. The proceeds of sales of stock and of some loans were first deposited in the Commercial National Bank at Chicago, but more than \$42,000 of these funds were transferred to the First National Bank of Cartersville, Jasper county, in the Western district of Missouri. The evidence does not clearly show what was done with this money, but it was doubtless expended in connection with the carrying on of the business of the company. Supported as the contention of the petition is by the finding of the master and the court, and conforming as it does to our own opinion from a reading of the evidence, the finding cannot be disturbed on this contention.

The petitioning creditors each held the note of the corporation. This constituted *prima facie* evidence of indebtedness, and the most that can be said is that the case thus made was somewhat shaken by the testimony. On this, as on the last point, the master and court both found that the company was indebted to all of the petitioners in

an amount in excess of \$500, and with that finding this court cannot, in view of the evidence, interfere.

The order of adjudication is affirmed.

DULUTH ST. RY. CO. v. SPEAKS.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1913.)

No. 3,811.

1. APPEAL AND ERROR (§ 537*)—BILL OF EXCEPTIONS—RECORD.

An alleged bill of exceptions, printed in the record on writ of error, cannot be considered, where it does not appear that it was ever presented to the trial judge for any purpose, or that he settled, signed, or allowed it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2404, 2405; Dec. Dig. § 537.*]

2. APPEAL AND ERROR (§ 701*)—REVIEW—INSTRUCTIONS—NECESSITY OF EVIDENCE.

Action of the trial court in giving and refusing instructions cannot be reviewed on a writ of error, without a properly settled bill of exceptions containing the evidence in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2933–2935; Dec. Dig. § 701.*]

3. APPEAL AND ERROR (§ 193*)—OBJECTIONS TO COMPLAINT—REVIEW—NECESSITY OF OBJECTION AT TRIAL.

An objection to a complaint, first made on a writ of error, will only be sustained if it fails to allege the substance or foundation of a good cause of action, and is so insufficient that it is impossible to cure the defect by amendment or by verdict, since otherwise the court is required to allow an amendment to cure the defect by Rev. St. § 954 (U. S. Comp. St. 1901, p. 696).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226–1238, 1240; Dec. Dig. § 193.*]

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action by Harry E. Speaks against the Duluth Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Thomas S. Wood, of Duluth, Minn., for plaintiff in error.

W. M. Steele, of Superior, Wis. (C. R. Fridley, of Superior, Wis., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

SMITH, Circuit Judge. The Duluth Street Railway Company is a corporation existing under the laws of Minnesota and authorized to do business in Wisconsin. At the time here in question it owned and operated an electric railroad in Duluth, Minn., and to and in Superior, in Wisconsin, and as a part thereof it operated a double-track electric railroad on Tower avenue, a north and south street in the city of Superior. Cars passing south used the westerly track,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and cars passing north used the easterly track. It appears that the company operated its cars so as to stop upon the far, rather than the near, side of intersections.

This action was brought by Harry E. Speaks, who alleged that on February 16, 1910, he as a passenger entered one of the defendant's south-bound cars on Tower avenue and paid his fare to be transported to the intersection at North Seventeenth street with Tower avenue.

"6. That upon approaching said North Seventeenth street the plaintiff signaled the motorman of the car he was riding upon to stop the same at said crossing, and that said motorman did stop the car on the south side of said crossing, and opened the rear doors and gates thereof to permit plaintiff to alight; that plaintiff disembarked from said car on the westerly side thereof, and passed around the rear end thereof to go to the easterly side of Tower avenue, to proceed thence to his home, and while he was proceeding with due care and caution, and just as he was about to step from behind the car upon which he had been riding toward the said easterly track to cross the same, and while his south view of said easterly track was wholly obscured and obstructed by the standing car, from which he had just alighted, and when defendant should reasonably have anticipated that passengers were disembarking from said standing car and might pass therefrom onto said easterly track, said defendant, disregarding its duty to plaintiff to exercise due care for his safety, without sounding any bell or gong, or giving any warning, and without bringing the car to a stop, or slowing down the speed thereof whatsoever, propelled one of its cars along said easterly track, past the car which plaintiff had just alighted from, at a dangerous, excessive, and high rate of speed, to wit, at a rate of speed exceeding 20 miles per hour; that by reason of negligence of defendant as aforesaid plaintiff was in imminent danger of being run over and severely injured or killed by said rapidly moving car, and to avoid the danger thereof and to save his own life plaintiff was compelled to and did throw himself backward and away from said moving car, and in so doing, by reason of the sudden and great exertion necessary thereto, received and sustained a severe abdominal hernia to his right side, and other severe internal and external injuries to his person, and was thereby made sick, sore, and lame, and caused to suffer severe pain and mental anguish for a long time; that plaintiff still suffers at times much pain and inconvenience therefrom; that plaintiff is informed and believes that his said injuries are permanent and are incurable, and will cause him much pain, both physical and mental, in the future; that as aforesaid plaintiff has suffered and still suffers great physical pain and mental anguish on account of said injuries, and in addition thereto because thereof has been injured and impaired in his ability to pursue many of the gainful avocations of life, has had the probable term of his life materially shortened, has since been and in the future will be unable to obtain life insurance on his own life, and has been otherwise injured and made to suffer loss, all to his great damage in the sum of thirty thousand (\$30,000) dollars.

"7. And plaintiff further shows to the court that by reason of having so received said injuries he was compelled to incur expense for medical care and treatment of his said injuries, and in the purchase of necessary supports and appliances to truss and support the injured parts, and has thereby been damaged in the further and additional sum of one hundred fifty (\$150) dollars, which was and is a reasonable sum, and that in the future he will in like manner be compelled to expend and pay out money for such medical care, and for supports and trusses, the amount whereof plaintiff cannot now state, but that he believes it will be large.

"8. And plaintiff further alleges the fact to be that all of said injuries, and consequent pain, suffering, loss, and damage, were solely and proximately produced and caused to plaintiff by the negligence and want of care of defendant as aforesaid, and without fault or negligence on plaintiff's part."

He further alleged:

"That a promulgated rule and regulation of said company to its employes operating its cars, as well as the exercise of ordinary care for the safety of alighting passengers and other persons crossing the streets where the defendant's tracks are laid, requires and then required that, when a car has stopped at a crossing, cars approaching or about to pass in the opposite direction on the other track shall slow down or stop while alongside of the standing car, and shall sound a bell or gong to warn alighting passengers and pedestrians crossing the street of the car's approach."

The street railway company having answered, a trial was had to a jury, who found for the plaintiff below, and fixed his recovery at \$5,000. The court required a remittitur to \$2,500, and, this having been filed, rendered judgment for that amount, and the street railway company sued out a writ of error to this court.

The assignment of errors filed in the District Court under rule 11, and the specification of errors here under rule 24, refer exclusively to the giving of certain instructions and the refusal to give certain instructions asked.

[1, 2] There is printed what purports to be a large amount of evidence under the heading "Bill of Exceptions"; but it does not appear to have been settled, signed, or allowed by the judge. It does not appear to have even ever been presented to him for any purpose. It is quite clear that without a bill of exceptions we cannot pass upon any of the questions raised by the assignment and specification of errors. Of course, it is impossible to pass upon the correctness of the action of the trial court in giving and refusing instructions without the evidence then before it. *Kinney v. United States Fidelity & Guaranty Co.*, 222 U. S. 283, 32 Sup. Ct. 101, 56 L. Ed. 200.

The street railway company insists, however, that if this should be the ruling of the court under rule 11, the court at its option may notice a plain error not assigned, and then calls attention to the fact that, as it contends, the complaint does not state a cause of action. So far as material, the complaint has been set out, and notwithstanding it was never assailed in any way in the court below by motion or demurrer, and no error was assigned there or specified here, the street railway company claims upon strict analysis the complaint is insufficient, and that this is such a plain error that the case should be reversed, citing *United States v. Tennessee & Coosa Railroad Co.*, 176 U. S. 242, 20 Sup. Ct. 370, 44 L. Ed. 452.

That case simply held that a bill to forfeit a certain land grant was sufficient to warrant a forfeiture of part of the grant, and that where the evidence only showed a right to forfeiture of part, and did not sufficiently show what part the government was entitled to cancel, the case should be reversed. In that case the one successful below was seeking to uphold the decree on the ground that the bill, being framed to procure a forfeiture of the entire grant, was not sufficient to warrant a decree for the government for part of the relief prayed. In overruling this contention the decision was manifestly correct, but in this case for the first time it is suggested in this court the complaint did not state a good cause of action.

Revised Statutes, § 954 (U. S. Comp. St. 1901, p. 696), provides:

"Sec. 954. No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

This was substantially section 32 of the act to establish the judicial courts of the United States, passed at the first session of the first Congress and was based on the English statute of 32 Henry VIII.

[3] It is manifest that, had the street car company by demurrer or otherwise attacked the complaint below, it could have been amended; but it failed to do so. Of course, if it appeared that it was impossible to have amended the complaint, this court would probably hold, even after verdict, the question could be raised here. In *Phillips & Colby Construction Co. v. Seymour et al.*, 91 U. S. 646, 23 L. Ed. 341, the Supreme Court said:

"There is no room here for amendment. There could have been none in the court below. To allow a verdict to stand which is responsive to no issue made by the pleadings, or which could have been made by any pleading in that action, is farther than we can go in the promotion of abstract justice."

The complaint here in question has now been aided by verdict, and the sole question is whether with such aid it is sufficient. In *Re First National Bank of Belle Fourche*, 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355, a bankruptcy case, this court, by Judge Sanborn, said:

"The sufficiency of this pleading was not challenged until more than a month after the adjudication upon it, and after verdict or judgment an objection that the petition fails to state facts sufficient to constitute a cause of action is tenable only when the pleading fails to allege the substance or foundation of a good cause of action, and the fact that it is otherwise defective, informal, indefinite, or incomplete is no longer material."

This was but a reiteration of the long-established rule of this court. *Gaspie v. Keator et al.*, 56 Fed. 203, 5 C. C. A. 474; *City of Plankinton v. Gray et al.*, 63 Fed. 415, 11 C. C. A. 268; *Keener et al. v. Baker*, 93 Fed. 377, 35 C. C. A. 350; *Mine & Smelter Supply Co. v. Parke & Lacy Co.*, 107 Fed. 881, 47 C. C. A. 34. It is, indeed, the general rule. *Roberts v. Graham*, 6 Wall. 578, 18 L. Ed. 791; *Palmer v. Arthur*, 131 U. S. 60, 9 Sup. Ct. 649, 33 L. Ed. 87; *Nashua Savings Bank v. Anglo-American Land, Mortgage & Agency Co.*, 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782. And the same rule has been laid down in a number of the circuits. Day, Circuit Judge, now a Justice of the Supreme Court, announced it in *Monarch Cycle Mfg. Co. v. Royer Wheel Co.*, 105 Fed. 324, 44 C. C. A. 523. And it has been so decided in *Nashua Savings Bank v. Anglo-American Land Mort-*

gage & Agency Co., 108 Fed. 764, 48 C. C. A. 15, Robinson v. Louisville Ry. Co., 112 Fed. 484, 50 C. C. A. 357, Schaeffer Piano Mfg. Co. v. National Fire Extinguisher Co., 148 Fed. 159, 78 C. C. A. 293, and in Puget Sound Navigation Co. v. Lavender et al., 160 Fed. 851, 87 C. C. A. 655.

Whatever may have been the defects in this complaint, aided as it is by verdict, they do not constitute a plain error of which this court can now take notice without assignment; and it follows the judgment must be affirmed.

DODGE v. KENWOOD ICE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1913.)

No. 119, Original.

1. BANKRUPTCY (§ 44*)—CORPORATIONS—VOLUNTARY PETITION—DEFECTS—OBJECTIONS.

Objections that a voluntary petition by a corporation was defective, in that it failed to show that the corporation was not a municipal, railroad, insurance, or banking association, required by Bankr. Act July 1, 1898, c. 541, § 4, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act June 25, 1910, c. 412, § 3, 36 Stat. 839 (U. S. Comp. St. Supp. 1911, p. 1494), that the seal of the corporation was not attached, and that it failed to show authority by the corporation, came too late after adjudication, since, if made prior to adjudication, they might have been cured by amendment as authorized by Rev. St. § 954 (U. S. Comp. St. 1901, p. 696), and General Order No. XI (89 Fed. vii, 32 C. C. A. xiv).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 43-46; Dec. Dig. § 44.*]

2. CORPORATIONS (§ 550*)—INSOLVENCY—ASSIGNMENT FOR BENEFIT OF CREDITORS—AUTHORITY TO MAKE—DIRECTORS.

The board of directors of a Minnesota business corporation has authority to make a general assignment of the corporation's assets for the benefit of creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2190-2200; Dec. Dig. § 550.*]

3. BANKRUPTCY (§ 43*)—CORPORATIONS—ADJUDICATION—DIRECTORS—AUTHORITY.

The board of directors of a Minnesota corporation has authority to adopt a resolution that the corporation is unable to pay its debts and is willing to be adjudged a bankrupt on that ground, without the authority of stockholders.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 38; Dec. Dig. § 43.*]

4. CORPORATIONS (§ 298*)—DIRECTORS—MAJORITY OF BOARD—VACANCY—ABANDONMENT OF MEMBERSHIP.

Rev. Laws Minn. 1905, § 2858, provides that the business of every business corporation shall be managed by a board of at least three directors, elected by ballot by and from the stockholders or members, and that a majority of the directors shall constitute a quorum for the transaction of business. *Held* that, where one of the three directors of a Minnesota business corporation became involved in an altercation at the company's office and either went out or was forced out of the office, and thereafter took no part in the management of the affairs of the corporation, declined to act as an officer or stockholder of the company, and brought

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

suit to cancel his stock purchase and to recover the entire purchase price, he thereby abandoned his office as director, so that the remaining two directors when assembled and acting as a board, were authorized to pass a resolution that the corporation go into voluntary bankruptcy at once, without notice of the meeting to such third director.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292-1317, 1319; Dec. Dig. § 298.*]

Petition to Revise Order of the District Court of the United States for the District of Minnesota; Chas. A. Willard, Judge.

Petition by Allen C. Dodge to revise an order of the District Court for the District of Minnesota, denying an application to annul an adjudication of bankruptcy, entered on the voluntary petition of the Kenwood Ice Company. 189 Fed. 525. Petition dismissed.

Henry C. James, of St. Paul, Minn. (W. H. McDonald, of Minneapolis, Minn., on the brief), for petitioner.

Frank W. Booth, of Minneapolis, Minn., for respondents.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

SMITH, Circuit Judge. May 29, 1911, there was filed before Alexander McCune, referee in bankruptcy in the district of Minnesota, a voluntary petition by the Kenwood Ice Company that it be adjudged a bankrupt, and the referee at once made the adjudication as prayed. On June 13, 1911, Allen C. Dodge filed a petition to vacate the order, substantially upon the following grounds:

First. That the petition was insufficient.

Second. That the proceedings were never authorized by the stockholders.

Third. That the only authority to file the petition was granted at a special meeting of two out of three directors, and the third director had no notice or knowledge of the meeting, although he lived in the city where the headquarters of the company were, and his residence was well known to the other directors. That by reason of the failure to notify him no legal meeting of the directors was held.

This application having been denied, Mr. Dodge filed a petition to review.

[1] It is first contended that the petition failed to show that the corporation was not a municipal, railroad, insurance, or banking association, as made necessary by section 4 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]), as amended by section 3 of the act approved June 25, 1910 (36 Stat. 839, c. 412 [U. S. Comp. St. Supp. 1911, p. 1494]), and that it did not have the seal of the corporation attached, and failed to show that it was authorized by the corporation.

Reliance is placed upon *In re Jefferson Casket Co.* (D. C.) 182 Fed. 689. In that case, as in this, the petition was signed by an attorney at law, as well as by officers of the company; but no reference was made to that fact, and it is only mentioned here to state that no consideration has been given to the question of its effect. The deci-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sion in question was rendered by Judge Ray and preceded any adjudication. The latter fact is also true of *In re Imperial Film Exchange*, 198 Fed. 80, 117 C. C. A. 188.

Under Revised Statutes, § 954 (U. S. Comp. St. 1901, p. 696), and General Order No. XI (89 Fed. vii, 32 C. C. A. xiv), an amendment could have been filed at any time before adjudication. Manifestly the objection came too late to be effective. *In re First National Bank of Belle Fourche*, 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355; *In re Plymouth Cordage Co.*, 135 Fed. 1000, 68 C. C. A. 434; *Duluth Street Railway Co. v. Speaks*, 204 Fed. 573.

The second and third grounds of attack upon the proceedings may be considered together.

[2] The Kenwood Ice Company was organized under the laws of Minnesota. It was there held that the board of directors could make general assignments for benefit of creditors. *Tripp v. Northwestern National Bank*, 41 Minn. 400, 43 N. W. 60.

[3] This being true, the board had authority to adopt a resolution that the corporation was unable to pay its debts and was willing to be adjudged a bankrupt on that ground. *Home Powder Co. et al. v. Albert J. Geis et al.*, 204 Fed. 568. If the board of directors can commit this act of bankruptcy, no reason can be assigned why it cannot authorize the filing of a petition in voluntary bankruptcy. *Loveland on Bankruptcy* (4th Ed.) § 157.

It is therefore concluded that the board of directors had power, without the sanction of the stockholders, to authorize the filing of a voluntary petition in bankruptcy, and the only question remaining is did the board act in this case?

[4] This corporation was created, under the general laws of Minnesota by which it is provided:

"The business of every such corporation * * * shall be managed by a board of at least three directors elected by ballot by and from the stockholders or members. * * * A majority of the directors or trustees shall constitute a quorum for the transaction of business." Section 2858, Laws of Minnesota.

The stockholders had thus chosen C. J. Minor, J. P. Hale, and Allen C. Dodge. About July, 1910, Mr. Dodge went to the company's office and there became involved in an altercation, and either went out or was forced out of the office. After July 1, 1910, he took no part in the management and affairs of the corporation, and on or about the 13th day of July, 1910, declined for the first time to act as an officer or stockholder of the company. On or about December 19, 1910, two icehouses, constituting the assets of the corporation, were destroyed by fire. They were insured.

On January 31, 1911, Mr. Dodge sued the company on a note for \$1,120.27, and sued out a writ of attachment, and garnisheed the Mechanics' Insurance Company, the Spring Garden Insurance Company, of Philadelphia, Pa., and the Insurance Company of the State of Illinois for the money due as insurance upon the icehouses. On the same day Mr. Dodge brought suit against the Kenwood Ice Company, C. J. Minor, and J. P. Hale, alleging that he acquired all his stock in

the Kenwood Ice Company as the result of fraud upon the part of Hale and Minor, and asked to recover the entire purchase price. The defendants answered that Mr. Dodge had always retained the capital stock in the company that was issued to him, and he replied that:

"Ever since he learned of the falsity of such representations he has been and is now ready, able, and willing to surrender all the stock and certificates thereof heretofore issued and delivered to the plaintiff in the defendant's company to whomsoever it shall be determined that said stock belongs."

Under these circumstances, on May 27, 1911, Minor and Hale, without notice to Dodge, met and adopted a motion, "Resolved, that the company go into voluntary bankruptcy at once," and thereupon the petition was filed.

It is urgently insisted that there was no valid meeting of the board, in the absence of notice to all its members, and, as Dodge was not notified, the proceedings are invalid. It is stipulated that Minor, Hale, and Dodge were directors at the time of the meeting of May 27th; but this is understood to be an admission of their election and qualification as directors, and not an agreement, if in conflict with the record, that Mr. Dodge was eligible and had not abandoned his membership. Mr. Dodge it appears had quarreled with his associates, had absented himself from all meetings for 10 months, had brought suit to rescind his purchase of stock, which alone made him eligible to be elected a director under the Minnesota law, and had announced his refusal to act as an officer and stockholder. These things, taken together, constituted an abandonment of his office of director. Thompson on Corporations (2d Ed.) § 1093; 29 Cyc. 1404.

If he was successful in his action for rescission, he ceased to be a stockholder, and to hold his office of director after his discovery of the alleged fraud would be a ratification and election to retain his stock. True, the law of Minnesota provided that the board should consist of at least three members; but there was no special provision for filling vacancies, either by the directors or stockholders, and, as the Minnesota law provided that "a majority of the directors or trustees shall constitute a quorum for the transaction of business," when the remaining two members assembled and acted, they constituted the board.

It follows that the petition must be dismissed.

In re KAHN et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 198.

1. CONTEMPT (§ 70*)—CIVIL AND CRIMINAL—DISTINCTION—EFFECT OF PUNISHMENT.

The character and purpose of the punishment distinguish civil and criminal contempts, the punishment for civil contempt being remedial, for the benefit of the complainant in the contempt proceedings, while the punishment for criminal contempt is punitive, to vindicate the authority of the court; so that, if imprisonment is imposed in a prosecution for a civil contempt, it must be coercive, and commitment can stand only until the defendant performs the affirmative act required by the court's order, while if inflicted in a criminal proceeding it is fixed and certain, as a punishment for completed disobedience of the court's orders or for other past wrongdoing.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 246; Dec. Dig. § 70.*]

2. BANKRUPTCY (§ 229*)—ORDERS—ENFORCEMENT—CONTEMPT PROCEEDINGS.

The classification of contempts and contempt proceedings into civil and criminal contempts is applicable to proceedings in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 385; Dec. Dig. § 229.*]

3. CONTEMPT (§ 72*)—PUNISHMENT—IMPRISONMENT—NATURE OF PROCEEDINGS.

A sentence to a fixed and absolute term of imprisonment for contempt can be justified only by showing that it was inflicted in a proceeding for criminal contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 249-256, 273; Dec. Dig. § 72.*]

4. BANKRUPTCY (§ 229*)—CONTEMPTS—PUNISHMENT—EFFECT.

An alleged bankrupt, having been found guilty of contempt in refusing to give proper testimony, was adjudged to be imprisoned in a specified jail for ten days, and at the expiration of that period to appear for examination, and in the event of his failure or refusal to present himself for examination or to give proper testimony, authorized an application for the continuance of his imprisonment. *Held*, that the coercive part of the punishment did not become operative until after the punitive part had been complied with, and that the latter could be supported only by showing that it was made in a criminal proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 385; Dec. Dig. § 229.*]

5. BANKRUPTCY (§ 229*)—CIVIL AND CRIMINAL CONTEMPT.

An alleged bankrupt having neglected and refused to give proper testimony, a contempt proceeding was instituted against him by petition, made by an attorney for the receiver in bankruptcy, and both it and the order were entitled in the bankruptcy proceedings. The government did not prosecute, nor did any one claim to act in its behalf, and the prayer for relief was for an adjudication of contempt and for further relief to the petitioner. *Held*, that the proceeding was for a civil contempt only, and that an order imposing imprisonment for a specified period was unauthorized.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 385; Dec. Dig. § 229.*]

In Error to the District Court of the United States for the Southern District of New York; George C. Holt, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of bankruptcy proceedings of Louis J. Kahn and William J. Kahn, alleged bankrupts. The order adjudged Louis J. Kahn guilty of contempt of court in having willfully and deliberately neglected to give proper testimony on behalf of the receiver, and particularly for giving the testimony set forth in the petition, and further ordered:

"Second. That the said Louis J. Kahn be committed for the contempt aforesaid and be imprisoned in Ludlow Street Jail for the period of ten days.

"Third. At the expiration of the said period of ten days, the said Louis J. Kahn may present himself before this court for examination by the receiver and in the event that the said Louis J. Kahn fails or refuses to present himself for examination of the said ten-day period, or in the event that he shall fail and refuse to give proper testimony, an application may be made for the continuance of the said imprisonment."

The petition that said Louis J. Kahn should be adjudged in contempt, upon which said order was based, was made by one Stephen Brooks Rosenthal as attorney for the receiver in bankruptcy and like the order itself was entitled as in the bankruptcy proceedings.

A. A. Silberberg, of New York City (J. Joffe and A. A. Silberberg, of New York City, of counsel), for plaintiffs in error.

Rosenthal & Heermance, of New York City (C. J. Heermance, of New York City, and F. C. Briggs, of Syracuse, N. Y., of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. [1] The recent decision of the Supreme Court of the United States in *Gompers v. Buck Stove Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, lays down the rules which must be followed by the federal courts in administering the law of contempt. In that decision it is said that the character and purpose of the punishment distinguish civil and criminal contempts. The punishment for a civil contempt is remedial and for the benefit of the complainant in the contempt proceedings. The punishment for a criminal contempt is punitive—to vindicate the authority of the court. If imprisonment be imposed in a civil proceeding it must be coercive in its nature. The committal must stand only unless and until the defendant performs the affirmative act required by the court's order. When inflicted in a criminal proceeding it is fixed and certain as a punishment for completed disobedience of orders or for other past wrongdoing.

[2] The classification of contempts and contempt proceedings made by the Supreme Court in the *Gompers* Case is general in its application and applies as well in cases arising in bankruptcy proceedings as in other causes. Whatever may be the source of the power of bankruptcy courts to punish for contempt, it must be exercised according to the general principles laid down.

[3, 4] Applying then the principles of the *Gompers* Case it is evident that when it appears that a sentence to a fixed and absolute term of imprisonment has been imposed it can be justified only by showing that it was inflicted in a proceeding for criminal contempt. Such a

punishment was imposed in this case. Nothing the defendant could have done would have prevented his imprisonment for the full term of ten days. That part of the punishment was to vindicate the authority of the court. The coercive part—the part to aid the complainant—did not become operative until after the punitive part had been complied with. The latter must be supported, if at all, by establishing that it was made in a criminal proceeding.

[5] Were the proceedings criminal in their nature? The most important question bearing upon this is whether they were between the public and the defendant. They were not. The government did not prosecute nor did any one claim to act in its behalf. The complainant was the attorney for the receiver in bankruptcy and the contempt proceeding was really in behalf of the latter. The petition was not entitled as in a criminal case. The order bore the title of the main bankruptcy proceedings. The prayer for relief was for an adjudication in contempt and for further relief to the petitioner. All the indicia of a civil cause incidental to the proceedings in bankruptcy, and none whatever of a criminal case, were present. The situation was precisely that stated in the Gompers Case:

“A variance between the procedure adopted and punishment imposed, when in answer to a prayer for relief in the * * * [civil] cause the court imposed a punitive sentence appropriate only to a proceeding at law for criminal contempt.”

There is error in the order and it is reversed with costs.¹

¹ We do not modify the order so as to preserve the merely coercive part because we are not certain that with punitive part omitted that would be the most appropriate action. Besides, we have not felt called upon on this writ of error to consider whether the remedial part stated by itself would be valid. The reversal is, however, without prejudice to further proceeding in the District Court.

PENNSYLVANIA R. CO. v. O'NEIL.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 155.

1. CARRIERS (§ 286*)—MOVABLE TICKET BOOTH—NEGLIGENCE.

It was not negligence for a railroad company to maintain a movable ticket booth and a movable sign on a standard on the pier of a steamship company for the convenience of passengers intending to continue their journey inland by land, so as to entitle a passenger to recover for injuries sustained by falling over the sign as she stepped back from the ticket window.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.*]

2. CARRIERS (§ 286*)—DANGEROUS PREMISES—MOVABLE SIGN—LOCATION.

Defendant railroad company, for the convenience of passengers landing from steamships, maintained a movable ticket booth on the steamship company's pier, designated by a movable sign constructed on a standard placed from four to six feet from the booth. Plaintiff applied for a ticket at the window, but the agent in charge, being unable to change her money immediately, asked her to step back, and as she did so her foot came in contact with the sign standard, and she was thrown and injured. *Held*, that it was not negligence to place the sign on a standard near the booth, nor was it negligently placed too near the booth, and, being easily avoidable, plaintiff could not recover.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.*]

In Error to the District Court of the United States for the Southern District of New York; E. Henry Lacombe, Judge.

Action by Helen T. O'Neil against the Pennsylvania Railroad Company. From a judgment for plaintiff for \$1,200, defendant brings error. Reversed.

Burlingham, Montgomery & Beecher, of New York City (Morton L. Fearey and Roscoe H. Hupper, both of New York City, of counsel), for plaintiff in error.

Arthur T. O'Leary, of New York City (J. A. O'Leary and J. M. Sullivan, both of New York City, of counsel), for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The defendant was permitted to maintain on the pier of the American Line at Philadelphia a small movable booth for the accommodation of passengers arriving from Europe where they could exchange steamship orders and procure tickets for inland points. In front of the booth was a movable sign with the words: "Railroad Tickets. Steamship orders exchanged here." This booth and sign could not be maintained in a fixed position as it was necessary to move them about so as to be near the passengers at whatever gang plank they might disembark. A photograph of the booth and sign shows that the latter was placed at the top of an upright which was made to stand by being fastened to a cross at the lower end and strengthened by braces running from a point on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the upright post, about 2 feet and 8 inches from the bottom, to the ends of the crosspieces. This sign stood about 6 feet from the booth. The signboard was approximately 28 inches wide and 16 inches high, the lower side being 6 feet and 8 inches from the floor of the pier. The accident occurred June 5, 1911, which was a dark day, but the pier was lighted from skylights and all objects were perfectly visible. The plaintiff formed in line with other passengers and, on arriving in front of the window, presented a \$20 bill for her ticket. The agent in the booth informed her that he did not then have the necessary change, but would have some in a short time. He said, "Just step back, please." The plaintiff testified, "I moved back in the direction in which I had come, to the ticket booth, and had only taken one step when I went to lift my left foot, and it was caught in some obstacle and I was thrown." She saw the sign but says she did not see how it rested on the floor.

[1] There can be no pretense that it was negligent for the defendant to maintain a ticket booth for the convenience of the passengers intending to go beyond Philadelphia by rail. So, too, it was perfectly proper, if not imperative, to place a sign to indicate to passengers the location of the booth. Neither the booth nor the sign could be stationary for passengers were discharged at different gangways and the booth had to be near the passengers when they first landed at the pier. Then too, it was necessary to mount the movable sign upon a standard, as it could not be suspended. The roof was very high and to hang the sign would have involved the use of long ropes or wires. Placing the sign in this position would have been a difficult and expensive task and would have been infinitely more dangerous than placing the notice on an upright standard with a base or foot broad enough to keep it from tipping over.

[2] If then, it was not negligence to place the sign on a standard near the booth for the information of passengers, the only remaining question is, was it placed too near the booth. This must also be answered in the negative. Whether the distance was 6 feet, as the measurement showed it to be, or 4 feet, as one of the witnesses estimated it to be, is immaterial, as, in either case, ample room was allowed for the passengers to pass by the booth without coming in contact with it. There is no testimony that an accident of any kind had occurred from the use of this sign before. We have not been able to find an authority where such an act has been held to be a fault. The court can take judicial notice of the fact that in railroad stations, theater offices and other similar places, it is customary to place bars and registering turnstiles opposite the office to keep the crowd orderly and in line. It is manifest that if a purchaser suddenly steps back against these structures, he is liable to fall or receive injuries. But the books record no case, so far as we can find, where a party has recovered for injuries so received. The reason is manifest; the law expects every one entering such places to keep his eyes open and not to stumble over a perfectly obvious obstruction. The photographs show that the pier in question was occupied by freight, wagons, baggage trucks and many other objects which

a blind man might stumble over, but which any one with his senses unimpaired would certainly avoid. That the sign in question was in plain sight is admitted, that the plaintiff saw it is admitted. To hold that the defendant is responsible because she stumbled over it carries the rule of negligence to such limits that the carrier becomes an insurer of all who are injured while rightfully on its premises.

These views are, we think, sustained by the following authorities: *Hart v. Grennell*, 122 N. Y. 371, 25 N. E. 354; *Strutt v. Brooklyn R. R. Co.*, 18 App. Div. 134, 45 N. Y. Supp. 728; *Wigg v. Erie Railroad*, 174 Fed. 401, 98 C. C. A. 289; *Elliott v. Chicago, M. & St. P. R. Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068; *Commissioners v. Clark*, 94 U. S. 278, 284, 24 L. Ed. 59.

The judgment is reversed.

NEW YORK TIMES CO. v. SUN PRINTING & PUBLISHING ASS'N.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 176.

COPYRIGHTS (§ 74*)—ESTABLISHMENT—FILING COPIES—INFRINGEMENT—SUIT—CONDITION PRECEDENT—"MAINTAIN."

Act March 4, 1909, c. 320, 35 Stat. 1075 (U. S. Comp. St. Supp. 1911, p. 1472), providing that no action or proceeding shall be maintained for infringement of a copyright of any book until two complete copies have been deposited in the Copyright Office, or in the mails, addressed to the Registrar of Copyrights, is not limited to an action or proceeding for infringement, but applies as well to a suit in equity for an injunction to prevent the infringement or violation of complainant's copyright, and for an accounting, precluding the lawful commencement of a suit for that purpose prior to deposit of copies; the word "maintain" including the commencement of such suit.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 65; Dec. Dig. § 74.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4277-4281; vol. 8, p. 7712.]

Appeal from the District Court of the United States for the Southern District of New York; Julius M. Mayer, Judge.

Suit by the New York Times Company against the Sun Printing & Publishing Association. From a decree dismissing the amended bill on demurrer, complainant appeals. Affirmed.

Leventritt, Cook & Nathan, of New York City (Alfred A. Cook, Max J. Kohler, and Franklin H. Mills, all of New York City, of counsel), for appellant.

James M. Beck and Charles K. Carpenter, both of New York City, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The principal question presented by this appeal is as follows: Can an action for the infringement of a copy-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

right of a book be maintained, unless it be alleged and proved that prior to the commencement of the action two complete copies of the best edition thereof were deposited in the Copyright Office or in the mail addressed to the Registrar of Copyrights at Washington, as provided by section 12 of the Copyright Law? The relevant portions of section 12 of the law are as follows:

"That after copyright has been secured by publication of the work with the notice of copyright as provided in section 9 of this act, there shall be promptly deposited in the Copyright Office or in the mail addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published. * * * No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this act with respect to the deposit of copies and registration of such work shall have been complied with." Act March 4, 1909, c. 320, 35 Stat. 1078 (U. S. Comp. St. Supp. 1911, p. 1476).

The last paragraph would seem to be a plain prohibition against the maintenance of an action or proceeding for infringement until the copies are deposited in the Copyright Office or in the mail. If an equity action for an injunction and an accounting be not such an action as the statute contemplates, it is difficult to perceive what the lawmakers had in mind. Manifestly the statute refers to precisely such an action as this, otherwise the language is meaningless. We are not concerned here with the wisdom or necessity of the provision. Congress was conferring a special privilege upon authors and could limit that privilege in any manner it saw fit. In order to secure a valid copyright or a valid patent, it is necessary to comply with every requirement of the law and a discussion of the wisdom or unwisdom of such requirements is wholly irrelevant. If a change in the law be needed, recourse should be had to the legislative and not to the judicial branch of the government. It is unnecessary to consider the status of the complainant's alleged copyright for other purposes than those involved in this action. The question here is, Can an equity suit for an injunction and an accounting be maintained thereon?

It is contended that as soon as the copyright was secured and before the copies were mailed, as required by law, the complainant acquired a right which was entitled to the protection of a court of equity. Such a construction wholly ignores the provision for mailing. It may never be complied with, and still, if the complainant's contention be correct, an equity suit may be commenced, an injunction issued and an accounting had. How can a court of equity protect an inchoate or incomplete right by a suit which the law says cannot be maintained? We are unable to assent to the proposition that this is not an action for infringement of a copyright, but rather, as complainant contends "a suit in equity by a party aggrieved, for an injunction to prevent and restrain the violation of the complainant's copyright secured by the copyright law." But this statement of the action is merely a change in nomenclature. There can be no doubt as to the character of the action. As before stated, not one of the criteria which determine an action for infringement is omitted.

A distinction is also sought to be drawn between "maintained" and

"begun"; the contention being that a suit may be begun before the copies are deposited in the mail. In other words, an action may be commenced which cannot be maintained. Not only so, but an injunction may issue restraining the defendant from publishing alleged infringing matter, in an action which cannot be maintained. We are unable to assent to this construction. That the prohibition against maintaining a suit includes the commencement thereof was decided in *Neuchatel Co. v. Mayor*, 155 N. Y. 373, 49 N. E. 1043; *Thompson v. Hubbard*, 131 U. S. 123, 150, 151, 9 Sup. Ct. 710, 33 L. Ed. 76; *Mahar v. Harrington Park Villa Sites*, 204 N. Y. 231, 97 N. E. 587, 38 L. R. A. (N. S.) 210; *David Lupton's Sons v. Auto Club of America*, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177.

Even if it be assumed that such an action may be commenced, the moment it is examined, it is found that it cannot be maintained. That is, it cannot be sustained, preserved or kept in being, no injunction can be granted, no judgment for the plaintiff can be entered therein. No matter what meaning may be given to the word "maintained" the statute clearly prohibits the complainant from procuring any relief in the action. The questions involved are carefully discussed by Judge Lacombe in *New York Times v. Star Co. (C. C.)* 195 Fed. 110, and we agree with what is there said as to the proper interpretation of section 36 of the act in connection with section 12.

As these views result in the affirmance of the decree, we deem it unnecessary to discuss the other questions presented at the oral argument and in the briefs.

Decree affirmed with costs.

In re L. S. STARRETT CO.

(Circuit Court of Appeals, First Circuit. April 23, 1913.)

No. 1,014 (Original).

MANDAMUS (§ 4*)—GROUNDS—REMEDY BY APPEAL.

In this case, the rule is applied that a writ of mandamus to the judge of a District Court will not be granted where all matters to which the petition relates may be reviewed by appeal.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 9-21, 24-34; Dec. Dig. § 4.*]

Petition by the L. S. Starrett Company for writ of mandamus against Arthur L. Brown, District Judge for the District of Rhode Island. Petition dismissed.

Robert W. Hardie, of New York City, for the petitioner.

Wilmarth H. Thurston, of Providence, R. I., opposed.

Before PUTNAM and DODGE, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a petition for writ of mandamus, to be directed to the judge of the District Court for the District of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Rhode Island. The proceeding out of which it arose was a bill in equity in favor of the Brown & Sharpe Manufacturing Company against the petitioner.

In that case the learned judge of the District Court had passed down an opinion sustaining the bill, and ordering an interlocutory decree for an accounting and an injunction. As yet the interlocutory decree has not been entered, and the matter is still in the breast of the District Court. We have carefully examined all the papers in the case, and we find no special reason why we should depart from the usual rule that a petition for writ of mandamus, or for a prohibition, cannot be allowed to take the place of an appeal or writ of error. On the other hand, there are special reasons why it is plain that the petitioner in this case has ample remedy by appeal, and ample time to avail himself of that remedy.

The petition relates entirely to proceedings, or omissions of proceedings, in the usual course of litigation in the District Court, for which there is ample remedy by appeal, subject to certain observations in two particulars. One relates to a claim that the action of the District Court in one respect was not *sub judice*; and another like claim is that the complainant was allowed to file *ex parte* affidavits without any opportunity for cross-examination or reply thereto by the respondent, the present petitioner. If the time for appeal had expired, and especially if a final decree had been entered, there might be some ground for a special writ, either mandamus or prohibition, with reference to those particular matters; but, as the case is still in the breast of the court, the petitioner, as we have said, has full remedy in regular course.

The other ground of the petition is that the opinion of the learned judge of the District Court, now on file in that court, has been modified from the draft originally filed. This is ordinarily a matter of no consequence, and is in accordance with the constant practice, though, perhaps, under very peculiar circumstances, it might justify application for relief. So far as we can perceive, the allegations in the petition with reference to this opinion fail to show that the case would not be met by a suggestion of diminution of the record, even if the allegations were substantiated in any particular; but the allegations illustrate a special reason of convenience, and also a reason for guarding against the possibility of error, by holding proceedings of the character now before us strictly within the limits of the ordinary rules of practice. The most that could be brought before the court by this proceeding would be a fragmentary consideration of the case on all the questions to which the petition relates, and especially with reference to the opinion which we have referred to; and such fragmentary considerations throw unnecessary burdens on the court, and lead to danger of error, or oversight, all of which will be avoided when the full record comes up on a regular appeal, from which we may perceive clearly, not only whether there have been errors, but that whatever errors are alleged, if they occurred, are trivial, and not material.

On the whole, we have no doubt that, on an appeal in the ordinary

way, the petitioner will be enabled to bring before us all the questions which he now seeks to raise. Neither have we any doubt that, if there proves to be any surprise in this respect, we will be able to give the petitioner adequate relief on a better understanding of the case than we can now receive.

The petition is dismissed, with costs for the respondent, and without prejudice.

THE HAMBURG.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 189.

1. COLLISION (§ 71*)—COALING VESSEL—NEGLIGENT MANEUVERS.

A boat loaded with coal having been sent to coal a steamship that was properly moored, breast out, from a pier, the servants of an independent contractor, bound to perform the work of coaling, so negligently moved the coal boat between the bow of a boat moored inside the slip and the stern of the steamship that she struck the steamship's starboard propeller and sustained considerable damage. The steamship was not moving her propellers, and none of her officers or crew had anything to do with the maneuver performed exclusively by the coaling company. *Held*, that the steamship was not at fault, though no notice was given that she had twin screws, the blades of which were near the surface, and had failed to provide a floating fender.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

2. INDEMNITY (§ 13*)—IMPLIED CONTRACTS—COALING VESSEL—NEGLIGENCE.

A contract between a steamship line and a coaling company provided for service charge of 20 cents a ton in transferring coal from boats alongside to the ship's bunkers, the steamship line furnishing and placing coal alongside the ships in boats and removing the boats as required by the coaling company. *Held*, that the servants of the coaling company, in bringing a coal ship alongside a steamship to be coaled, were not loaned to the steamship line, but were doing something which the steamship line ought to have done, and therefore the coaling company could not claim indemnity from the steamship line for the negligence of its own servants in doing the work, causing injury to the coal ship.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29-35; Dec. Dig. § 13.*]

Appeal from the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

Libel by the Berwind-White Coal Mining Company against the Hamburg and others. Decree for libelant, and the Hamburg-American Line, claimant, appeals. Reversed.

H. G. Cortis, of New York City, for appellant.

Roderick Terry, Jr., of New York City, for appellee Berwind-White Coal Mining Co.

Convers & Kirlin, of New York City (J. P. Kirlin, and Russell T. Mount, both of New York City, of counsel), for appellee De Mayo Coaling Co.

WARD, Circuit Judge. [1] May 5, 1910, the libellant's boat Eureka No. 2 was sent with coal for the steamship Hamburg to the pier of the Hamburg-American Line in Hoboken. The steamship was lying breasted out from the pier, and the boat was moored in the slip about 15 feet astern of her and outside of another coal boat. Early the next morning the De Mayo Coaling Company's servants, wanting to get the boat alongside the steamship, moved her between the bow of the inside boat and the stern of the steamship, but so negligently that she struck the starboard propeller and sustained considerable damage. The libel was filed against the steamer in rem. We discover no ground whatever for such a liability. The steamship was properly moored, was not moving her propeller, and none of her officers or crew had anything at all to do with the maneuver which was being performed exclusively by the De Mayo Coaling Company.

The Hamburg-American Line, under the fifty-ninth rule in admiralty, brought in the De Mayo Company as a party, charging that the damage was due to its negligence. The De Mayo Company replied that the cause of the accident was the negligence of the Hamburg Line in not giving notice that the steamship had twin screws, whose blades were near the surface of the water, and in failing to provide a floating fender. This charge was but faintly pressed, and the likelihood that the De Mayo Company did not know all about these circumstances was small. See *The Willie* (D. C.) 29 Fed. 153.

[2] The contract between the De Mayo Company and the Hamburg Line provided that the De Mayo Company should take entire charge of coaling the Hamburg Line's steamships and article III further provided:

"III. The party of the first part [Hamburg-American Line] agrees to pay the party of the second part [the De Mayo Coaling Company] for such service 20 cents per ton for every ton of 2,240 pounds of coal taken from boats alongside the ship and deposited and trimmed in the bunkers of the ship."

And also:

"It is further understood that the party of the first part [Hamburg-American Line] will furnish and place coal alongside the ships in boats and remove said boats as required by the party of the second part [De Mayo Coaling Company]."

The trial judge rightly construed these provisions as requiring the Hamburg Line to bring the boats alongside and to remove them, and as making it the duty of the Coaling Company to discharge the boats when alongside by means of its patent elevator. But he held that, though the De Mayo Company's servants negligently moved the boat, the steamship was responsible to the libellant, because the Hamburg Line allowed or impliedly requested the De Mayo Company to act for it in the premises. We think this was erroneous.

Even if the relation between the Hamburg Line and the De Mayo Company was that of principal and agent, it is unnecessary to inquire whether the Line would also have been liable to the libellant in an action in personam. The De Mayo Company was primarily liable. It was an independent contractor. It moved the boat without any supervision from the Hamburg Line. Its servants were not loaned to the

Hamburg Line to do something which that Line was supervising. On the contrary, the De Mayo Company was doing by means of its own servants something for the Hamburg Line, or something which the Hamburg Line ought to have done. It cannot claim indemnity from the Hamburg Line for its own negligence in doing the work it undertook.

The decree is reversed, with costs to the Hamburg Line against the libellant, and with directions to the court below to enter a decree for the libellant against the De Mayo Coaling Company, with interest and costs.

In re SCHICKERLING.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 195.

BANKRUPTCY (§ 407*)—DISCHARGE—GROUNDS—FRAUDULENT TRANSFER.

Bankr. Act, July 1, 1898, c. 541, § 14(b), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), provides that a bankrupt may be denied a discharge if at any time subsequent to the first day of the four months immediately preceding the filing of the petition he shall transfer, remove, destroy, or conceal, or permit to be removed, destroyed, or concealed, any of his property with intent to defraud his creditors. A bankrupt, six years before the filing of his petition, transferred certain insurance to his wife, leaving himself penniless. In March, 1906, he organized a jewelry business, and certified that it was carried on by his wife, by himself as manager; she having surrendered the insurance, receiving therefor \$1,000, part of which went into the business. *Held* that, since the transfer of the policy was not within the four-months period, it was not in itself a ground for refusing the bankrupt a discharge, which could be refused on the ground of fraudulent transfer only, on proof that the jewelry business, which was claimed to be her property and not scheduled, was started by the insurance money, and was continued as the bankrupt's property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 753, 760, 761; Dec. Dig. § 407.*]

Appeal from the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

In the matter of the bankruptcy proceedings of Alfred Schickerling. From an order denying bankrupt's discharge, he appeals. Reversed.

Wm. P. Schoen, of New York City (E. Kohn, of New York City, of counsel), for appellant.

Cohen, Creevey & Richter, of New York City (Julius Henry Cohen, of New York City, of counsel, and J. de R. Storey, of New York City, on the brief), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. November 15, 1911, Alfred Schickerling was adjudicated a bankrupt on his own petition, and he applied for a discharge in the following December. In his schedules he included as a creditor in the sum of \$45,338.21 one James Talcott, and stated

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that he had no assets whatever. The indebtedness to Talcott arose in this way: In 1901 the bankrupt was a stockholder and treasurer of the corporation known as Schickerling Bros. & Co. In October, 1904, he guaranteed Talcott against loss in making advances to the corporation on its outstanding accounts. In February, 1906, the corporation became bankrupt, owing Talcott for advances. Talcott opposes the bankrupt's discharge on the grounds that he did not keep proper books of account, that he failed to include in his schedules his interest in his father's estate, and that he fraudulently concealed and transferred certain assets. Both the special master and the District Judge have found against the first two objections, and, as we agree with them, nothing further need be said.

July 20, 1904, the bankrupt did make a bill of sale to his wife of all his property except a 20-year endowment policy of insurance on his life, dated July, 1904, for \$25,000. September 12, 1905, he transferred this policy also to her, leaving himself penniless. A month after the bankruptcy of the corporation of Schickerling Bros. & Co.—that is, in March, 1906—the bankrupt organized a jewelry business, filing a certificate in the county clerk's office that it was carried on by his wife, Carrie Schickerling, he being her manager. This was in accordance with the requirements of Pen. Code N. Y. § 363b. There is much testimony to show that this business was started with money of Mrs. Schickerling coming in part from the bankrupt at a time when he was not in debt and before he made the guaranty to Talcott. In July, 1906, she did raise upon the surrender of the policy of insurance above mentioned something like \$1,000, part of which, at least, went into the business.

The principal contest between the parties is whether the business was the property of the wife or of the bankrupt. If the latter, he was guilty of fraudulently concealing assets, when he did not mention it in his schedules. The referee, sitting as special master, reported that the discharge should be granted; but the District Judge denied it, on the ground that the business was the bankrupt's, having been started by money borrowed on the insurance policy. He found it impossible to believe that the transfer of the policy so soon before the failure of Schickerling Bros. & Co., of which the bankrupt was treasurer, with an indebtedness to Talcott guaranteed by him individually in the amount of about \$45,000, was not made with fraudulent intent. Conceding that this is so, the transfer was made six years before, and not within four months of the filing of the petition, and so was not in itself a ground for refusing his discharge under section 14 (b) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]). The only way the order can be sustained is by holding that the business was started by the insurance money, and so began and was continued as the bankrupt's property. The testimony is vague and contradictory; but we are not satisfied that the insurance money, though it went into, did start the business.

The order is reversed, with costs.

THE AMERICAN.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 163.

COLLISION (§ 96*)—STEAMER AND TOW—STEAMER TURNING IN CHANNEL.

A steamer, after passing up the East River on a clear day on full tide, started to turn to port with the help of a tug on the starboard bow, in order to enter a Brooklyn slip. When she reached a position across the river with her bow about the center of the channel, she stopped to await the removal of some barges from the slip. The *Staples*, in response to an exchange of signals, passed under her stern, and the *St. Patrick*, a tug with a single tow, attempted to follow, when the steamship began to back, cut the hawser, and came into collision with the tow. *Held*, that the tug was not negligent, nor guilty of "close shaving," in attempting to pass under the steamship's stern, and that the steamship was at fault and liable for the damages sustained; the testimony of the master of the tug that he passed as near the Brooklyn shore as safety would allow not being contradicted.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 170-174; Dec. Dig. § 96.*

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Eastern District of New York; Thomas I. Chatfield, Judge.

Suit in admiralty by James F. Dwyer and others, owners of the brig *Ryder*, against the steamship *American* and the steam tug *St. Patrick*, for collision. From a decree against the *American* (196 Fed. 147), the American-Hawaiian Steamship Company, claimant, appeals. Affirmed.

Appeal by the owner of the steamship *American* from a final decree of the District Court, Eastern District of New York, holding the *American* responsible for a collision in the East River on October 14, 1911, with the cement boat *John P. Kane, Jr.*, in tow of the tug *St. Patrick*, and exonerating the *St. Patrick* which had been brought in under rule 59 in admiralty.

A complete account of the collision will be found in the opinion of the District Judge reported in 196 Fed. 147. The statement of facts so made is accepted as substantially correct by this court, and, consequently, only those facts relating to the particular questions examined are discussed in the opinion following.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham, of New York City, and B. W. Wells, of counsel), for appellant.

James J. Macklin, Foley & Marten, De Lagnel Berier, and F. A. Spencer, Jr., all of New York City, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. In our opinion the *American* was at fault primarily for failing to observe properly the *St. Patrick*. The day

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was clear and there was nothing to interfere with navigation. The American was executing a turning movement to get into her pier and was lying across the river. She knew that the Staples which preceded the St. Patrick, was, after an exchange of signals, passing under her stern. She saw or should have seen the St. Patrick following the same course. Under the circumstances she should have used especial caution to give the St. Patrick room to pass. Apparently she might have given plenty by putting her engines ahead sooner. Instead, she did nothing to avoid the collision. Indeed the weight of the testimony is to the effect that she backed and brought it about directly. The American is held liable.

We think that the St. Patrick was not negligent in attempting to pass under the stern of the American. It is true that when her first signal was unanswered she might have gone around the American's bow. But she was not obliged to do so. It was manifest that the Staples was to pass by the stern by agreement and the St. Patrick was so close behind that she was justified in thinking that she might safely do the same. Moreover she had the right to assume that the American would make way for the Staples by going ahead. If the American had done so the St. Patrick would only have embarrassed her by attempting to cross her bow.

We have had doubt whether the St. Patrick was not guilty of "close shaving." Regarding only the distances stated, it would seem that she might have gone somewhat nearer the Brooklyn shore and thus have avoided the collision. But her master testified that he went as near as safety would allow and there is no substantial testimony to the contrary. Upon the whole we reach the conclusion that the charge is not established. We think, also, that the other charges of negligence on the part of the St. Patrick are not well founded.

The decree of the District Court is affirmed with interest and costs.

MACRAE v. PARLIN & ORENDORFF PLOW CO. OF OMAHA.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1913.)

No. 3,768.

MASTER AND SERVANT (§ 40*)—CONTRACT OF EMPLOYMENT—CONSTRUCTION—SALARY—AMOUNT—EVIDENCE.

In an action for breach of a contract of employment, conflicting evidence held to sustain a finding that plaintiff's salary was \$1,800 a year.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 47-49; Dec. Dig. § 40.*]

In Error to the District Court of the United States for the District of Nebraska; William H. Munger, Judge.

Action by John D. MacRae against the Parlin & Orendorff Plow Company of Omaha. From a judgment for plaintiff for less than the relief demanded, he brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

C. S. Montgomery, of Omaha, Neb. (Matthew A. Hall and Raymond G. Young, both of Omaha, Neb., on the brief), for plaintiff in error.

Constantine J. Smyth, Edward P. Smith, and William A. Schall, all of Omaha, Neb., for defendant in error.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

SMITH, Circuit Judge. Plaintiff, John D. MacRae, first went to work for a corporation, then known as the Parlin, Orendorff & Martin Company, but now known as the Parlin & Orendorff Plow Company, in October, 1882, as a traveling salesman. While so employed he acquired a dwelling house at Omaha. He quit that employment about 1886, and after a short service on the Pacific coast went to work for Kingman & Co. in Kansas and Oklahoma, and lived at Wichita, Kan. In January, 1900, he had an interview at Omaha with Mr. Euclid Martin, president of the Parlin, Orendorff & Martin Company, at his home. At this interview he was orally employed again by the Parlin, Orendorff & Martin Company. He went to work on April 1, 1900, and worked until March 15, 1909, when he was discharged. During the first year he received \$1,800, and on April 15, 1901, \$200 were credited by sundries, and this was drawn by him. After his relations were severed, he brought this suit, claiming his contract was for \$2,000 a year and that the end of the company's fiscal year had been changed at an early date from April 1st to July 20th; that he had been regularly re-employed for several years for a new period of one year from July 20th, and was so re-employed on July 20, 1908, and the defendant had no right to discharge him until July 19, 1909. He asked judgment at \$2,000 a year from the time of his last payment until July 19th, and for the difference between \$1,800 and \$2,000 a year after the first year and until his last payment. The case was submitted to a jury, who found in effect that his contract was for \$1,800 a year, but that he was entitled to payment until July 19, 1909, and returned a verdict accordingly, upon which judgment was rendered, and he brought the case here on writ of error.

It is contended there is no conflict in the evidence as to the rate at which plaintiff was working; but we think there is a conflict of the most serious character. The plaintiff testified the contract was for \$2,000 a year. Euclid Martin, who had severed his relations with the defendant, testified the contract was for \$1,800 a year. During the first year that is all that was credited to him as salary, and the same is true of all subsequent years. On October 1, 1905, a voucher was issued, "Balance a/c to Oct. 1—05," for \$500, and this was signed "in full for above" by the plaintiff; and on February 20, 1909, a voucher was indorsed by plaintiff for "Salary 2/20/09" for \$150. Everything in the record, aside from the plaintiff's own testimony, corroborates the testimony of Mr. Martin that his salary was \$150 a month. Whether the \$200 paid on April 15, 1901, was an additional allowance, in view of his moving to Omaha, does not appear; but the

evidence overwhelmingly supports the finding of the jury, and a verdict to the contrary would have been difficult to sustain.

The case was fairly submitted to the jury, and, while there are assignments of error on a ruling on evidence and instructions to the jury given and refused, they are without substantial merit; and the case is affirmed.

WRIGHT CO. v. HERRING-CURTISS CO. et al.

(District Court, W. D. New York. February 21, 1913.)

No. 400.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FLYING MACHINE.

The Wright patent, No. 821,393, for a flying machine, is for a combination which was not anticipated, and by the means shown of securing the equilibrium of the planes made an important advance in an embryonic art. If not strictly for a pioneer invention, in the sense of producing an apparatus novel in its entirety, in such means it surpassed anything in the prior art, and is entitled to a liberal construction. Claims 3, 7, 14, and 15 also *held* infringed by the Curtiss *aéroplane*.

2. PATENTS (§ 53*)—SUIT FOR INFRINGEMENT—DEFENSES—PRIOR STRUCTURES.

An invention or discovery set up in defense of infringement must have been complete and capable of producing the desired result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 71; Dec. Dig. § 53.*]

3. PATENTS (§ 177*)—CONSTRUCTION AND VALIDITY OF CLAIMS—SUBCOMBINATION.

It is not essential to the validity of a claim of a patent that all parts of the machine, or all parts specified in other claims, which are necessary to its operativeness, should be included therein; but where the patent is for a combination, a claim may be for a subcombination, which, although not operative alone, is new and capable of co-operating with other things, which would be understood by those skilled in the art, or for which reference may be had to the specification, to produce a useful result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 253, 254; Dec. Dig. § 177.*]

In Equity. Suit by the Wright Company against the Herring-Curtiss Company and Glenn H. Curtiss. On final hearing. Decree for complainant.

For former opinions, see 177 Fed. 257, and 180 Fed. 110, 103 C. C. A. 31.

H. A. Toulmin, of Dayton, Ohio (Frederick P. Fish and Edmund Wetmore, both of New York City, of counsel), for complainant.

Emerson R. Newell, of New York City (J. Edgar Bull, of New York City, of counsel), for defendants.

HAZEL, District Judge. This bill in equity relates to the infringement of United States letters patent granted May 22, 1906, to Orville and Wilbur Wright on application for patent filed March 23, 1903, for improvements in flying machines, or, in other words, for a structure commonly known as an *aéroplane*. At this date, owing to articles in daily papers and periodicals with regard to notable flights in this

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

country and abroad by the late Wilbur Wright, Orville Wright, defendant Glenn H. Curtiss, and other venturesome aviators, the *aéroplane* and the *modus operandi* thereof are reasonably familiar to the intelligent public. That such structures are supported in their flight by the reaction of the air against an inclined surface, and that the advancing air presses against the plane surfaces, thereby inclining them to rise, while at the same time a resistance to forward motion is encountered, which is overcome by the propelling motor, are facts now reasonably familiar to us.

[1] By those who early studied the art the fundamental physical principles involved in the flight of a plane heavier than air, when advancing against the wind or currents of air, were well recognized. That a plane descending in response to the force of gravity naturally inclined in a forward direction, and that the air resisted its forward descent in proportion to the exposed surface of the plane, were matters thoroughly understood by those who were interested in the subject. This knowledge eventuated in the structures for *aërial* flying shown in the exhibit publications and in the Wright patent in suit. The objects of the latter, according to the specification, are:

"To provide means for maintaining or restoring the equilibrium or lateral balance of the apparatus, to provide means for guiding the machine both vertically and horizontally, and to provide a structure combining lightness, strength, convenience of construction, and certain other advantages which will hereinafter appear."

There are 18 claims in the patent; but claims 3, 7, 14, and 15 only are infringed, and they read as follows:

"3. In a flying machine, a normally flat *aéroplane* having lateral marginal portions capable of movement to different positions above or below the normal plane of the body of the *aéroplane*, such movement being about an axis transverse to the line of flight, whereby said lateral marginal portions may be moved to different angles relatively to the normal plane of the body of the *aéroplane*, and also to different angles relatively to each other, so as to present to the atmosphere different angles of incidence, and means for simultaneously imparting such movement to said lateral marginal portions, substantially as described."

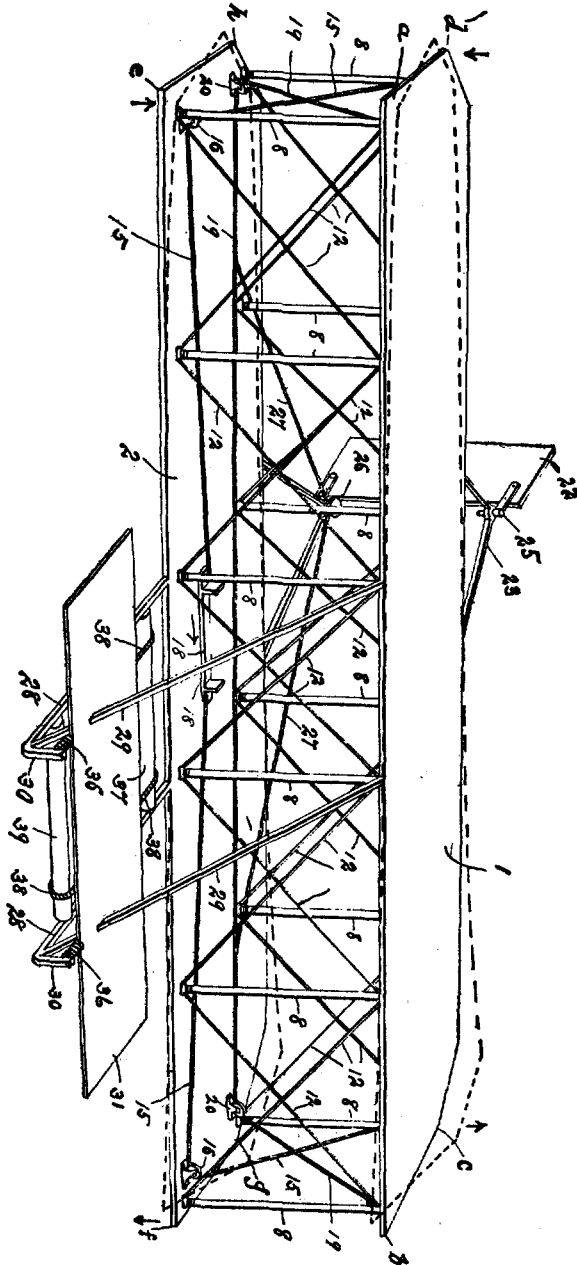
"7. In a flying machine, the combination with an *aéroplane*, and means for simultaneously moving the lateral portions thereof into different angular relations to the normal plane of the body of the *aéroplane* and to each other, so as to present to the atmosphere different angles of incidence, of a vertical rudder, and means whereby said rudder is caused to present to the wind that side thereof nearest the side of the *aéroplane* having the smaller angle of incidence and offering the least resistance to the atmosphere, substantially as described."

"14. A flying machine comprising superposed connected *aéroplanes*, means for moving the opposite lateral portions of said *aéroplane* to different angles to the normal planes thereof, a vertical rudder, means for moving said vertical rudder toward that side of the machine presenting the smaller angle of incidence and the least resistance to the atmosphere, and a horizontal rudder provided with means for presenting its upper or under surface to the resistance of the atmosphere, substantially as described."

"15. A flying machine comprising superposed connected *aéroplanes*, means for moving the opposite lateral portions of said *aéroplanes* to different angles to the normal planes thereof, a vertical rudder, means for moving said vertical rudder toward that side of the machine presenting the smaller angle of incidence and the least resistance to the atmosphere, and a horizontal rudder provided with means for presenting its upper or under surface to

the resistance of the atmosphere, said vertical rudder being located at the rear of the machine and said horizontal rudder at the front of the machine, substantially as described."

The following is a perspective view of the Wright machine:



The defenses are: (1) That the patent is not entitled to a broad construction; (2) that, if it is broadly construed, it is invalid in view of the prior art; (3) that, if properly construed as to its scope, the defendants do not infringe; and (4) that in any event defendants' mode of flying is on a different principle from complainant's.

The record is replete with publications and oral testimony showing that the principal obstacle to the use of the *aéroplane* before the invention in suit was the inability to maintain lateral balance, due to disturbing *aërial* forces which swerved the *aéroplane* from its intended course. Indeed, this was the perplexing problem upon which human flight depended and the one with which the patentees had to cope. The specification says:

"In flying machines of the character to which this invention relates the apparatus is supported in the air by reason of the contact between the air and the under surface of one or more *aéroplanes*, the contact-surface being presented at a small angle of incidence to the air. The relative movements of the air and *aéroplane* may be derived from the motion of the air in the form of wind blowing in the direction opposite to that in which the apparatus is traveling, or by a combined downward and forward movement of the machine, as in starting from an elevated position, or by combination of these two things, and in either case the operation is that of a soaring machine, while power applied to the machine to propel it positively forward will cause the air to support the machine in a similar manner."

Much, indeed, prior to the Wright patent, had been written on the subject of *aërial* machinery by Prof. Langley, of the Smithsonian Institute, Octave Chanute, and others, and there were a number of patents in this country and in foreign countries disclosing diligent and painstaking efforts by inventors to achieve success in *aërial* navigation with heavier than air machines; but all such efforts for one reason or another were abortive, and the intentions of the inventors and experimenters miscarried. The prior art taught that Langley, Lilienthal, Chanute, Maxim, and others had faithfully endeavored to solve the difficulties and remedy the imperfections in apparatus. Flying machines of various kinds had previously been built, but no one had flown save a few, Chanute in this country, and Lilienthal and Pilcher abroad, who were engaged in experimentation.

In this situation the patentees conceived the idea of hinging dihedral planes to supports at their front and rear margins, with flexible joints to permit warping or tilting them at their extreme lateral ends by the use of suitable levers to impart to the *aéroplane* surface a helicoidal twist. On this point the specification says:

"We prefer this construction and mode of operation for the reason that it gives a gradually increasing angle to the body of each *aéroplane* from the central longitudinal line thereof outward to the margin, thus giving a continuous surface on each side of the machine, which has a gradually increasing or decreasing angle of incidence from the center of the machine to either side. We wish it to be understood, however, that our invention is not limited to this particular construction, since any construction whereby the angular relations of the lateral margins of the *aéroplanes* may be varied

in opposite directions with respect to the normal planes of said *aéroplanes* comes within the scope of our invention."

It was believed in the beginning that, by warping or depressing the margins of the supporting planes at opposite ends, the *aéroplane* could be controlled in its movements and its equilibrium maintained in flying, and the proofs show that in their earlier efforts the inventors did not design to use either a horizontal rudder in front of the machine or a vertical rudder at the rear; but later, before the application for patent was filed, these instrumentalities were added. The movable vertical rudder or tail exerts a retarding influence on the side of the machine, which in flying has a tendency to move ahead of the opposite side, and thus assists the wings or marginal ends in keeping the *aéroplane* properly balanced.

Means were provided for increasing or decreasing the angle of incidence to restore lateral balance, such means consisting of a rope attached both to the vertical rudder and to the wings or margins, which enabled the aviator, lying in the cradle, to operate by the motion of his body both instrumentalities for maintaining the equilibrium of the apparatus. In the estimation of the Wright brothers the machine was prevented from turning on its vertical axis by the adaptation of the movable vertical rudder as an auxiliary to the warping planes or ailerons as described in the specification, and by the conjoint use of such parts they were able to fly, steering in either direction, and to restore and retain equilibrium.

To induce a construction of the claims in controversy that will exclude defendants' *aéroplanes*, it is contended that the patentees merely improved the known gliding machine—a contrivance for gliding down slopes—and that the wing tips, horizontal rudder, and vertical rudder were old separately and in combination. In the year 1896, and previously, Lillenthal had flown experimentally with a gliding machine which was afterwards wrecked. Later, the Pilcher and Chanute structures, of both the monoplane and biplane type, were used for experimental flying; but they also were failures, and little success was achieved in correcting their imperfections.

In a published address by Chanute, who had carefully studied the subject of *aéro-dynamics* and disclosed a keen familiarity with flying machines of the *aéroplane* type, there is contained a percursorial review of the *aéroplane* and its practicability up to the year 1897. In this address he points out the differences between curved and flat planes with regard to the effect of air pressure thereon; but his descriptions were not sufficiently definite to suggest the later improvements by the patentees. He declared that the use of a horse power motor to facilitate flight, if of sufficiently light weight, was a minor detail and not a serious problem, and that the maintenance of the equilibrium was the most important problem in connection with *aërial* navigation. While his experimentation and publications were helpful to the patentees, it is not contended by the defendants that they were anticipatory of the

claims in suit, but merely that they showed the progress that had been made in efforts to make possible human flight.

That the prior patents do not show the patented combination of complainant's construction is evident from an examination thereof.

The Henson British patent of 1842 was for a monoplane having two pivoted tails independently operated—one a horizontal tail, controlling the upward and downward movements of the apparatus; the other a vertical tail, guiding its direction. The statement in the specification as to the dimensions of the machine indicates its impracticability, and there is nothing to show that the patentee had in mind the principle that the steering or control of the machine depended upon the tilt of the wings in connection with the use of the vertical rudder.

In the Maxim British patent, No. 16,883, of 1889, for an aerial machine, there is a vertical movable rudder and a horizontal rudder—the former for guiding the aeroplane in an upward or downward direction, and the latter for steering to right or left. While the function of the Maxim horizontal rudder was apparently the same as that of the Wright horizontal rudder, the function of the vertical rudder was essentially different.

In the Lanchester British patent, No. 3,608, the intention of the patentee was to secure the lateral balance of his aerial machine by automatic means. He, however, never succeeded in carrying out his design. In addition to the horizontal rudder, his machine carried a rear rudder, which was used for steering, and not for maintaining the equilibrium of the contrivance, and the wings were immovable.

The patents to Crepar and Johnston for gas balloons, lighter than air, were provided with horizontal and vertical rudders; but such rudders did not perform the function of the Wright movable vertical rudder in combination with the marginal tips. However, apparatus of this description, even though provided with planes, and horizontal and vertical rudders, bears no close similarity to machines of the type under consideration, as lateral balance is secured upon an entirely different principle.

In the description of the Harte British patent, No. 1,469, of 1870, it is stated that the wings of the machine when in operation form a single plane, moving through the air in the direction of least resistance, and that they have hinged to the ends triangular extensions, called by the defendants aileron portions, which afford means for steadying the apparatus. While the extensions may be movable above and below the normal plane of the main body, yet there is no simultaneous manual control, and therefore, in my opinion, the described means do not correspond to the combination in claim 3 of the Wright patent, and as the vertical steering rudder of the Harte patent is not usable to maintain steadiness or balance, the elements of claims 7, 14, and 15 are not disclosed.

The Mouillard patent, No. 582,757, for a glider, bears more particularly on claim 3, and is said to contain aileron portions on the sides of the planes. The description is of a monoplane surface with

separate portions at the rear of each wing (light nets of silk twist *J'*, with meshes about 2 inches square under the frame of the wings), which are movable by cords extending to the operator. This structure was never reduced to practice. The specification in no way indicates that Mouillard considered the problem from the viewpoint of the patentees; nor does it show means for simultaneously increasing the lift of one aileron and depressing the other, or for simultaneously adjusting the ailerons above or below the horizontal plane; nor does it show the use of a rudder in connection with the depressible portions. The complainant's expert witnesses expressed the opinion that the depression of one wing operated to turn the apparatus, and not to balance it.

[2] Much has been said by defendants of the Boulton British patent, No. 392, of 1868, for aerial locomotion relating principally to the generation of the motive force used. The inventor of apparatus connected therewith appreciated the necessity for lateral stability in such constructions. Figure 5, attached to the drawing, shows vanes which are located on the sides of the machine and which constitute its ailerons. There are rudders which are designed to prevent the machine from being turned on its axis from the pressure of the air, and side vanes which may be turned around, according to the patent, like a "throttle valve." Defendants argue that such patent discloses the elements of claim 3 in suit; but complainant has shown with reasonable certainty that the pressure on the lateral vanes would be such as would not only turn one upward and the other downward, but that it would also pull the weight *d* (shown in Fig. 5) to one side, with the result that the apparatus would become unbalanced. The side vanes of the patent to Boulton did not, in my opinion, suggest the lateral marginals of the patent in suit. While the vanes were operated from their normal position in a somewhat similar way to complainant's marginal wings when the apparatus was rotated, yet there was no manual control of the side portions as in complainant's machine. It is true that the vanes are said to be operated by hand, although a self-acting mechanism in connection with their control is also specified, but which, I think, was inoperative, even though stops were used to prevent the vanes from completely turning or from moving to and fro. Although Boulton theoretically understood the probable disturbances due to air pressure, his self-acting mechanism for controlling and safely directing his machine amounted to little, and his assertions and suggestions were altogether too conjectural to teach others how to reduce them to practice, and therefore his patent is not anticipatory. *American Graphophone Co. v. Leeds & Catlin Co.*, 170 Fed. 327, 95 C. C. A. 511. Nor does the Boulton structure weigh with me sufficiently to require a limitation of claim 3, for it is well settled that an invention or discovery set up in defense of infringement must have been complete, and capable of producing the desired result, and there is no such showing here. *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821.

Importance is attached to the revived Mattulath application for a patent, dated January 8, 1900; but I think there is an utter failure to show that the catamaran-like structure of 180 feet over all and revolving disk 40 feet in diameter, with its decks, compartments, and machinery, was complete, or that it was even remotely possible to reduce it to practice, and without such showing it is devoid of material significance. Even assuming that it belongs to a prior art, the structure is not provided with movable side ailerons simultaneously adjustable, or a movable rudder, but has a fixed rudder, which has no connection with the ailerons.

One additional publication, the Ader article, published in France in 1893, may be dwelt upon. The conception of Ader relates to apparatus for flying which somewhat resembles the wings of birds or bats, having tips which, according to the specification, could be moved forward and backward. The machine was of the monoplane type, and carried a motor; but, as there was no connection between the warping features and the rudder by which the lateral balance of the machine was secured, the publication is not entitled to be considered in limitation of the claims in suit embodying such elements.

Challenging the claim of the patentees that equilibrium is maintained by the connection between the rear rudder and the warping tips, the defendants point to the Voisin machine (model exhibit)—a structure without warping means or its equivalent, but having a rear rudder for steering and maintaining balance. Such device, however, is provided with vertical end surfaces which impart lateral resistance to air pressure, while in complainant's and in defendants' *aéroplanes* the ends are open, the air passing through without resistance, and therefore the principle of operation in the Voisin structure is essentially different.

The Schroeder German patent of 1894, upon which the defendants lay stress, is for a gas balloon, a structure lighter than air, having a flat under surface and a slanting upper surface, a steering rudder operated by a single lever, and two wings, one at each end of the under side of the plane for maintaining equilibrium. Defendants' expert witness Waterman expressed the opinion that the Schroeder structure was readable on claims 3 and 7 of the Wright patent, and testified that the ailerons were movable automatically, although, if desired, they might be controlled by hand. The specification shows that in the center of the under side of the balloon there was suspended a car in which the operator was seated, who, by inclining his body from side to side, obtained lateral balance by the movement of the wings, which were automatically controlled by the tipping of the machine. The wings, which I think were merely incidental to the construction, without being regarded as of the essence thereof, were mounted on a horizontal shaft extending from one end of the contrivance to the other; but they did not extend beyond the normal plane, as do the ailerons of the defendants' machine. There is conflict of evidence as to whether such patent discloses means for simultaneously moving the rudder

and the wings. From my examination thereof, I conclude that there was no such co-ordination between the vertical rudder and the wings as would enable their simultaneous movement to restore lateral balance. At any rate, as hereinbefore stated, there is a wide distinction between a gas-containing machine designed for aërial navigation and an aëroplane. In the former there is a gradual descent to terra firma, either from loss of gas or because of increased weight; while in an aëroplane the descent is precipitous.

No useful purpose would be served by the consideration of other contrivances. A summary of what had gone before in aërial machinery unmistakably discloses, first, publications which did not contain descriptions of apparatus of such clearness and definiteness as to enable the skilled in the art to construct therefrom an operative device, or clearly suggesting ways or means to solve the problem of lateral balance; and, second, exhibit patents which, as Judge Coxe says in *Cimioti Unhairing Co. v. American Unhairing Co.*, 115 Fed. 498, 53 C. C. A. 230, "emerged from oblivion solely to meet the exigencies of the occasion," and which contain undeveloped plans or ideas for constructions incapable of successful operation. As the defendants have not proven that the defects attributable to such devices could have been removed by the exercise of the skill and training of an engineer or mechanic, I am of opinion, after complete consideration of the testimony on both sides, that the patentees, by their method of securing the equilibrium of the planes, made an important advance in an embryonic art. They were not the first to conceive the idea of using monoplane or biplane surfaces for flying, nor the first to support two planes at their margins one above the other, or to use vertical tails or rudders for steering, or to place horizontal rudders forward of the machine to guide it upward or downward in its flight. The prior separate use of such elements is freely admitted by the patentees; but they assert, rightly, I think, that the patented combination was a new combination, performing a new and novel result. The antecedent patents, the efforts to perfect the gliding machine and to provide means for restoring equilibrium, in short, the many unsuccessful attempts to remedy existing imperfections in aërial machinery, all bear witness to the fact that the achievement of the patentees required the exercise of the inventive faculty. Having attained success where others failed, they may rightly be considered pioneer inventors in the aëroplane art. Their concept was practical, and their combination of old and new elements meritoriously advanced the operativeness of aëroplanes of this type from which astonishing flights have resulted.

Of course, it is not intended to decide, and such decision should not be inferred from what has been stated, that by the adaptation described in the specification and claims in suit the capsizing or upsetting of the aëroplane has been made impossible or its stability in the air positively assured; for this is not contended. But that the invention is a strong factor in restoring equilibrium where, owing to the fluctuations of the wind or to other disturbing causes, the aëroplane is shifted or swerved from its course, is undoubtedly proven. When such deflections occur,

the warping device, imparting to the aëroplane surface a helicoidal twist, is used, and at the same time the vertical rudder is turned to recover the equilibrium. And even if the patentees were not strictly pioneers, in the sense of producing an apparatus novel in its entirety, they nevertheless strikingly surpassed their predecessors in devising means for restoring lateral balance, and are entitled to a liberal construction of their claims in controversy, and to the application of a range of equivalents that will include an aëroplane appropriating substantially the same instrumentalities and the same principle of operation.

The defendants urge that the patentees' invention is without practical utility, that the flat planes described in the specification were never used, that the vertical rudder is useful merely to equalize resistance, that the patent fails to disclose the manner of effecting the equalization of the differences of air pressure, and argue that in turning complainant's machine the ailerons are warped, with the result that the aëroplane swings or circles toward the side on which the greater angle of incidence was produced, that by such maneuvering to prevent upsetting complainant's machine has to be turned from its course, it being impossible to further turn the vertical rudder, and they argue that defendants' aëroplane is radically different from complainant's. They also claim that it was not until the vertical rudder was constructed to move independently of the ailerons, as in defendants' aëroplane, that an operative device was produced.

In the specification the surfaces of the planes are described as "normally substantially flat," and in the claims they are referred to as "normally flat," and it is stated that, when the supporting surfaces are made of cloth or other flexible fabric, a curvature is imparted to the planes by the resistance of the air. But the patentees did not limit themselves to the precise details of construction, and they stated in their specification that the same might be modified without departing from the principle of the invention. The patentees evidently believed that the curved surfaces would be made normally flat in view of the flexibility of the material originally used by them, and that to their surfaces there would be imparted a curvature by air pressure. They were required by law merely to state the best manner known to them of embodying their invention in a complete practical structure, and were not limited to the specific form, or to the best form known to them, if their claims were broad enough to entitle them to equivalents. *Columbia Motor Car Co. v. C. A. Duerr & Co. et al.*, 184 Fed. 893, 911, 107 C. C. A. 215.

The defendants assert that curved surfaces impart lifting advantages to the planes, and also increase the stability of the planes, and that the patentees purposely refrained from disclosing the best form of their apparatus, intending by a faulty description to mislead the public. In answer, however, it suffices that the evidence does not support any such view.

To the aëroplanes later constructed by the complainant there has been added a supplemental lever for turning the vertical rudder, which,

as shown by the evidence, is used to increase the swing of the machine in one direction or another, when the conditions are such as to necessitate turning the rudder further to the right or left to retard the speed of the right or left wings than can be done by using the cradle. This alteration or additional feature was not necessary to the practicability or operativeness of the invention; such rudder still being relied upon in connection with the warping instrumentality.

Defendants further contend that the patent is silent regarding the use of a motor, and that therefore it was never intended to pass beyond the gliding machine stage; but this is incorrect, as the specification expressly alludes to flying either by the application of mechanical power or gravity. Moreover, the use of motors in aerial machinery was not a new idea, and was never regarded as a knotty problem.

[3] There was much discussion at the bar as to claim 3, which does not include the vertical rudder as an element. The important feature thereof is that the lateral marginal portions of the planes must be capable of movement to different angles relatively to the normal plane of the aeroplane and about an axis transverse to the line of flight; the purpose of said movements being to present to the atmosphere different angles of incidence. It was argued that without the co-operation of the vertical rudder the claim was wholly impracticable. The complainant company, to the contrary, rejoins that there is shown a subcombination which is valid, and which should be sustained. There is evidence that the marginal ends of the supporting planes are capable of moving simultaneously in different angular relations to the plane and to each other without the assistance of the vertical rudder; but the result was not satisfactory as the machine in its flights skidded to the side, an imperfection which has been remedied by the use of the vertical rudder in conjunction with the ailerons. It is not essential to the validity of claim 3 that all parts of the machine, or all parts specified in other claims, which are necessary to its operativeness, should be included therein, and resort must be had to the specification for a disclosure of the parts necessary to insure the practicability of a patented device. In the Wright structure a new and novel result was attained simply by having the ailerons on the ends of the planes, without the supplemental feature of the vertical rudder. The warping feature is, in fact, the essential part of the machine, while the vertical rudder, insuring successful flying, is a valuable adjunct, without which lateral balance could not be restored. The employment, in a changed form, of the warping feature or its equivalent by another, even though better effects or results are obtained, does not avoid infringement. In such circumstances, as I read the authorities, the claim is valid as a subcombination. *Thomson-Houston Electric Co. v. Black River Traction Co.*, 135 Fed. 759, 68 C. C. A. 461; *Deering v. Winona Harvester Works*, 155 U. S. 286, 15 Sup. Ct. 1187, 39 L. Ed. 153; *Taylor et al. v. Sawyer Spindle Co.*, 75 Fed. 301, 22 C. C. A. 203. In *Railroad Co. v. Dubois*, 12 Wall. 47, 20 L. Ed. 265, the Supreme Court of the United States says:

"Undoubtedly a patentee may claim and obtain a patent for an entire combination, or process, and also for such parts of the combination or process as are new and useful, and he may claim and obtain a patent for both."

In *Thomson-Houston Electric Co. v. Black River Traction Co.*, *supra*, Judge Wallace, writing for the Circuit Court of Appeals, said:

"Many subcombinations, although new, are not useful, except to perform their appropriate functions in the machine of which they are a part. The description in the patent of the whole machine, and of the means or mode by which the subcombination is brought into co-operative relation with the other parts, usually indicates how the subcombination may effect a useful result. When this is so the combination need not be operative alone, because (to use the language of Mr. Walker) 'utility is justly ascribed to things which have their use in co-operating with other things to perform a useful work.' In *Taylor v. Sawyer Spindle Co.*, 75 Fed. 301, 309, 22 C. C. A. 203, 211, in considering the objection that the claims by themselves were void, because not composing an operative mechanism, the court said: 'The law upon this subject is too well settled to be open for discussion. A patentee is not required to claim the entire machine in each claim. Each of the claims at issue is for a complete combination of the spindle and its supporting tube and devices, and there was no necessity for expressing in terms the devices for revolving the spindle. Any appropriate means for operating it will be understood. The omission of the sleeve wheel does not affect the validity of either of the claims, which belong to that class where reference may be made to the specification to supply in a claim what is plain to any one skilled in the art.'"

To a similar effect, see *Canda et al. v. Michigan Malleable Iron Co.*, 124 Fed. 486, 61 C. C. A. 194, and *Clark Blade & Razor Co. v. Gillette Safety Razor Co.*, 194 Fed. 421, 114 C. C. A. 383. The doctrine of such adjudications may appropriately be applied to the situation presented herein. Consideration has already been given the patents to Mouillard and Boulton, which show lateral extensions, and which, it is asserted, limit claim 3, and nothing further need be added to the criticism elsewhere made.

It is next contended that defendants' *aéroplane* does not infringe claim 3, as its ailerons do not move in either direction above or below the normal plane of the body portion; but any such alteration, however, is immaterial, as defendants' planes move at different angles relative to the *aéroplane* and to each other, and attain the substantial result of the Wright patent.

Claim 7 is for the elements of (1) an *aéroplane*; (2) means for moving the ailerons in different directions; (3) a vertical rudder; and (4) means for operating the rudder causing it to "present to the wind that side thereof nearest the side of the *aéroplane* having the smaller angle of incidence, and offering the least resistance to the atmosphere, substantially as described." The description of the *modus operandi* of the rear rudder plainly discloses its object and purpose, and is not restricted to the warping ropes or wires. Claim 14 includes the horizontal rudder, with means for presenting its underside to the resistance of the air currents, while claim 15 specifies the location on

the aëroplane of the vertical and horizontal rudders. The said claims must be given an interpretation of sufficiently wide scope to cover the appropriation of the substance of the invention or the equivalent means by which the principle is applied to an aëroplane of the type described in the patent in suit.

This brings me to the final question of whether or not there is in defendants' machine a tendency to spin or swerve, which is checked or counteracted by the operation of its vertical rudder. Upon this phase of the case considerable oral testimony was given bearing upon the practical and theoretical sides. Notwithstanding the construction to which the claims are thought entitled, if the defendants operated their aëroplane upon a different principle, using means which were old in aërial navigation or foreign to complainant's, then infringement cannot be sustained.

The evidence is that the defendants in their machine have two slightly curved planes supported by rigid posts placed vertically to the planes at the front and rear sides, the ends thereof being open the entire length, and that there are two ailerons or wings on the extreme sides of the planes, each pivoted to supports and crosspieces midway between the upper and lower planes. Such ailerons or supplementary planes are extended in part beyond the edges of the main planes, and are not continuous or integral portions thereof, as are complainant's. They are adjustable at different angles, and are raised and lowered by the lateral movement of the body of the aviator, who is seated in a movable seat in the central portion of the aëroplane. Each aileron has the same angle to the supporting props as the other, and as the angles of incidence of the planes change in flying the angles of the ailerons also change, each presenting unequal angles and resistances. In consequence of such variation in the angles of the ailerons, the speed of the high and low sides varies whenever the planes are tilted from the normal angle. At the rear of defendants' construction there is a vertical rudder, and there is a sharp question of fact as to whether such rudder is used to assist the ailerons in recovering lateral balance by retarding the speed of the high side and increasing the speed of the opposite side. If it is not so used, then in my opinion the defendants' machine is not operated on the principle of claims 7, 14, and 15 in suit. The claim is that such rudder is operated in a manner to compensate for the difference in head resistance on the ailerons, due to the unequal angles caused by the continuous alteration of the angle of incidence of the machine, or, in other words, that the defendants' rudder is turned to the high side because of the unequal resistance exerted by the ailerons. This mode of operation the defendants earnestly deny, and there is much dispute in regard thereto.

In front of their machine the defendants also use a horizontal rudder, which directs the upward and downward course, and which may be maneuvered by the aviator to coact with the ailerons and the

If I am correct in my interpretation of claim 3 and the rule of law applicable thereto, the ailerons of defendants' construction and the manner of using them are within its scope. The witness Curtiss frankly testified that the purpose thereof is to preserve the lateral balance "without the use of any other element or part"; it making no difference whether the *aéroplane* is in a straight or curved flight. Such concession supports the asserted infringement of the claim under consideration. There is, however, other testimony showing the specific manner in which the result is attained. The witnesses for complainant have sworn that in defendants' construction the aviator to restore lateral balance causes the ailerons to be lowered or raised, thus increasing the angle of incidence of one while decreasing that of the other, by inclining his body and moving his seat towards the high wing. It is true that the vertical rudder is not connected so as to coact with the ailerons, there being no direct connection between them, but each is controlled separately. According to the evidence, a turning effect is at times produced in defendants' machine by air disturbances, to counteract which the right aileron of defendants' machine may be pulled downward as the other is raised, and the vertical rudder inclined towards the raised aileron. Defendants firmly deny that there is any turning tendency or swerving which requires turning the rudder away from its central position; and, giving effect to the language of the Circuit Court of Appeals in its opinion on the appeal to be relieved from the preliminary injunction, upon this point really hangs the question of infringement. *Wright v. Curtiss*, 180 Fed. 110, 103 C. C. A. 31.

Curtiss testified that he had given particular attention in flying to the ailerons of his machine, to acquaint himself with their movements, and to find out whether they caused a swerving of the machine on its vertical axis, which in its correction necessitated the use of the rear rudder, and he swears that the rear rudder is not used to assist the ailerons in their functions or to restore equilibrium, but merely for steering. The witness Willard, who has many times flown a Curtiss *aéroplane*, swears that in recovering balance there is no swerving or turning on the vertical axis, and that in effecting such maneuver the vertical rudder is held in a central position, and that he has never noticed any tendency of the machine to swerve because of the use of the ailerons, and in support of his testimony he cited an instance of the breakage of the controlling wires leading to the vertical rudder, and said that he flew ahead for a distance of two miles without its use; but as an equalizing device was used, and as the ailerons in the machine used were differently placed than midway between the planes, the incident loses importance. Captain Beck of the government aviation station, who has flown the defendants' *aéroplane*, substantially testified that there were no deviations of the *aéroplane* from its course, owing to the use of the ailerons, that the vertical rudder was not used to counteract any turning or swerving due to their use, and that he had never made such use of the vertical rudder; but he admitted that

on one occasion in climbing he tilted abnormally, and turned his rear rudder in the opposite direction to restore balance, and succeeded in doing so. Lieut. Ellyson, of the United States Navy, also testified that he noticed no swerving when flying, and that the vertical rudder in the Curtiss aeroplane is usually used in starting from the ground, but not in flying, except for steering purposes. The witness Post testified that from his observations in experimental tests he could testify positively that there is no turning of the machine around a vertical axis when the balancing planes are used, and that the rudder is used solely for steering.

The testimony of witnesses who have flown the defendants' aeroplane and swear that the rear rudder is not in fact used for recovering lateral balance, but that such function is performed solely by the ailerons, would ordinarily be entitled to greater weight than the opinions of experts, or the contradictory testimony of witnesses who were on the ground or in other flying machines, observing the movements of the defendants' machine, or than the statements made by others in relation to the manner in which such machine should be or had been operated, and would in this case, were it not that there is cogent evidence tending to modify or qualify their denials of the use of the vertical rudder except for steering. Willard concedes that the rear rudder is turned to the high side to gain additional restoring power, and that it is used as "a separate agent to accomplish a desired result more quickly or more positively." In the Curtiss letter in evidence it is substantially admitted that the rear rudder is turned toward the high side at times *to assist in balancing* the machine by steering or turning.

The testimony of Lieut. Milling of the United States Signal Corps aviation school, who has frequently flown in both Wright and Curtiss machines, strongly supports the claim that the defendants employ the vertical rudder for the dual purpose of steering and recovering balance under certain conditions. I quote therefrom concerning the method of flying the Curtiss machine. He says:

"I move the aileron on the low wing in order to increase the angle of lift, and move the vertical rudder toward the other side until the machine resumes a horizontal position," and move "the aileron on the other side in the opposite direction. * * * On two or three occasions, in very gusty weather, I have allowed the wing to remain in the position assumed when pressed down by a down trend of air, and have attempted to raise it by using only the ailerons. I held it in this position without touching the vertical rudder as long as I felt it to be safe, without any response. By moving the vertical rudder toward the high side, the machine resumed a horizontal position immediately."

This would seem to bear out the assertion that the rear rudder is used to correct the differences of resistance, and not merely to recover from an unusual tilt due to untoward causes. Although Lieut. Milling subsequently stated that under ideal weather conditions it is not necessary in the Curtiss machine to use the rear rudder in balancing, still, giving consideration to all the evidence, I am led to the conclusion that, notwithstanding the claim of the defendants that turning the rudder to the high side results in the performance of a different function

than in complainant's machine, the fact is clear that it does on occasion assist the ailerons in restoring equilibrium. That it is capable of action separately from the ailerons, or that it is turned to the high side only on extraordinary occasions, or that it is primarily for use in steering, and only incidentally to assist in restoring balance when abnormally tilted, does not avoid infringement.

The wheel by which the rudder is turned, and to which it is connected by wires, is positioned directly in front of the machine, and is adapted for movement practically at the same time with the ailerons, and thus the rear rudder and ailerons are capable of substantial co-ordination. It is true that none of the claims specifically state that the vertical rudder should be turned to the high side to recover the balance of the machine, or to keep it balanced, yet in claims 7, 14, and 15 means are included for moving it to the side of least resistance, which the evidence shows was the high side, the greater angle of incidence being the low side, as the pressure caused the machine to go faster on the high side, and necessitated counterbalancing, or checking such tendency. That the vertical rudder of defendants' machine at times operates on this principle is fairly substantiated. It is not unlikely that its ailerons produce a more effective result than do those of complainant's machine, and that the vertical rudder is not as often resorted to for maintaining or restoring balance; but nevertheless the evidence shows that there are times when the rudder is turned to the high side to prevent that side from flying faster than the opposite side, and by exerting an influence upon the ailerons assists them in their functions.

To further differentiate their machine from complainant's, the defendants assert that in their aeroplanes there is no normal difference in the angle of incidence to the course of travel as in complainant's, as their ailerons are directly in the "stream-line" and have no unequal pressures which tend to cause the machine to turn or swerve; and it is argued that the problem of the patentees was different from the problem solved by Curtiss, in that the machine of the former is steered by its wing tips and vertical rudder, while that of the latter is steered wholly by the rudder. But, as elsewhere shown, this argument is not entirely substantiated by the facts. It is true that in complainant's machine the vertical rudder is turned to the right when the course of the machine is to the left, while the Curtiss machine responds to the direction of its rudder. This difference, however, is not of controlling importance, and does not establish a patentable differentiation. With a knowledge of the principle of the patent in suit, and a familiarity with the method of operation of the marginal ends of the planes, it is not likely that there was much difficulty in making the supplementary planes of the defendants' machine in such a way as to avoid a difference in the normal angle of incidence by putting the planes in the "stream-line." Such alterations or modifications, however, in view of the latitude of the claims, did not constitute fundamentally different modes of operation from those described in the Wright specification.

The defendants are believed to have appropriated the substance of claim 7, and to have infringed claim 14, inasmuch as, in addition to the essential elements of the Wright patent and the object with which such elements are used, they also employ in their aeroplane, as herein-before shown, a horizontal rudder for "presenting its upper and under surfaces to the resistance of the atmosphere." Claim 15 contains the essential elements, and specifies the location of a vertical rudder at the rear of the machine and a horizontal rudder at the front thereof.

The defendants have embodied in their aeroplane the various elements of the claims in suit. While it is true, as pointed out herein, that the defendants have constructed their machine somewhat differently from complainant's, and do not at all times and on all occasions operate the same on the Wright principle, yet the changes they have made in their construction relate to the form only. They have constructed their machine so that it is capable of restoring equilibrium in substantially the same way as is complainant's machine, and the evidence is that on occasions, depending upon aerial conditions or other disturbing causes, they use the vertical rudder, not only to steer their machine, but to assist the ailerons in restoring balance.

It is unnecessary to further answer the arguments advanced at the bar bearing on the defense of noninfringement, as to do so would extend this opinion beyond reasonable length. Everything relating to the testimony and the criticisms thereon has not been fully treated, yet the material features have been sufficiently elaborated. The questions of law in the case are important; but the questions of fact are controlling, and in view of the novelty of the claims and their scope, the question of infringement is resolved adversely to the defendants as to the claims which are the subject of this controversy.

A decree may be entered, with costs, in favor of the Wright Company, as prayed in the bill; but, because of the importance of the litigation and of the questions involved, a supersedeas will be allowed, upon condition that an appeal be diligently prosecuted.

BURROWES et al. v. FERGUSON BROS. MFG. CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 168.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FOLDING TABLE.

The Burrowes patent, No. 766,988, for a folding table, claim 4, is void for lack of invention. Claims 5 and 6, which are for variation in details of prior structures only, *held* not infringed.

Appeal from the District Court of the United States for the Southern District of New York; Julius M. Mayer, Judge.

Suit in equity by Edward T. Burrowes and the E. T. Burrowes Company against the Ferguson Bros. Manufacturing Company. Decree for defendant (198 Fed. 136), and complainants appeal. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from a decree of the District Court, Southern District of New York, dismissing the bill in a suit to restrain the alleged infringement of letters patent No. 766,988, issued August 9, 1904, to Frank T. Burrowes, assignor, for an improvement in folding tables. The claims in issue read as follows:

"4. In a foldable stand, pivoted legs, blocks arranged adjacent to one side of the legs when said legs are folded, and braces for the legs at the side thereof opposite the blocks, said braces being formed of springy material and arranged when closed to force the legs into frictional holding engagement with the blocks.

"5. In a card table, the combination with an open supporting frame, having a plurality of cross-bars flush with the upper surface of the frame, legs secured to the frame, a top co-extensive with the frame and formed of fiber board fixedly secured to the frame and cross-bars, a flexible protective covering extending over the top and along the outer faces of the frame, and a surrounding molding secured to the outer faces of the frame and against the edges of the covering, whereby the covering is secured in place and the edges of the thin top protected.

"6. A card table consisting of an open frame rigid cross-bars whose upper faces are flush with the supporting-surface of the frame, a top formed of thin material such as fiber board having the edges secured to the supporting-surface of the frame, and resting on the cross-bars, a flexible protective covering for the top extending over the edges thereof and secured to the frame, and a surrounding molding secured to the frame and against the edges of the covering whereby the edge of the thin top and cover are protected."

L. S. Bacon, of Washington, D. C., C. C. Linthicum and C. E. Dunn, both of New York City, and J. H. Milans and C. T. Milans, both of Washington, D. C., for appellants.

E. C. Seward (J. P. Bartlett, Brown & Seward, and Wm. McK. Barber, all of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The patentee lays especial stress in the specification upon the compact form of his table when folded, but that is not an element of any of the claims. So the lightness of the table is urged as a meritorious feature, but that is not mentioned in the claims and is only to be inferred from the specification. The claims in issue are for particular forms of construction and upon their face are narrow in scope. We are aided but little in determining whether they are valid and infringed by reference to the merits of the complainants' commercial article. We must consider them as they stand.

Taking up claim 4: It has reference to a folding stand having (1) pivoted legs; (2) blocks arranged adjacent to one side of the legs when folded, and (3) braces of springy material opposite the blocks. Broadly, the claim covers a structure in which the legs are kept closed by being pressed against blocks by springs. Looking into the prior art to see whether this claim is anticipated, we find the Bowen patent No. 515,462. This patent is for a folding table which has pivoted legs, blocks and spring braces similar to and working in the same way as those elements in claim 4. The only distinction is that the blocks in the Bowen patent engage the legs at all times and not merely when they are closed. We think, however, this distinction insufficient to avoid anticipation. And if strict anticipation be not shown, it is clear that with the Bowen patent in the prior art, there is no invention in claim 4. The claim is held to be invalid.

In considering the next claim in issue—claim 5—we may conveniently determine first whether infringement is shown. If it is not, we need not examine the question of validity.

Claim 5 has these elements:

- (1) An open supporting frame with flush cross-bars;
- (2) Legs secured to the frame;
- (3) A fiber-board top co-extensive with the frame and secured to the frame and cross-bars;
- (4) A flexible covering extending over the top and along the outer faces of the frame;

(5) A surrounding molding secured to the outer faces of the frame for holding the covering in place and protecting the edges of the top.

The question then is whether the defendant's structure possesses these elements, and this may be narrowed into the inquiry whether it has the last three. Considering, then, whether the top of the defendant's structure is co-extensive with the frame, we find that it is not. The top is set into the frame. So the covering in the defendant's structure does not extend over the top and along the outer faces of the frame. It is glued into the top of the frame. So in the defendant's structure there is no surrounding molding for the purposes stated in the claim. Indeed there is no surrounding molding at all.

As, then, the defendant's structure does not possess three of the elements of claim 5, infringement is not shown unless the complainants are helped by the doctrine of equivalents. But this is not a case where that rule has any substantial part. Earlier patents show that the methods employed by the patentee with respect to the side rail construction and the arrangement for fastening the covering were old, and it is doubtful whether there was novelty in the organization of the frame with the cross-bars. Accepting the validity of the claim, it is so limited in its scope by the prior art as to cover little other than the form of construction described. It marks no decided advance in the art. Moreover the scope of the claim is limited by its terms. A patentee who limits his claim to particular forms, cannot be heard to complain that a person is an infringer who uses materially different forms. The language of the claim may be such as to exclude the doctrine of equivalents. Where a surrounding molding to hold a covering to a frame is required, a one-piece frame cannot be regarded as an equivalent even though a part of it be considered the molding. Such construction would not pinch and hold the covering. So where the requirements are specifically that the top shall be coextensive with the frame, and that the covering shall extend along its outer faces, it cannot be considered an inconsequential change to set the top into the frame and to keep the covering away from the outer faces. It is true that these are slight distinctions and that the defendant may appropriate the substance of that which the patentee regarded as his invention. The difficulty is that the claim is for small details and those details the defendant does not employ. The patentee could not get broad claims. He accepted claim 5 as it is, and as it is it does not read upon the defendant's structure and cannot be strained to do so by any established principles of construction.

For these reasons it is held that claim 5 is not infringed. Claim 6 differs slightly from claim 5, but the differences are not sufficient to prevent the reasons which negative infringement with respect to the latter from showing non-infringement of the former.

The decree of the District Court dismissing the bill is affirmed with costs.

DUNN MFG. CO. et al. v. STANDARD COMPUTING SCALE CO.

(Circuit Court of Appeals, Sixth Circuit. March 13, 1913.)

No. 2,294.

1. PATENTS (§ 318*)—SUIT FOR INFRINGEMENT—ACCOUNTING FOR PROFITS.

On an accounting for profits in an infringement suit, where the infringing article sold by defendant was that of the patent, with a patented improvement on which defendant paid royalties, the amount so paid does not of itself constitute such a segregation of profits attributable to the use of the improvement as to leave all the remaining profits necessarily attributable to the invention infringed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

2. PATENTS (§ 318*)—SUIT FOR INFRINGEMENT—ACCOUNTING FOR PROFITS.

Whether the fact that the entire structure made and sold by an infringing defendant is included in the combination claims of the patent requires it to account for all of the profits made thereon, without proof and a finding of the fact that the sales were due to the presence of the feature which distinguished the patented device from the prior art—*quære*?

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

Accounting by infringer for profits, see note to *Brickill v. Mayor, etc.*, of City of New York, 50 C. C. A. 8.]

3. PATENTS (§ 328*)—INFRINGEMENT—COMPUTING CHEESE CUTTER.

The Dunn patent, No. 800,431, for a computing cheese cutter, *held not* infringed by a device made and sold by defendant, as changed after a decree holding its former device to be an infringement, and the bearing of the fact that such change avoided infringement on the computation of profits recoverable for the former infringement considered.

4. PATENTS (§ 27*)—INVENTION—DOUBLE USE.

Where a given mechanical structure is devoted to a new manner of use, employing a function which is distinct from its old function, though inchoate in and developable therefrom, this may show invention, rather than mere double use, although the only physical change is appropriate re-marking.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

5. PATENTS (§ 322*)—ACCOUNTING—DAMAGES AND PROFITS.

If, upon an accounting, no established royalty appears, should the master ascertain and report what a reasonable royalty would be—*quære*?

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 590-595; Dec. Dig. § 322.*]

Appeal from the District Court of the United States for the Eastern District of Michigan; Alexis C. Angell, Judge.

Suit in equity by the Dunn Manufacturing Company and others against the Standard Computing Scale Company. On appeal by com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plainants from final decree awarding nominal damages only for infringement of patent. Reversed.

V. H. Lockwood, of Indianapolis, Ind., for appellants.

E. N. Pagelsen, of Detroit, Mich., for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and COCHRAN, District Judge.

DENISON, Circuit Judge. After the opinion of this court, sustaining the Dunn patent, No. 800,431 (163 Fed. 521, 90 C. C. A. 331), the usual interlocutory decree for complainants was entered below and an accounting had. Complainants waived damages. It appeared that defendant had embodied in its market structure not only the patent infringed, but also, under a royalty contract with one Osborn, an improvement thereon patented to the latter. After the decree, defendant changed the form of its device, and claimed that it thus avoided infringement. Complainants insisted that the change was not material. The master declined to go into any inquiry after the change in form. Defendant's total net profits were found to be about \$18,250, leaving out of account \$4,250 which it had paid to Osborn for his royalty. The master considered this royalty to be defendant's statement of the portion of its profits properly apportionable to its use of the Osborn patent, held that the remainder of the profits was attributable to the infringement, and reported a finding for complainants of about \$14,000. The District Court thought the complainants had failed to sustain their duty of apportionment, and (in November, 1911) gave judgment for nominal damages only. Complainants appeal.

This case reaches this court in so nearly the same general situation as was the Westinghouse Case when it reached the Supreme Court (Westinghouse Co. v. Wagner Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222) that we think it should be disposed of in the same way. The decree will be reversed, with costs, and the record remanded, with instructions that the master's report be vacated and a new reference made, in the conduct of which the parties and the master will have the benefit of this opinion by the Supreme Court.

[1] This result necessarily implies our disapproval of the master's conclusion that the amount paid for royalty on the Osborn improvement, constituted, of itself, such a segregation of profits attributable to the use of that improvement as to leave all the remaining profits necessarily attributable to the presence of the Dunn invention. There cannot be any presumption that a manufacturer contracts to pay, as royalty to a patentee, a sum equal to all the profits which the manufacturer expects to derive from the use of the invention. The ordinary inference, as of the date of the royalty contract, must be otherwise. Royalty payments are rather, from the manufacturer's standpoint, a part of the cost of construction, and from the standpoint of the patentee, whose dominant patent has been infringed, such royalty might or might not, according to the facts of the case, be considered an element of cost.

[2] In support of the master's report, it is also urged upon us that the article, patented to complainant and manufactured by defendant, was an entirety; that the five elements of the claim, recited as constituting a combination, make up the entire market structure; and hence that all the profits on that structure flow from the infringement, and that there is no occasion for any apportionment of profits by either party. This argument assumes that the rule of necessity for apportioning profits, and all the difficulties arising thereunder, pertain only to a case where a patented combination is a part of, or an attachment to, a more extensive structure, and that, where the defendant's sale is of a structure comprising only the combination of the patent, the defendant must, ipso facto, account for all the profits received on the sale. This view is plausible, as a matter of original reasoning, and finds support in statements made by several courts, and in some things said by this court;¹ but we do not think it has ever been intended to establish this proposition as a general rule. (For a carefully distinguished application, see *Orr v. Murray* [C. C. A. 7] 163 Fed. 54, 89 C. C. A. 492; and for discussion of analogous problem, see *Schmertz Wire Glass Co. v. Western Glass Co.*, 203 Fed. 1006.) In any broad application there seems to be conflict with the familiar rule that profits or damages should be measured by comparison with the thing which defendant had the right to make (*McCreary v. Pennsylvania*, 141 U. S. 459, 12 Sup. Ct. 40, 35 L. Ed. 817; *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. Ed. 263), and with the other equally common rule that the entire profits cannot be awarded, as of right, without proof and finding of the fact that the sale was due to the presence of the feature which distinguished the device from the prior art (*Wales v. Waterbury* [C. C. A. 2] 101 Fed. 126, 41 C. C. A. 250; *Westinghouse v. New York* [C. C. A. 2] 140 Fed. 545, 72 C. C. A. 61). Even where a device is an improvement added to, and a part of, a more extensive structure, the operative association of the larger structure is usually implied, and often expressed, in the claims of the patent. An improvement in the governor of a steam engine might well be formulated:

"The combination of a boiler, a steam engine, the connecting supply pipe, the throttle," etc.

This is an extreme illustration, but the question of profits can hardly depend on the largely fortuitous language of the claim in extending the combination, instead of on the actual advance in the art. It is enough to say at present that in this respect the instant case cannot be distinguished from the case in 225 U. S. There, also, a combination claim covered all parts of the entire structure manufactured and sold by defendant, excepting some additions claimed to be improvements, and, if an apportionment of the profits was there necessary, it is here required.

[3] Upon examination of the present record, we think it also re-

¹ NOTE.—*Yesbera v. Hardesty*, 166 Fed. 120, 92 C. C. A. 46, is cited to this effect. In that case defendant's conduct was such as to prevent apportionment and to require the result reached.

quires that we should determine whether the changed form avoids infringement, and this not only because we ought, as far as we safely can, to end the controversy now, but also because the sales of and profits from the new form, if it is not an infringement, are claimed to have important bearing on the matter of profits attributable to the infringement. To make clear the merit of our proposed disposition of this question, a further statement is necessary; and this must be regarded as supplementary to the statement and discussion contained in the opinion upon the former appeal.

The subject-matter of the H. F. Dunn patent in suit was a computing cheese cutter, called a "total value" cutter. The cheese rested upon a rotating table, and a knife, swinging vertically on its fixed support, would cut from the cheese a "pie-shaped" piece, the base width of which would be determined by the amount which the table had rotated since the last cut. Rotation was imparted to the table by a vertical lever, pivoted at one end under the edge of the rotating table, having a handle at the outer, free-swinging end, and connected to the table by such gearing that a movement of the lever in one direction would cause the table to rotate for a distance corresponding to the length of the lever stroke, while the reverse movement of the lever would be inoperative. In this way the continued reciprocating motion of the lever would give a step by step rotation to the table, and the length of the arc step would correspond to the length of the lever stroke, and would be positively regulated, first, by the proportional gearing selected in the construction; and, second, by adjusting the length of the permitted lever stroke. In connection with this lever arm, there was provided a scale bar, constructed upon the arc of a circle struck from the lever pivot, and lying alongside the sweep of the lever. This scale bar was graduated and marked with numerals, so as to indicate desired subdivisions of the distance; and the gearing was so proportioned that a sweep of the lever from nothing to the highest numeral would rotate the table for the fraction of its circumference indicated by the highest numeral, or for the fraction half as large, or one-quarter as large.

For example, if the numeral at the forward end of the lever stroke was 15, the gearing was so proportioned that a stroke of the lever to that point would move the table either one-fifteenth, one-thirtieth, or one-sixtieth of its circumference, according as the lever-table gearing was proportioned one to one, one to two, or one to four. It follows that, if the numerals are assumed to indicate pounds, a 15-pound cheese would be cut into 15 one-pound pieces, 30 half-pound pieces, or 60 quarter-pound pieces, according to the selected construction; and, accordingly, these cutters, of the second or third form, have been commercially designated as half-pound cutters or quarter-pound cutters. A stop, sliding on this scale bar and capable of being fixed at any point, limits the length of the stroke, and so locates what is, for the time being, the highest numeral. A cheese would be put on a scale, and found to weigh, for example, 18 pounds. It would then be placed on the rotating table, the stop on the scale

bar would be set at eighteen, and the device would automatically measure off half-pound or quarter-pound slices.

It seems that retailers, particularly in some parts of the country, had calls, not for quarter-pound or half-pound slices, but for 5-cent slices or 10-cent slices, and it was plain enough, when once pointed out, that such a cutter would apportion total price into fractions as well as total weight into fractions. In other words, if the total desired selling price was \$3, and the stop was set at the numeral 30, the device would deliver either 30 or 60 pieces, according as it was of the one for one or two for one type, and at the \$3 total price these would be 10-cent pieces or 5-cent slices. After this observation of the principle involved, it is also plain enough, when stated, that if we have a scale bar where the numerals represent pounds, and where the device will cut half-pound slices, and if we then assume that the numerals indicate dimes, and set the stop at any particular numeral, the cheese will be cut into twice as many pieces as there are dimes in the numeral—that is, into 5-cent slices. If we add a cipher, and so change the dimes into cents, and a decimal point and make dollars, we have a total value scale bar. If the stop is at 30, representing pounds, we will get 60 half-pound pieces, and if the stop is set at the same place, representing 30 dimes, or 300 cents, or \$3, we will get 60 5-cent slices.

All this, except as will be pointed out, was well known before the H. F. Dunn invention. Roth, by patent No. 657,621, of September 11, 1900, in a device for this purpose and of somewhat similar construction, and which was proportioned four to one, had a rod with two scale bars, one marked with numerals representing pounds, and the other marked with registering numerals indicating dollars, but, owing to the four to one proportion, the dollar numerals are twice as large as in the two for one example which we have above given; that is to say, opposite the numeral 25 was the mark \$5.00; opposite 34 was the mark \$6.80, etc. Speaking of the second scale bar, Roth says it "is graduated and marked to indicate the total value or total selling price of various cakes of cheese"; and "to illustrate, a 40-pound cheese, at 10 cents per pound, would be worth \$4, or the same as a 20-pound cheese at 20 cents a pound. Hence, if the cheese is to be sold by price, the measuring wheel should be set at the \$4.00 mark on the scale"; and again, "it matters not what the weight and price of a cheese may be, so long as the cheese is worth \$4, inasmuch as, for 10 cents, for instance, a purchaser should secure one-fortieth segment of a cheese."

F. P. Dunn, by his patent No. 790,564, considered in the former opinion, had alongside his operating lever an arc scale bar graduated with numerals assumed to represent the total weight of the cheese, and adapted to cut on the four to one basis, or quarter-pound pieces. He assumed that the selling price is 20 cents per pound, and that he has a 12-pound cheese, and then says that setting his stop at the numeral 12 "will cause the cheese-carrying table *B* to move through one forty-eighth of the complete revolution, so that a 12-pound cheese may be divided into 48 pieces, which at 5 cents each, would amount

to \$2.40, the price of a 12-pound cheese at 20 cents per pound." Having thus shown that his device, with the stop set at 12, was a "total value" 5-cent cutter for a \$2.40 cheese, and not stating, and probably not observing, the simplicity of the relationship by which multiplying by 20 (the number of nickels in a dollar) any numeral on his scale bar would convert this numeral into the desired total selling value in cents, and thinking that the computation involved was too difficult for the mental powers of the average clerk, he provided a mechanical aid for such computation. This consisted of a slide rule, which he mounted in the machine under the table, but which might as well or better have been entirely separate from the device, since the rule had with the table no co-operative mechanical connection or relation whatever. He said that this was, in principle, "the well-known slide rule, in which the scales are logarithmic, and the operations of multiplying and dividing are performed mechanically." It was used by adjusting one point to indicate the weight of the cheese in pounds and another point to indicate the selling price per pound, whereupon the third pointer would indicate, normally, the total selling price in cents, and thereupon the operator would divide this by 20 to find the scale bar numeral at which he should set the stop in order to apportion this selling price into 5-cent fractions; but F. P. Dunn made his slide rule perform this division also, and so his third pointer indicated, not selling price in cents, but the desired scale bar numeral.

H. F. Dunn, by the patent in suit, observed the simplicity of the relationship above mentioned. He saw that all which was accomplished by F. P. Dunn's sliding scale was to ascertain the total selling price, and then apply such total selling price to the existing weight numerals on the scale bar by dividing by 20 (or, of course, in the half-pound cutter, by dividing by 10). He saw that this was the same thing as converting the weight scale bar into a total value scale bar by multiplying the existing numerals by 20, or by 10, and calling them cents. While it is quite true, therefore, that, mechanically speaking, H. F. Dunn did nothing, except to add a cipher to the F. P. Dunn scale bar numerals and throw away or forget F. P. Dunn's independent, mechanical aid to the clerk's problem in arithmetic, yet he did, for the first time, produce something which F. P. Dunn did not have, and probably had not comprehended, viz., a total value scale bar which would automatically cause the cutting of 5-cent pieces when the stop was set at the marked "total value." It is true, also, that Roth had disclosed this ultimate result, but by an apparatus not so simple. It was this new result, accomplished by the simple mechanism of both the Dunn patents, which this court held constituted invention and made the patent valid. We have elaborated this situation only to make its bearing clear on the further facts now involved.

Before the former opinion, defendant had been making, among other styles, a cutter containing both the common weight bar of the earlier art and the total money value bar of the H. F. Dunn patent. Since the opinion was rendered, it has continued to make the same device, without the money value scale bar, and, upon its other forms,

it has substituted the old and common weight bar for its money value bar. It has then sent, with its machines, a circular of instructions explaining how the weight bar, without any change whatever, can be used as a total value bar, to cut 5-cent slices, by assuming that each numeral on the weight bar indicates dimes. These instructions are based upon the principles and theory which we have explained, and which had been vaguely apprehended by earlier inventors, and which H. F. Dunn had clearly seen, and had embodied in his apparatus, and had somewhat imperfectly explained in his patent. We find, then, that in this new form defendant uses exactly the mechanism of the F. P. Dunn patent, adding nothing whatever and subtracting only the slide rule, which was in truth no part of F. P. Dunn's operating mechanism. For this slide rule defendant substituted pencil and paper in the hands of the clerk. It is thus clear that defendant's new form, accompanied by its card of instructions, cannot be held to infringe the H. F. Dunn patent, without holding that there would also have been infringement thereof by operating the earlier F. P. Dunn patent, for its intended use and in a manner in which it was capable of being operated without even the slightest mechanical change; and this conclusion would be fatal to the validity of the H. F. Dunn patent.

[4] It seems rather a strange result that the patent law should allow liberty to use, or should prohibit the use of, a given mechanical structure according as one part of it is marked with one or another kind of numerals; yet this is the necessary result of our previous decision, and of the facts which now clearly appear. Not only are we under a more or less absolute obligation to adhere to the former decision, but under these peculiar facts we are satisfied with that decision. The total value bar and the weight bar are not functionally the same thing, though one function is inchoate in and developable from the other; and the thought that the work of these computations and these transpositions could be avoided, and their result displayed in figures on the face of the bar, so producing a ready-made total value cutter, instead of somewhat raw materials for one, we consider was, in fact, invention, and not merely double use, even though the only physical change involved was the remarking appropriate to the convenient use of the newly developed function. Defendant, in its newer cutter, has abandoned the "ready-made" total value bar, and gone back to the "raw materials."

If the profits for which defendant is liable are to be assessed by a comparison with the profits which they "would have had in using other means open to the public" (*Coupe v. Royer*, *supra*), it is manifest that this accounting presents an unusual problem. A determination based on any technical rule of burden of proof and on the unintentional default of one or the other party would be unfortunate; and the circumstances strongly indicate that neither an award of all the profits, nor an award of none, would be substantial justice. Upon the new accounting, some clear measure of the profit actually due to the invention may appear, as, perhaps, would be the comparative

profits on a cutter having only the weight bar and an otherwise equivalent cutter having both weight and value bars.

[5] Further, if, upon the new accounting, complainants wish the inquiry to cover both profits and damages, so that, after the facts are fully developed, they may choose which to pursue (so far as any election may then be necessary), the master should, in addition to the usual facts on that subject, ascertain and report whether there was any fixed and established royalty, and, if not, then what would be a reasonable royalty upon each machine for such use of the invention as defendant made. We do not intend to intimate that such reasonable royalty would be in any event a proper measure of damages, but only to have the facts so completely found that this question might be open to consideration.

SCHUPPHAUS v. E. I. DU PONT DE NEMOURS POWDER CO.

(District Court, D. New Jersey. April 22, 1913.)

PATENTS (§ 312*)—SUIT FOR INFRINGEMENT—PLEA OF OWNERSHIP—PRACTICAL CONSTRUCTION OF CONTRACT.

A plea filed by the defendant in an infringement suit, alleging ownership in itself of the patent in suit by virtue of a contract requiring complainant and others to assign to it patents relating to a certain subject, *held* not sustained by the evidence; it appearing that, as construed by the parties, all of the patents called for by the contract had been assigned and the full purchase price paid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. § 312.*]

In Equity. Suit by Robert C. Schupphaus against the E. I. Du Pont de Nemours Powder Company. On final hearing. Decree for complainant.

Binney & Mastick, of New York City (Harold Binney, of New York City, of counsel), for complainant.

J. P. Laffey, of Wilmington, Del. (Townsend & Button, of New York City, of counsel), for defendant.

CROSS, District Judge. The bill of complaint in this cause alleges that patent No. 526,752, owned by the complainant, has been infringed by the defendant, and asks the usual relief in such cases. The defendant in due course filed a plea, which alleges, in substance, that the patent in suit was its property, and not the property of the complainant. To this plea the complainant filed a replication. Under the issue thus joined the parties have taken testimony, and the question now presented to the court for answer is whether or not, under the evidence, the plea is true. Upon that issue the burden of proof rests upon the defendant. The issue is obviously narrow, and the evidence relating thereto is not voluminous.

On or about March 8, 1897, a Virginia corporation, known as the Maxim Powder & Torpedo Company, as party of the first part, en-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tered into an agreement with six named individuals, who together constituted a copartnership under the firm name of E. I. Du Pont de Nemours & Co., as party of the second part. Said agreement, among other things, contained the following clause:

"The said party of the first part, with respect to any and all letters patent of the United States owned or applied for, either by it or by any of its stockholders, concerning or relating to the manufacture of a perforated grain of smokeless powder and of the ingredients and formula thereof, and the mixing of the same, further agrees that it will cause the same to be assigned, transferred, and set over unto Edward G. Bradford, of Wilmington, Delaware, to hold the said letters patent, now issued or applied for as aforesaid, in trust," etc.

The trust thus indicated was declared to be for the benefit of said copartnership.

Another contract, which recognized and in some respects modified the above, was entered into some time in January, 1898, between Hudson Maxim, Frederick E. McGahie, and Robert C. Schupphaus (the complainant), as parties of the first part, and the copartnership of E. I. Du Pont de Nemours & Co., composed as above mentioned, as party of the second part. This contract referred to the agreement of March 8, 1897, recited the provision thereof with reference to the transfer of all patents owned or applied for by the party of the first part thereto, or by any of its stockholders, concerning or relating to the manufacture of smokeless powder, to a trustee for the benefit of the party of the second part, stated that such agreement had been in part performed, but that said patents had not been transferred to a trustee, and then, after stipulating a reduced consideration for such transfer, provided that the patents should be transferred absolutely and directly to the party of the second part. The parties of the first part to this later agreement of January, 1898, were recited therein to be stockholders of the Maxim Powder & Torpedo Company, the party of the first part to the first agreement.

The case shows, and it is not disputed, that both of the agreements above referred to were subsequently assigned by several mesne assignments from the copartnership of E. I. Du Pont de Nemours & Co. to the defendant herein, and that they were in the possession of and were produced by it when the testimony in this suit was taken. It also appears that on or about the date of the first agreement the complainant executed six several assignments of that many patents then owned and controlled by him to said Bradford in trust, which assignments were delivered to the Du Ponts, together with certain information, and that there was paid to the complainant at that time the sum of \$25,000 by said copartnership as a part of the consideration mentioned in said agreement. It appears, however, that the person therein named as trustee declined to act, whereupon the Du Ponts, as appears from their own letter, subsequently and on or about May 13, 1897, returned said assignments to Schupphaus with a request that he would transfer them to Mr. John S. Gerhard, as trustee, stating that the desired change in the name of the trustee was in accordance with an agreement executed by the Maxim Powder & Torpedo Company. Subsequently, and in compliance with said request,

Schupphaus made and executed other assignments of said patents to Gerhard as trustee, which, however, apparently never became operative, whereupon the agreement of January 8, 1898, was executed, and during that month, and as provided in that agreement, the six patents above referred to, with an additional one, were assigned absolutely and directly to the firm of E. I. Du Pont de Nemours & Co. With the delivery of these assignments, the balance of the purchase money, as fixed by the January, 1898, agreement, was paid.

It also appears in the case that an agreement was entered into December 15, 1896, between E. I. Du Pont de Nemours & Co., of the one part, and Robert C. Schupphaus, of the other part, by virtue of which the party of the first part, in consideration of the free use of all the patents covering the manufacture of a perforated grain of smokeless powder and of the ingredients, formula, and mixing the same, were to pay the party of the second part the sum of \$25,000 in cash and a royalty thereafter from year to year, the exact amount of which it is unnecessary to state. The complainant swears that, after this agreement was made with him, the Du Ponts told him that they would like, for reasons of their own, to be relieved from its terms and make another direct with the Maxim Powder & Torpedo Company, and that under this new agreement they, knowing that he was the owner, would ask him for an assignment of such patents as they thought ought to come to them, and that they then and there agreed with him upon the six specific inventions which were the subject-matter of the six Bradford assignments. The interviews at which these conversations, according to Mr. Schupphaus, took place, were held either late in December, 1896, or early in January, 1897, with Mr. Eugene Du Pont and Mr. Francis G. Du Pont, but chiefly with the latter. It was objected on the part of the defendant that the conversation just referred to is inadmissible as evidence, because intended to contradict and vary the terms of the written agreement of March 8, 1897. The rule of evidence thus invoked is not, however, applicable, since the witness was neither a party nor a privy to that agreement; furthermore, if the conversation took place after that agreement was executed, as under the evidence is possible, it would serve to modify rather than contradict it.

It is also urged that the testimony was objectionable because of the fact that Mr. Eugene Du Pont and Mr. Francis G. Du Pont have since died; but, as neither of the parties to this suit is suing or sued in a representative capacity, the objection is without merit. Furthermore, as the attempt is being made to hold Mr. Schupphaus to the terms of the agreement of March 8, 1897, by reason of its subsequent recognition by him in the manner already stated, it is altogether right and proper for him to show what interpretation was put upon it, and what scope and effect were given it, by the predecessor of the party now seeking to charge him, at or prior to the time when it was first recognized by him. For what reason a seventh patent was added to the six, and ultimately assigned with them to the copartnership of E. I. Du Pont de Nemours & Co., does not clearly appear. It does appear, however, that a question designed to elicit the information was

asked by complainant's counsel, but withdrawn because of an objection interposed thereto by defendant's counsel.

From what has already been said, it appears that certain specific patents were assigned by the complainant to the copartnership of Du Pont de Nemours & Co. by agreement, as complainant insists, with certain members of that firm, in full satisfaction of the terms of the agreement, and that upon the delivery of said assignments the full compensation was paid him. Furthermore, there is no evidence to show that after the transaction, running as it did through a period of nearly a year, and involving the preparation and execution of three separate sets of assignments, as well as a modification of the agreements, was, as the complainant contends, completed, any claim or demand was made upon him, under said agreements or otherwise, to assign the patent in suit, or, indeed, any other patent or patents.

In addition to the circumstances above mentioned, the complainant has shown by certain letters of the defendant's predecessors, parties to the above-mentioned agreement, as well as by letters of their attorney, that they in substance admitted that the transfer to them of the specific patents above referred to was in full satisfaction of the terms thereof. Among letters of that character is one dated December 10, 1897, to Dr. Schupphaus from the Du Pont copartnership, in which they say:

"We will be very much obliged to you if you will, in accordance with our letter written under date of May 13th last, in which we sent you the assignments of the patents which you had made out in the name of Judge E. G. Bradford, transfer these assignments to Mr. John S. Gerhard. This in accordance with an agreement executed by the Maxim Powder & Torpedo Company, granting this change in the name of the trustee. If we had these assignments, we would then have the agreement with the Maxim Powder & Torpedo Company completed, and it would allow us to send the assignments to Mr. Gerhard. * * * We are very anxious to get this matter finished, and all that remains is to receive from you the assignments transferred as stated. Trusting that you will give this matter prompt attention," etc.

Before passing to the next letter, special attention should be called to the sentence in the last which says:

"If we had these assignments, we would then have the agreement with the Maxim Powder & Torpedo Company completed."

Yet this agreement, thus admitted to have been completed, is the sole and only foundation of the defendant's case. If the defendant has any case, it is because this agreement, which the party in interest at the time said was completed, was nevertheless not completed; and it is this proposition which the defendant has sought to maintain, without any allegation of fraud, surprise, or mistake.

The following is an extract taken from another letter to the complainant from the same parties, dated January 13, 1898:

"Note what you say concerning the usual course to be pursued when it is desired to have assignments of patents on record at the Patent Office. We desire, before the payment of \$81,250 [the amount provided for by the contract of January, 1898] is made, to have everything in proper shape at the Patent Office, and we will be much obliged to you if you will undertake to manage this matter for us previous to the cash payment referred to."

In a letter dated January 17, 1898, written to Schupphaus by the counsel of the Du Pont partnership, to whom, according to the evidence, the supervision of the transfers above referred to had been committed, the following appears:

"I will have a conference with you in New York to go over the papers and patents with you there, and arrange for the closing of the transaction at an early subsequent date."

On January 18, 1898, the Messrs. Du Pont wrote Dr. Schupphaus a letter as follows:

"Yours of 15th inst. is at hand, and we note the list of letters patent and applications for letters patent for which you have executed assignment to us direct under date of January 13, 1898; also that you have written Mr. Vandergrift that Mr. Maxim, Mr. McGahie, and yourself will sign the paper which we think necessary. As to what you say concerning the closing of this transaction on Wednesday next, we would say we will do our very best to have this matter hurried forward; but, after a conversation over the phone this morning with Mr. Vandergrift, he tells us he will be in New York on Wednesday next, and will write you making an appointment, so that this matter can be hurried forward. We desire, when the transaction is closed, to take businesslike precautions in the matter of the assignment of the patent, because we know that you and Mr. Maxim will probably depart for Europe immediately after the receipt of the money; consequently, if there is anything that might interfere with the assignment at Patent Office of the patents to us, such as faulty registration or some other clerical error, we would have difficulty in attending to the matter after you and Mr. Maxim had departed. As stated, we are pressing the matter to a conclusion, and after Mr. Vandergrift's interview on Wednesday we have no doubt the end will be near at hand."

And on January 24, 1898, the counsel of the Du Ponts wrote another letter to the complainant, in which he says:

"A registered letter has just been received containing an acknowledgment of the Maxim Powder & Torpedo Company that it has no right, title, or interest of any kind whatsoever in or to any of the letters patent and applications therein mentioned, and that all license or licenses with respect thereto have been revoked and have no force or effect. Permit me to express my appreciation of the attitude you have assumed throughout this transaction."

The patents referred to in the last letter, and, indeed, in all of the letters, were those which were assigned directly to the Du Pont co-partnership. In this connection, it should be noted that they also exacted from the complainant herein, as a prerequisite to the payment of the consideration for the assignment, an affidavit that he was the sole owner of the patents, and that there were no outstanding licenses pertaining to or affecting the same, all of which goes to show that great care was exercised to see that no error or mistake crept into the transaction.

On the other hand, the defendant produced a witness who testified that the complainant admitted to him that the patent in suit was included in the agreements above mentioned, and that the reason that it was not assigned with the other patents was because the Du Ponts said that they only cared for an assignment of those which they regarded as of the most importance. The making of these alleged admissions is, however, denied by the complainant. The same witness also produced three letters written to him by Dr. Schupphaus under

the following dates, February 19, 1897, February 26, 1897, and March 12, 1897, passages in which it is claimed conflict with the testimony of the complainant. It should be noted, however, that these letters, two of them, at least, and perhaps the third, were written when the transaction was inchoate, and before the agreement of March 8, 1897, was actually executed (there being some evidence that that agreement was not executed until the 12th of March), and almost a year prior to the writing of the Du Pont letters above referred to. Furthermore, an examination of the letters shows that they are not in direct conflict with the complainant's testimony, but rather show a willingness on his part, in order to hasten the completion of the transaction, to yield to any reasonable demand made upon him. As to the testimony of the witness who produced the letters, and to whom they were written, it should be said that it does not command respectful consideration. His desire to take control of his own examination, to answer such questions and such only as he deemed relevant, and particularly his refusal for the most part to answer questions which tended to show his employment by and possible resultant bias in favor of the defendant, render the bare reading of his testimony exasperating in the extreme; and this court has no hesitation in saying that, had a motion been made to suppress it, unless the witness were reproached and submitted himself to a full and thorough cross-examination, the motion would have been granted, but, as it is, the weight and efficiency of his testimony are seriously impaired.

For the reasons above suggested, I conclude that the terms of the agreement have been satisfied, and that the predecessors of the defendant have had assigned to them all of the patents for which they bargained and paid. There is no allegation of surprise, accident, fraud, or mistake. There is evidence that the Du Ponts had actual knowledge of the patent in suit; at all events, since it was of record, they had the means of knowledge. The Messrs. Du Pont availed themselves of the services of counsel, and apparently acted from first to last with care, caution, and prudence. Moreover, at the close of the transaction their counsel expressed his appreciation of the complainant's attitude throughout. The evidence shows that the agreement as understood and interpreted by the parties has been performed. The law in such cases as generally held, may be found declared in the following cases:

Insurance Co. v. Dutcher, 95 U. S. 269, at page 273 (24 L. Ed. 410), wherein the court says:

"The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned as a factor in the case."

In *District of Columbia v. Gallagher et al.*, 124 U. S. 505, 510, 8 Sup. Ct. 585, 588 (31 L. Ed. 526), Mr. Justice Matthews says:

"We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract according to which the defendant seeks to obtain a deduction in the contract price."

See, also, *Topliff v. Topliff*, 122 U. S. 121, 131, 7 Sup. Ct. 1057, 30 L. Ed. 1110; *Chicago v. Sheldon*, 76 U. S. (9 Wall.) 50, 54, 19 L. Ed. 594.

But if the view of the case already taken were erroneous, and if the entire case were made to turn, as the defendant insists it should, upon a construction of the clause of the contract of March 8, 1897, hereinabove set forth, my conclusion would still be that the defendant has not sustained the burden of proof resting upon it, and that consequently a decree should be entered in favor of the complainant upon the issue joined. The patent in suit does not directly concern or relate to the manufacture of a perforated grain of smokeless powder, nor does it relate to the ingredients and formula thereof, and the mixing of the same. It is true that the patent is called a process of nitrating cellulose, and is declared to relate generally to the manufacture of gun-cotton, and more particularly to the nitration step of the process in such manufacture. The defendant lays great stress upon this language, when coupled with the fact that nitro-cellulose or gun-cotton is an ingredient of smokeless powder. A thorough and careful examination, however, of the specification of the patent and of its claims, shows beyond question that this patent does not directly or necessarily have anything to do with the manufacture of nitro-cellulose. It merely provides, using its language:

"A simple and economical method of replenishing or bringing the weakened acids bath to its proper strength and proportions."

The evidence shows that, during the process of nitrating the cellulose, the use of an acids bath composed of definite proportions of sulphuric and nitric acids is requisite, and that such bath is weakened by use and must have its strength restored before it can be repeatedly used. That the process of the patent in suit is a process of restoration of the bath to its normal strength plainly appears, not only from the specification, but from the claims, in each of which the following language is used:

"In the art of nitrating cellulose the herein described method of restoring the weakened acids bath."

After which follows a description of the method of restoration. The defendant has produced two experts, who testified that the language of the contract embraces the patent in suit; but their testimony is deemed altogether insufficient for that purpose. Indeed, under the plain language of the agreement and the equally plain purpose of the patent, expert testimony is seemingly out of place. To hold that a contract which provided for the transfer and assignment of all the patents for the tools used in the construction of a house could reasonably and properly be construed to embrace a patent for the process of sharpening such tools, or the removal of rust therefrom, in order that they might be rendered usable again, would border

upon absurdity. But the process of the patent in suit performs relatively the same function that a method of sharpening the tools, or of removing rust therefrom, would in the case suggested. In the case at bar, the acids bath is admittedly weakened by use, and must either be discarded, and a new bath prepared of fresh acids, or the weakened acids must be restored to their normal strength. The patent is purely economical. This is admitted by the experts; for instance, one of them, in answer to an appropriate question, says:

"The restoration of the waste acids in the manufacture of nitro-cellulose is only an economical one. It enables these waste acids, after restoration, to be used over again; otherwise, they would have to be discarded."

At other places in his testimony, the same witness admits that the introduction of "a fortifying mixture" is for the purpose of economy, and to enable the nitro-cellulose to be manufactured at the least cost, while at other places he says, in substance, that an acids bath, having been once used for the purpose of nitrating cellulose, is not, without reinforcement, as effective as it originally was, and adds that by continued and repeated application of the bath in nitrating cellulose the time comes when it cannot be further used. Upon the whole question, it seems perfectly plain that a "perforated grain of smokeless powder" can be manufactured just as well, but not as economically, without knowledge of the process of the patent in suit as with. Furthermore, the process of the patent in suit does not, either necessarily or directly, concern or relate to the ingredients of a perforated grain of smokeless powder, or to the formula thereof, and the mixing of the same. To return to the illustration already used, the patent in suit is, speaking figuratively, a process for sharpening a tool which has become dull by use, and not a patent for the tool itself.

But again, even if it were admitted that the patent in suit concerns or relates to the manufacture of smokeless powder in general, that would not bring it within the purview of the language of the agreement upon which the defendant relies, since by that agreement no patent was to be assigned that did not concern or relate—

"to the manufacture of a *perforated grain* of smokeless powder, and of the ingredients and formula *thereof*, and the mixing of *the same*."

It is apparent, therefore, that the contract referred to embraced such patents, and such only, as related to or concerned a particular form or kind of grain of smokeless powder, and that it did not include patents which might concern or relate to the manufacture of smokeless powder in general. The distinction between a *perforated grain of smokeless powder* and *smokeless powder* in general is one that has been made by the contract and must be observed. It can neither be obliterated nor ignored. There is no evidence that the patent in question relates to the manufacture of a perforated grain of smokeless powder, as distinguished from the ordinary grain of smokeless powder. The only evidence at all bearing on the subject of the manufacture of smokeless powder is that an acids bath is used in the manufacture of nitro-cellulose, which is an ingredient of smokeless powder.

For the reasons given, the defendant has not shown title in itself

to the patent in suit, and accordingly its plea to the effect that it has such title is false, and will be overruled.

Upon notice, a decree will be entered in favor of the complainant, with costs of suit.

FREE SEWING MACH. CO. v. BRY-BLOCK MERCANTILE CO.

(District Court, W. D. Tennessee, W. D. April 1, 1913.)

No. 680.

1. PATENTS (§ 257*)—EXTENT OF MONOPOLY—POWER TO CONTROL SALE OF PATENTED ARTICLES.

A purchaser of a patented article of manufacture from an agent authorized to sell the same in the place of sale becomes the absolute owner with the unrestricted right to resell the same at any time and in any place, although it may be in territory exclusively assigned by the patentee to another as agent or licensee.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 257.*]

2. PATENTS (§ 257*)—EXTENT OF MONOPOLY—POWER TO CONTROL SALE OF PATENTED ARTICLES.

A patentee or his assignee who has sold the patented article, received full payment therefor, and parted with the possession thereof has received the full benefit of the "exclusive right to vend" said article given him by Rev. St. § 4884 (U. S. Comp. St. 1901, p. 3381), and has not the right to fix the price at which it may be resold by a purchaser with whom he has no contractual relations, although such purchaser may have knowledge of the attempted restriction.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 257.*]

3. PATENTS (§ 191*)—"EXCLUSIVE RIGHT TO VEND"—"SOLE LIBERTY TO VEND."

The phrases "exclusive right to vend," used in Rev. St. § 4884 (U. S. Comp. St. 1901, p. 3381), relating to patentees of inventions, and "sole liberty to vend," as used in Rev. St. § 4952 (U. S. Comp. St. 1901, p. 3406), relating to copyrights, mean substantially the same thing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 268; Dec. Dig. § 191.*]

In Equity. Suit by the Free Sewing Machine Company against the Bry-Block Mercantile Company. On motion by complainant for preliminary injunction. Denied.

Caruthers Ewing, of Memphis, Tenn., for plaintiff.

Hirsh & Goodman, of Memphis, Tenn., for defendant.

McCALL, District Judge. This case is before me upon an application for a temporary injunction, and was heard on the bill and answer and affidavits filed by the plaintiff and defendant, tending to support their respective contentions. The bill avers and the proof shows the requisite diversity of citizenship, but no allegation is made in the bill of the amount involved, nor does it otherwise satisfactorily appear. The suit is to restrain defendant from infringing certain alleged rights of the plaintiff arising under the patent laws of the United States. Since the decision in the case of *Henry v. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, there seems to be no doubt of this court having jurisdiction to entertain cases of the character here un-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

der consideration, irrespective of the citizenship of the parties or the amount involved. To the same effect is the recent case of *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 33 Sup. Ct. 410, 57 L. Ed. — (opinion of United States Supreme Court March 24, 1913). At the hearing, it was admitted for present purposes that letters patent declared upon were issued to the patentees and are valid, and that the plaintiff as patentee and assignee is entitled to and does use said patents in connection with the making, use, and sale of the Free sewing machine, of which sewing machine the plaintiff is the sole and exclusive manufacturer.

It appears from the record that the policy of the plaintiff was to appoint, and it did appoint, only one dealer or agent in each city or town for the sale of the Free sewing machine, and that for some time prior to February 16, 1910, the defendant was such appointed dealer and agent at Memphis, Tenn., when, for reasons satisfactory to the plaintiff, defendant's agency terminated and another dealer or agent was, as is alleged in the bill, "licensed to advertise, exhibit, offer for sale and sell said Free sewing machine in said Memphis; said license to be exclusive to said dealer, after the defendant should have disposed of all the said Free sewing machines previously bought by the defendant" of the plaintiff. Subsequently the defendant purchased of one B. W. Barfield, an agent of the plaintiff at Brownsville, Tenn., quite a number of the Free sewing machines, through a Mr. Taylor, who was just prior to and just after said purchase a sales agent of the plaintiff, and who it appears the defendant understood was such sales agent at the time of the purchase. No contract or agreement was made in this sale and purchase tending to restrict defendant as to the manner, place, or price in the sale of the machines. The plaintiff, however, had theretofore fixed \$35 as a minimum price at which the Free sewing machine should be sold at retail by those whom it licensed or appointed as its agents. This was known to the defendant, who was and is a general dealer in sewing machines in connection with its department store in Memphis. To each machine was attached the following notice:

"Patented

Feb. 11-02	Sep. 15-08
Oct. 17-05	Dec. 21-09
July 30-07	Jan. 10-10

Other patents pending.

Notice to
Jobbers and Dealers.

This machine is sold subject to conditions and restrictions as to price at which and persons by whom it may be resold ascertainable from the manufacturer upon application."

Notwithstanding this notice and knowledge on the part of the defendant, it, prior to the filing of the bill advertised, offered for sale, and sold the Free sewing machine so purchased at a cut price of \$27.50 in Memphis, Tenn.

Upon the record in this case, the temporary injunction prayed for

should not in my judgment be granted unless plaintiff's right thereto is made clearly to appear under and by virtue of the patent law as declared by statute, or the construction placed thereon by the United States appellate courts. The right contended for is essentially monopolistic, and it would seem to be against public policy to extend it beyond the limits fixed by statute. Nor should the rule of construction be strained in interpreting such statute in the interest of the patentees, but they should be held to the enjoyment of only such legitimate fruits of the monopoly created by statute in their behalf as Congress clearly intended should be their reward for invention.

Keeping these general propositions in mind, the action of the court in granting or refusing the injunction must turn upon two questions, namely:

First. Whether or not one who purchases a patented article for resale (without restriction as to manner, place or price of such resale) from an authorized or licensed agent of the patentee or his assignee may offer for sale and sell said article in a different territory assigned by the patentee or assignee to another and different licensee or agent.

Second. Whether or not a patentee or his assignee may fix the price at which his patented article shall be sold to the consumer by retail dealers, with whom the patentee or his assignee has no contractual relation, after the patentee or assignee has sold said article, received full payment therefor, and parted with the possession thereof, although the retail dealer knows of the restricted price and the conditions attached to the sale of the patented article by the patentee or his assignee.

[1] It seems to me that the first question suggested is answered in the affirmative by the Supreme Court of the United States in the case of *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848. In that case the defendant had purchased from the territorial assignee in Michigan a quantity of the patented articles for the purpose of selling them in Massachusetts, for which state the plaintiffs were the exclusive assignees of the patentee. An injunction was obtained in the lower court against the defendant, who had purchased the patented article from the Michigan assignee, enjoining him from selling them in the Massachusetts territory. On an appeal to the Supreme Court of the United States, the decree granting the injunction was reversed. And it was there held that one who buys patented articles of manufacture from one authorized to sell them at the place where they are sold becomes possessed of an absolute property in such articles, unrestricted in time or place; and quoting with approval from the case of *Hobbie v. Jennison*, 149 U. S. 355, 13 Sup. Ct. 879, 37 L. Ed. 766, wherein the court held that as between the assignees of different parts of the territory, it is competent for one to sell the patented article to persons who intend with the knowledge of the vendor to take them for use into the territory of the other. In the case at bar the defendant purchased the Free sewing machines from an authorized agent of the plaintiff in the Brownsville territory, and brought them to Memphis, in the territory of another licensee of the plaintiff, and offered them for resale and resold them. Thus it appears that the facts in this case in this particular are strikingly similar to the facts

in the Standard Folding Bed Case, and in my opinion the holding in that case is decisive of the question now being considered in the instant case.

[2] The second question is a more difficult one. Neither the Circuit Court of Appeals of the Sixth Circuit nor the Supreme Court of the United States has considered it. The authorities cited and relied upon by counsel for the plaintiff from the Sixth Circuit and the Supreme Court of the United States are *Button Fastener Case*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848, and *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, neither of which, in my judgment, is authority for plaintiff's contention, nor do they decide the question here presented. The case of *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424, 61 C. C. A. 58, and the later case of *Winchester Repeating Arms Co. v. Olmsted*, 203 Fed. 493, both of which cases are from the Seventh Circuit, are relied upon by the plaintiff. While in certain material particulars the facts in those two cases differ from the facts in the case at bar, yet they tend strongly to support the plaintiff's contention. However, since each case must stand upon its particular facts, and in the absence of any decision, so far as I am advised, either by the Circuit Court of Appeals of the Sixth Circuit or the Supreme Court of the United States, wherein the facts presented on this record were involved, I feel that it is my duty to consider the question presented here as an open one in this circuit.

It has been held by the Supreme Court in the case of *Henry v. Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, that a patentee may, by a conditional sale, so restrict the use by his vendee within specific boundaries of time, place, or method as to make prohibited uses of the patented article outside of those boundaries constitute infringement and not mere breach of a collateral contract, that the monopoly of the patent extends to the right of making, selling, and using, and that each is a separable and substantial right. It follows, therefore, that while the patentee may, by a conditional sale, restrict the use of the patented article by his vendee, it leaves open the question as to whether or not he may restrict the price at which such vendee may sell the patented article in holding that the right of making, using, and selling are each separable and substantial rights.

In the case of *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, it was held that the sole right to vend, granted to the holder of a copyright under section 4952 of the Revised Statutes (U. S. Comp. St. 1901, p. 3406), does not secure to the owner of the copyright the right to qualify future sales by his vendee or to limit or restrict such future sales at a specified price, and a notice in the book that a sale at a different price would be treated as an infringement is ineffective against one not bound by contract or license agreement. And, further, that there are differences between the patent and the copyright statutes in the extent of the protection granted by them, and the rights of a patentee are not necessarily to be applied by analogy to those claiming under the copyright; the court saying:

"If we were to follow the course taken in the argument, and discuss the rights of a patentee, under letters patent, and then, by analogy, apply the conclusions to copyrights, we might greatly embarrass the consideration of a case under letters patent, when one of that character shall be presented to this court. We may say in passing, disclaiming any intention to indicate our views as to what would be the rights of parties in circumstances similar to the present case under the patent laws, that there are differences between the patent and copyright statutes in the extent of the protection granted under them. This was recognized by Judge Lurton who wrote a leading case on the subject in the Federal Courts (*The Button Fastener Case*, 77 Fed. 288 [25 C. C. A. 267, 35 L. R. A. 728]), for he said in the subsequent case of *Park & Sons v. Hartman*, 153 Fed. 24 [82 C. C. A. 158, 12 L. R. A. (N. S.) 135]: "There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute and the rights secured to an inventor under the patent statutes that the cases which relate to the one subject are not altogether controlling as to the other."

A critical examination of section 4884 of the Revised Statutes (U. S. Comp. St. 1901, p. 3381), conferring rights upon the patentee, and section 4952 of the Revised Statutes (U. S. Comp. St. 1901, p. 3406), conferring rights under the copyright law, is therefore important in arriving at the difference between the rights conferred under the patent and under the copyright statutes referred to by Mr. Justice Lurton.

Section 4884, granting franchises under the patent law, reads as follows:

"Every patent shall contain * * * a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use and vend the invention or discovery. * * *"

Section 4952 of the Revised Statutes, granting franchises under the copyright law, reads as follows:

"Any citizen * * * who shall be the author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition * * * and the executors, administrators or assigns of any such person, shall * * * have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same."

This last clause may be stated, without in my judgment affecting its meaning, in this wise: That the holder of a copyright shall have the exclusive right to make and vend the work so copyrighted. Under the first section quoted, the patentee has the *exclusive right of vending* the invention or discovery. Under the second section quoted the owner of the copyright has the *sole liberty of vending* his copyright work. So that the essential difference seems to me to be that the word "use" appears in section 4884, relating to patents, and is omitted from section 4952, relating to copyrights. The patentee under said section 4884 has the *exclusive right to vend* his invention or discovery, and the owner of the copyright, under section 4952, has the *sole liberty to vend* the work copyrighted. Now, if the owner of the copyright is not guaranteed the right by the words, "sole liberty to vend," in section 4952, to qualify future sales by his vendee, or to limit or restrict such future sales at a specified price by a notice in the copyrighted book that a sale at a different price would be treated as

an infringement, and such notice is ineffectual against one not bound by contract or license agreement, as is held in *Bobbs-Merrill Co. v. Straus*, it would seem to follow that a patentee or his assignee who has sold the patented article received full payment therefor and parted with the possession thereof is not granted the right by the words "exclusive right to vend" in section 4884 to limit or restrict future sales of his patented article to a specified price by those who have purchased such articles from the authorized agents of the patentee or his assignee, and who have entered into no contract or license agreement with the patentee or his assignee or his agent to sell such articles at the price fixed by him.

[3] After a careful examination of the meaning of the words, "exclusive," "right," "sole," and "liberty," as defined in Webster's New International Dictionary, I conclude that, if there is a difference in the meaning of the phrases "exclusive right to vend," and "sole liberty to vend," it is so subtle that my mind fails to grasp it, and my pen fails to define it. In my opinion, therefore, it cannot be seriously argued that there is any material difference in the meaning of the two phrases, as used in the patent and the copyright statutes. If these two phrases mean substantially the same thing, as I hold they do, and the right is not conferred under the copyright statute upon the owner of the copyright to restrict the price of the copyrighted article in the hands of his vendee, to whom he has sold and parted with the possession of the article copyrighted, then it is difficult to comprehend how the right given to the patentee under the phrase, "exclusive right to vend," could be held to confer the right upon the patentee to restrict the price of the patented article in the hands of the defendant, except it be by contract or agreement, of which there was neither in this case. At any rate, in the exercise of what I am pleased to term a sound discretion, I am constrained to decline the application for an injunction pending the preparation and trial of the case upon its merits.

An order to that effect will be entered, and dissolving the restraining order heretofore granted.

SAWYER-SMITH CO. v. JOHN DITTMAR & SONS et al.

(District Court, D. Maryland. April 15, 1913.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BOWLING PIN.

The Sawyer patent, No. 1,030,834, for a bowling pin having a ring of indurated fiber set in a groove in the bottom to prevent splitting or chipping, was not anticipated and discloses patentable invention; also held infringed.

In Equity. Suit by the Sawyer-Smith Company against John Dittmar & Sons, John Dittmar, John Dittmar, Jr., and William Dittmar. On final hearing. Decree for complainant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A. V. Cushman, of Washington, D. C., and Mann & Co., of Baltimore, Md., for complainant.

Charles Lee Merriken, Charles B. Backman, and William M. Ballou, all of Baltimore, Md., for defendants.

ROSE, District Judge. The complainant is the owner of letters patent No. 1,030,834, issued June 25, 1912, to Edward H. Sawyer and others. Its purpose was to provide more durable pins for bowling alleys. From the rough usage which such pins necessarily receive, their wooden bases are liable speedily to break or chip to such an extent that they no longer will stand upright. The record shows that at least three other inventors had previously sought a remedy for the like evil:

On May 5, 1900, letters patent 649,745 were issued to one Niemeyer. He proposed to undercut the lower extremity of the pin and to spring an elastic base around the projection thus formed.

Scharkopsky, in letters patent 682,498, issued September 10, 1901, thought he had solved the problem by providing a metal ring, which was embodied in, and projected from, the bottom of the pin.

On March 3, 1903, letters patent 721,976 were granted to Stevens. He described a bowling pin with a ring of resilient material around its base. The lower surface of this ring was flush with that of the base of the pin.

According to the recitals of the patent in suit, and to some of the testimony offered at the hearing, none of these devices were altogether satisfactory. The projecting metal base of Scharkopsky damaged the balls, the alley, and the other pins. The rubber bases or rings of Niemeyer and Stevens were themselves quickly cut or broken. These devices had one feature in common. In all of them the base of the pin was in whole or in part formed of a different material from that of which the body was composed. In this respect Sawyer followed in the footsteps of his predecessors. In some other matters he takes his own course. Partly by substituting a ring of indurated fiber for one of metal, principally by making the under surface of such ring flush with the base of the pin and by leaving an outer circle of wood around the inner ring or fiber, he greatly lessens the danger of damaging balls, alleys, and other pins. By using for his reinforcing material a substance which will not readily break, he escapes some of the disadvantages of the Niemeyer and Stevens devices.

His scheme, as shown and described in his drawings and specifications, consists in so setting a ring of indurated fiber in an annular groove or channel cut in the base of the pin that the bottom surface of this ring will be flush with that of the pin, and in giving this ring an outer circumference, which will be very nearly as great as that of the base of the pin itself. In other words, it is part of complainant's design that the outer ring of wood encircling that of fiber shall be very narrow. The evidence shows that pins made in accordance with complainant's device have gone into fairly extensive use, and

that they command at least twice the price which is paid for ordinary pins.

The defendants have been for many years engaged in the business of making bowling pins. The plaintiff, about the time the patent was applied for, employed the defendants to make pins for it according to the patented design. Defendants did so. From the delivery tickets put in evidence it appears that defendants, upon plaintiff's order, manufactured for the latter at least 450 sets of the patented pins and were paid their price for so doing. In the spring of 1912 the plaintiff learned that the defendants had on their own account begun the manufacture and sale of the pins which in its judgment infringe its patent. Business relations were ended. Shortly after the issue of the patent the bill in this case was filed.

The plaintiff's pin as actually made and used appears to be in strict accordance with the drawings and specifications of the patent. The defendants' pin is said to differ from it in two respects. In both there is a cavity at the center of the base of the pin. Bowling pins are now usually so made. Plaintiff in its pin leaves a portion of the wooden base surrounding this cavity. Defendants do not. In their pin the ring of indurated fiber comes up to the hollow space.

The third claim of the complainant's patent reads as follows:

A bowling pin having a body with a circumferential side wall that curves downwardly and inwardly to the bottom, and the said body provided with a circular cavity formed entirely in the under side of the body and whose outermost edge together with the bottom edge of said circumferential wall forms a tapered ring-shaped edge, and a circular indurated filling fitted into said underside cavity—the bottom surface of said filling being flush with the bottom of said tapered ring-shaped edge.

Defendants' pins are provided with a circular cavity formed entirely in the under surface of the body of the pin. In this cavity is fitted a circular indurated filling; the lower surface of said filling being flush with the bottom of the ring-shaped edge of the base of the pin.

There is nothing in the prior art, as far as that is disclosed in this record, to suggest that it is material whether the ring of indurated filling goes to the central cavity or stops short of it. More stress is laid upon the other respect in which the two pins differ. Complainant's claim, as described in its patent, contemplates that the ring of indurated material shall come very close to the outer edge of the base. It is essential that there shall be a wooden ring around the indurated one. The indurated material must not present a sharp edge to balls or alley. That this ring should be thin was highly important. The more exposed, the greater liability to chipping. Moreover, if that which could chip formed only a trifling portion of the whole surface of the base, the stability of the pin was not appreciably affected. In plaintiff's pin this outer ring of wood is very narrow. In defendants' it is apparently two or three times as wide. Compared, however, with the entire surface of the base, it is quite narrow. It may be that the defendants' construction is not as perfect an embodiment of the invention described in the patent in suit as it would have been if the outer wooden ring was of less width. Infringement is not thereby avoided.

At the hearing I had some doubt as to whether what the patent disclosed amounted to invention. From this record it appears that for more than a decade inventors had been unsuccessfully seeking a solution of the problem to which Sawyer addressed himself. He solved it. He succeeded, when others had failed, not merely by using different material from that which they had employed, but by using new material in such a different position or relation to the wooden portion of the pin as to secure, to some extent, at least, a different method of operation. What he accomplished, perhaps, did not require the exercise of a grade of inventive genius much above the lowest, but it did call for that. Ordinary mechanical skill would not have sufficed. Defendants have been in the business of making bowling pins for more than 30 years. For a considerable portion of that time there was a demand for a pin which had the properties the witnesses say plaintiff's has. Defendants were not able to furnish such a pin until plaintiff showed them how it could be done. They knew the plaintiff had applied for the patent. By its direction they had stamped a notice to that effect on every one of the 4,000 or 5,000 pins which they had made for it. Nevertheless, they apparently found that plaintiff's pin was so much better than anything which they had the right to make for themselves that they could not resist the temptation to imitate it.

A decree for an injunction and accounting will issue.

KANSAS CITY SOUTHERN RY. CO. v. UNITED STATES (INTER-
STATE COMMERCE COMMISSION, Intervener).

(Commerce Court, April 21, 1913.)

No. 56.

1. COMMERCE (§ 91*)—INTERSTATE COMMERCE COMMISSION—ORDERS—AC-
COUNTING.

Orders made by the Interstate Commerce Commission with reference to railroad accounting, as authorized by Interstate Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), cannot be set aside by the courts, unless they constitute an unlawful interference with railroad property rights.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 143; Dec. Dig. § 91.*]

2. COMMERCE (§ 85*)—ORDERS OF COMMISSION—ACCOUNTING—ABANDONED
PROPERTY.

An order of the Interstate Commerce Commission, classifying expenditures or improvements where parts of a railroad or shop are abandoned and replaced, requiring the cost or estimated replacement value of the abandoned property, less salvage, to be deducted from the cost of the new work, and the balance only charged to the property account, and the cost or value, less salvage, of the abandoned property charged to operating expenses, was not objectionable as an arbitrary exercise of power by the Commission.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

3. CONSTITUTIONAL LAW (§ 297*)—DUE PROCESS OF LAW.

Such orders do not deprive the railroad company of any property or property rights, and are therefore not invalid as a deprivation of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 832-834; Dec. Dig. § 297.*]

Petition by the Kansas City Southern Railway Company to vacate certain accounting orders entered by the Interstate Commerce Commission, in which the Commission intervened. Petition dismissed.

Samuel Untermeyer and Arthur M. Wickwire, both of New York City (Samuel W. Moore, of Kansas City, Mo., on the brief), for petitioner.

Winfred T. Denison, Asst. Atty. Gen., and Blackburn Esterline, of Washington, D. C. (Thurlow M. Gordon, Sp. Asst. Atty. Gen., on the brief), for the United States.

Charles W. Needham, of Washington, D. C., for Interstate Commerce Commission.

Before KNAPP, Presiding Judge, and HUNT, CARLAND, and MACK, Judges.

CARLAND, Judge. By orders of the Interstate Commerce Commission made June 3, 1907, June 1, 1908, June 21, 1909, and May 31, 1910, there was established and promulgated a uniform system of accounts for steam railroads, and a classification of expenditures for additions and betterments. These orders and classifications provide

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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that in classifying expenditures for improvements properly chargeable to additions and betterments, where parts of a railroad or a shop are abandoned and replaced by a new railroad or shop upon a new right of way or site, but serving the same territory, traffic, or purpose, the cost or estimated replacement value of the abandoned property, less salvage, shall be deducted from the cost of the new work, and the balance only charged to the property account, and that the cost or value, less salvage, of the abandoned property shall be charged to operating expenses, provided that, if the amount of the charge to operating expenses warrants a distribution of the loss over a series of years in the future, the total amount may be charged into an account designated "Property Abandoned Account" during a term of years previously approved by the Commission.

Petitioner prays that the orders and classifications above mentioned be annulled, in so far as the particular provision above specified is concerned, for the reason that the classification of expenditures for additions and betterments is unreasonable and beyond the power of the Commission, and because the enforcement thereof will deprive petitioner of its property without due process of law. Petitioner bases its right to complain of said orders and classification upon the following facts:

Petitioner is the owner of a railroad, which it maintains and operates, extending from Kansas City, Mo., to Port Arthur, Tex. The road was originally constructed with a ruling maximum grade of 1 per cent., though in the mountain district it ran as high as 1.35 per cent. It was a properly located, well-constructed road, and ample for the needs of the country through which it ran. In the course of time, with the great development of the country and the resultant increase in traffic which approached the limit of the road's capacity, the conditions warranted and rendered highly desirable such additions or improvements as would enlarge the road's capacity and permit traffic to be moved more rapidly and economically.

Two methods of increasing the capacity of the road were possible—one by double-tracking the road; the other by lowering the grades and permitting traffic to be moved more cheaply. The road is in active competition with powerful rivals in the same general territory, among which are the Southern Pacific, the Missouri, Kansas & Texas, the Missouri Pacific, the St. Louis Southwestern, the Texas & Pacific, the St. Louis & San Francisco, the Atchison, Topeka & Santa Fé, and the Rock Island. The character of the road as a trunk line having a long average haul and the prevalence of low-grade traffic—timber, coal, oil, and like commodities—entailed a low average freight rate. Under these conditions the management decided that the most desirable plan was to lower the grades of the road and thus increase its capacity, promote economy, and render better service to the public. Two methods of reducing the grades at various points along the line were presented; one by raising or lowering the roadbed on the existing right of way, the other by the construction of short sections of new road in substitution for portions of the old road in instances where the desired result could be thus obtained at less cost.

Petitioner determined to revise its grade to a maximum of 0.5 of 1 per cent. at six different points or portions of its line by the construction of short sections of new road and the abandonment of road thus replaced. It was found that the cost of securing the desired gradient upon the original roadbed would be \$1,230,318.99, but that the same result could be obtained by means of relocations for a net expenditure of \$629,399.74. The actual expenditure on the six new locations, as ascertained on completion of the work and after the filing of the petition in this case, was \$763,798. But this in no wise affects the proportion of expenditure between relocations and grade reduction upon the original roadbed. In order to meet the necessary expenditure caused by the reduction of grade, and other improvements, in the manner determined upon, petitioner duly issued and sold \$10,000,000 of bonds, dated July 1, 1909, secured by its refunding and improvement mortgage of the same date.

Using the figures appearing in the petition for illustration, we have, as the cost of the grade reduction by relocations, \$629,399.74. The estimated cost of replacing the discontinued portions of the road is \$482,953. The salvage amounted to \$96,469, the difference being \$386,484. The orders and classification of the Commission complained of require that this sum of \$386,484 must be deducted from the total cost, leaving a net amount of only \$242,915.74 chargeable to additions and betterments, the said sum of \$386,484 to be charged to the current expenses of operation.

As a second ground upon which petitioner claims to have a right to attack the orders in question the following facts appear: Petitioner owns a shop and terminal plant at Shreveport, La. The shop, with its equipment, is not worn out or obsolete, and is capable with ordinary running repairs of performing for an indefinite term the functions for which it was originally constructed. Petitioner has determined as an integral part of an extensive program of interrelated improvements to construct, and is now engaged in constructing, a new and enlarged shop and terminal plant at Shreveport on a new and different location from that of the shop and terminal plant now existing, which last-mentioned shop and terminal plant are incidentally to be abandoned. The value of the Shreveport shop and terminal plant so to be abandoned is approximately \$100,000. The orders and classification complained of require that the estimated replacement value, less salvage, of said shop and terminal plant now existing, shall be charged to petitioner's operating expense account in monthly installments distributed over a period of time to be designated by the Commission, whereas petitioner insists that it has the right to charge the value of the shop and terminal plant when abandoned, less salvage, against its accumulated surplus, as represented in its profit and loss account.

It is evident that the object which the Commission had in view in making the classification of expenditures for additions and betterments was to cause the property account of any railroad to show only the property it had in use, and to eliminate therefrom all property which had been abandoned. It is also evident that the underlying basis for

the contention of petitioner is that it desires to retain in its property account the replacement value, less salvage, of the pieces of road abandoned. It sufficiently appears in the record that what are known as the strong roads financially do not object to the classification of the Commission, for they are quite willing to charge the replacement cost of property abandoned against current operating expenses, as they have the right to earn operating expenses without question. On the other hand, roads that are less strong financially, among which petitioner classes itself, desire to keep the property account as large as possible, because it is a material asset upon which to maintain credit.

[1] In order to clear the case of matters which might lead to confusion, it is proper to say that as to mere bookkeeping this court has no power or authority to interfere with the orders of the Interstate Commerce Commission, and bookkeeping includes all matters relating to the manner or form in which an entry shall be made. In order that this court may interfere, a classification prescribed by the Commission must be such as unlawfully interferes with petitioner's property rights. As to the power of Congress to vest in the Commission, in the manner set forth in section 20 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), authority to establish a uniform system of accounts, and to require annual reports with a uniform balance sheet, and to determine the classification and form of such accounts, we have no doubt. The decisions of the Supreme Court have settled this proposition beyond controversy. *St. Louis, I. M. & S. Ry. v. Taylor*, 210 U. S. 287, 28 Sup. Ct. 616, 52 L. Ed. 1061; *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; *The Daniel Ball*, 77 U. S. 557, 19 L. Ed. 999; *Employers' Liability Cases*, 207 U. S. 497, 28 Sup. Ct. 141, 52 L. Ed. 297; *United States v. Goodrich Transit Co.*, 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729.

The real questions for decision are clearly stated in the brief of counsel for the Commission, as follows: (1) Did the Commission act in an unreasonable and arbitrary way in requiring the carriers, when making improvements and betterments chargeable to property account, to deduct from the cost of these improvements and charge to operating expense account the value or estimated value, less salvage, of the property abandoned? (2) Is the requirement that the value or estimated value, less salvage, of abandoned property be charged to the operating expense account a violation of any right guaranteed to the petitioner by the Constitution of the United States?

[2] The orders in controversy were made in pursuance of the command of the statute. The complaint of the petitioner that the orders are an arbitrary exercise of power by the Commission does not relate to the manner of its procedure, but relates to the inherent effect which the orders and classification may have upon petitioner's property rights. The Commission, in making the orders complained of, was establishing a uniform system of accounts and classification for all railroads subject to the provisions of the act. It was impossible to establish separate systems for each railroad, if the system for all of them was to be uniform; hence it is not surprising that the system

of accounts established does not operate upon all roads alike. The object which the Commission had in mind, however, was the same in all cases. The charge that the making of the orders was an arbitrary exercise of power is based upon the claim that upon no theory of correct accounting can the Commission require petitioner to deduct from the cost of additions and betterments the value or estimated value, less salvage, of property abandoned, and to charge the value or estimated value, less salvage, of the property abandoned to operating expenses.

We are not at liberty to invalidate the orders of the Commission on this ground, for there is abundant evidence in the record that the method required by the orders of the commission is a correct and proper one. The testimony is conflicting, but Messrs. Farrington, Bailey, and Adams, gentlemen of high repute in the profession of accounting, testified unqualifiedly that the method adopted by the Commission was a correct and proper one. In addition to this expert testimony is the authority of Mr. Robert H. Montgomery, author of the work *Auditing—Theory and Practice*, page 319; also Whitten on *Valuation of Public Service Corporations*, c. 19, § 450 et seq.

[3] Do the orders complained of deprive petitioner of its property without due process of law? To compel petitioner, for the purpose of regulation by the Interstate Commerce Commission, to charge out of its property account property abandoned in improvements for additions and betterments, certainly does not deprive it of any property. Property abandoned ought not to appear in any account, unless in an abandoned property account. Petitioner insists, however, that in the case under consideration there is no abandonment of property. It appears to us like abandonment, and we think it so appeared when counsel for petitioner framed the paragraph of the petition, which reads:

"The said six sections of your petitioner's line were well located at the time the road was constructed, and were, *at the time of the abandonment thereof*, reasonably well adapted to the needs of your petitioner."

We further think that the effect of charging the replacement value or cost of abandoned property, less salvage, in connection with additions and betterments, in the operating expense account, is overestimated. We, of course, cannot pass upon the wisdom of the requirement complained of. Whether or not the matter might have been handled through the profit and loss account with better results is not for us to decide. If the requirement does not affect the property rights of petitioner, this court can afford no relief. The charge in the operating expense account is accompanied by the explanatory statement: "Property abandoned because of additions and betterments." It does not pretend to be an expenditure of money, and therefore might properly be found in some other account; but its entry in the operating expense account deprives petitioner of no property, and if the effect of the entry will be to reduce the net revenue from which dividends are to be paid, still the preferred stockholders cannot complain, as, the re-

duction being lawful, they receive as much as they are lawfully entitled to receive.

The improvements which caused the abandonment were made with money derived from the sale of bonds, and as the improvements were in fact thus made the mortgage bondholders have no reason to complain, and no person, with the proper explanatory notes in connection with the entries required to be made, would be in any way deceived. In view of the foregoing, we are clearly of the opinion that with such statements upon the records of the corporation, in connection with the entry required by the orders of the Commission as petitioner has the right to make, it will not be deprived of any property or illegally injured in any way.

In regard to the provision contained in the "Classification of Expenditures for Additions and Betterments," which allows a distribution of the loss over a series of years in the future, the total amount to be charged into an account designated "Property Abandoned Account," with the approval of the Commission, we must assume that the Commission would grant such privilege in any case where it was reasonable to do so. We cannot, in advance of any application by petitioner for this privilege, assume that it would be denied.

Following the course of the discussion at bar, principal attention has been given to the matter of grade reduction; but what we have said is intended to apply as well to the matter of the shop and terminal plant at Shreveport.

At the time the testimony in this case was taken before a judge of this court, certain letters written to the Commission, approving the manner in which the Commission by its orders has required the cost of abandoned property, less salvage, to be entered, as hereinbefore stated, were offered in evidence by counsel for the United States, and the same were excluded as hearsay. The same matter has been again presented to this court, and after due consideration we are of the opinion that the letters were properly excluded. Counsel for the United States claim that the letters were admissible for the purpose of showing that the Commission did not act arbitrarily. As we have before stated in this opinion, there is no claim in this case that the procedure in connection with the making of the orders complained of was irregular or arbitrary, but that the inherent effect of the orders themselves demonstrated that the orders were an arbitrary exercise of power. The orders were made pursuant to the command of the statute. The Commission could have made them without consulting any one, and the fact that the Commission received such letters as were offered in evidence was immaterial, and the letters themselves, if material, were mere hearsay.

It is claimed that the orders and classifications complained of are arbitrary, for the reason that, if the grade reductions had been made on the original right of way, no deduction from capital account of property abandoned would have been required, and that there is no reason for making any distinction between the two methods of grade reduction. We do not think petitioner is in a position to urge this conten-

tion, as it voluntarily adopted the method of relocation for grade improvements, and it is with reference to that method that the orders and classifications must be tested. In other words, if they are valid as to grade reductions made by relocations, they may not be avoided because of their effect on other methods of grade reduction not followed by petitioner.

The petition will be dismissed; and it is so ordered.

ATCHISON, T. & S. F. RY. CO. et al. v. UNITED STATES (INTERSTATE COMMERCE COMMISSION, et al., Interveners).

(Commerce Court. March 31, 1913.)

No. 41.

COMMERCE (§ 85*)—POWERS OF INTERSTATE COMMERCE COMMISSION—REGULATION OF PRACTICES—PRE-COOLING AND PRE-ICING CITRUS FRUITS.

A practice was adopted by shippers of citrus fruits from Southern California, at the suggestion of the Department of Agriculture, of pre-cooling and pre-icing, by packing the fruit in a cooled warehouse, where it remained until thoroughly cooled and was then transferred through an inclosed way to the car, the bunkers of which were filled with large blocks of ice and all openings sealed before it was delivered to the railroad company for transportation. It was found that the fruit could be so transported to Eastern points without re-icing, where it arrived in better condition than under standard refrigeration furnished by the railroad companies and at a large saving in cost. *Held*, that an order of the Interstate Commerce Commission requiring the railroad companies to maintain in force a regulation permitting shippers to exercise the privilege of so pre-cooling and pre-icing shipments, including the filling of the car bunkers with ice, until the carriers should offer a substitute therefor which was fairly its equivalent in cost and efficiency, was an administrative order relating to a practice affecting rates, which was within the power and jurisdiction of the Commission, and not reviewable by the courts.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

Petition by the Atchison, Topeka & Santa Fé Railway Company, the Southern Pacific Company, and the San Pedro, Los Angeles & Salt Lake Railroad Company against the United States of America, in which the Interstate Commerce Commission, the Arlington Heights Fruit Company and others, intervene. On final hearing. Petition dismissed.

For opinion of Interstate Commerce Commission see 20 Interst. Com. Com'n R. 106, and 23 Interst. Com. Com'n R. 267.

T. J. Norton and H. A. Scandrett, both of Chicago, Ill. (Robert Dunlap, of Chicago, Ill., C. W. Durbrow, of San Francisco, Cal., and Gardner Lathrop, of Chicago, Ill., on the brief), for petitioners.

Blackburn Esterline, Sp. Asst. Atty. Gen., of Washington, D. C., for the United States.

P. J. Farrell, of Washington, D. C., for Interstate Commerce Commission.

William E. Lamb, of Chicago, Ill. (Asa F. Call, of Los Angeles, Cal., on the brief), for intervening shippers.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before KNAPP, Presiding Judge, and HUNT, CARLAND, and MACK, Associate Judges.

CARLAND, Judge. The questions to be decided in this case arise in this way: The petitioners, as well as other carriers, parties to the orders of the Interstate Commerce Commission hereinafter referred to, are and have been engaged in transporting from points in Southern California to various points in the United States citrus fruits in car load lots under refrigeration as well as under ventilation. At certain times of the year refrigeration is necessary to protect such shipments. Under standard refrigeration the oranges are loaded into a refrigerator car before either the fruit or the car has been artificially cooled; the boxes being so packed as to allow a free circulation of air between and around them. After being loaded, the car is taken to some gathering point, usually San Bernardino, upon the line of the Santa Fé and Colton upon the line of the Southern Pacific, when the shipments originate in Southern California, and the bunkers are there filled with ice. As the car journeys eastward, the bunkers are opened from time to time and replenished with additional ice.

The charges for refrigeration from California points in case of oranges and lemons are, per standard car, to the Missouri river, \$60; to Chicago and similar points \$62.50; to Buffalo and Pittsburgh, \$72.50; to New York, \$75; and to Boston, \$77.50. The Interstate Commerce Commission found that the cost of refrigeration to Chicago over the Santa Fé was \$55 per car, and itemized said cost as follows: Cost of ice, \$30; cost of repairs to bunkers, \$5; hauling of ice, \$20—and upon complaint in Arlington Heights Fruit Exchange et al. v. Southern Pacific Company et al., 20 Interst. Com. Com'n R. 106, found the charges for the transportation of oranges and lemons from California points under standard refrigeration to the points hereinbefore mentioned were reasonable.

On or about July 5, 1909, petitioners amended their refrigeration rules so as to provide as follows:

"On all car loads of citrus fruit pre-cooled and pre-iced, or pre-iced by shipper, offered for shipment with instructions 'Do not re-ice en route,' a charge of \$30 per car of 32,000 pounds or less will be made, excess weight to be charged for at 9.375 cents per 100 pounds. On all cars handled under this rule, shipper will sign the following release, which must in all cases appear on shipping ticket and bill of lading and be copied on waybill by agent: 'The giving and acceptance of these special instructions from the shipper releases the initial carrier and its connections from all liability for damages caused by nonicing in transit or at destination.' In event any such car is re-iced in transit, the above charge of \$30 will be canceled and the regular refrigeration rate applicable from San Bernardino or Los Angeles, Cal., to final destination, as shown in this tariff, will apply and must be added to the waybill for collection in the usual manner."

We take from the report of the Commission in the case above cited the following description of pre-cooling and pre-icing, referred to in the above amended rule:

"The system of refrigeration known as pre-cooling, which is essentially different from the standard refrigeration just considered, grew out of experiments conducted by the United States Department of Agriculture into the

handling of oranges. Those researches demonstrated that decay in oranges was due mainly to mechanical injury in the handling, and that if this could be avoided refrigeration was not necessary to prevent decay, but only to preserve the appearance of the fruit. While the greatest care is now exercised in the handling of the orange from the tree to the car, abrasions of the skin cannot be entirely avoided, and the experiments above referred to further demonstrated that in case of such injury the result was minimized by cooling the fruit at the earliest possible moment and maintaining thereafter a low temperature. It was more difficult to arrest and control the process of decay when it had once fairly set in than it was to check it at its inception. Pre-cooling grew out of these investigations of Prof. Powell and was tried by him in the course of his experiments. In actual practice it takes two forms, which may be termed pre-cooling by the shipper and pre-cooling by the railroad. These two methods are essentially different, and must be understood in order to intelligently appreciate the question presented.

"In pre-cooling by the shipper the basic idea is to bring the fruit under the influence of a low temperature at the earliest possible moment. The oranges are brought from the tree to the packing house and packed in a box which is immediately deposited in a cold room. Here the process of extracting the heat from the orange at once begins and gradually continues until at the end of from 24 to 48 hours all parts of the fruit in all parts of the box have been reduced to a uniform temperature of from 33° to 35° F. The box remains in this cold room at this temperature until it is to be loaded. The car is then connected with the room by a collapsible passageway, and the oranges are taken directly from the cold storage to the car, where they are placed, not with air spaces between, as in case of ordinary refrigeration or ventilation, but close together. The bunkers of the car are filled with large blocks of ice especially intended for that purpose, and the bunkers and vents are now sealed up so as to make the car as nearly air-tight as possible. All this is done by the packer at the packing house, and the car is now delivered to the railroad with instructions to transport to destination without re-icing and without breaking the seals.

"The cost of pre-cooling and pre-icing a car in this manner, including interest on the investment and depreciation of the plant, is from \$30 to \$35; a fair average being, perhaps, \$32.50."

On January 14, 1911, the Commission found that a charge of \$30 per car as provided in the above amended refrigeration rule, when the citrus fruit was pre-cooled and pre-iced by the shipper, was excessive and unreasonable, and ordered said charge to be reduced to \$7.50 per car, and that no more than said last-named amount should be charged for a period of two years from April 15, 1911. Whereupon petitioners, on May 4, 1911, filed their original petition in this court to annul said order reducing the charge of \$30 on pre-cooled and pre-iced citrus fruit. The case subsequently came on before this court on motion for a preliminary injunction, and the motion was denied; this court being of the opinion that the order of the Commission did not compel the carriers to permit shippers to pre-cool and pre-ice their fruit, and that the charge of \$7.50 prescribed by the Commission was not unreasonable. Whereupon the Atchison, Topeka & Santa Fé Railway Company, the Southern Pacific Company, and the San Pedro, Los Angeles & Salt Lake Railroad Company filed with the Commission amendments to their tariffs, whereby what the carriers denominated the privilege of permitting the shippers of citrus fruit to pre-cool and pre-ice carload shipments was withdrawn; the carriers asserting in said amended tariffs that they had the exclusive right and control of furnishing and doing all icing and refrigeration of citrus fruits in all

cases where shippers did not specifically request or instruct shipments to move solely under ventilation.

Before said amendments became effective, however, the Commission entered orders from time to time suspending the operation and effect of said amendments, and a hearing upon said suspensions having been had, the Commission, on April 8, 1912 (23 Interst. Com. Com'n R. 267), held that the amendments to petitioners' tariffs purporting to withdraw the right and privilege of pre-cooling and pre-icing from the shipper were illegal and invalid, and ordered the petitioners to cancel said tariffs and supplements on or before May 20, 1912, and further ordered petitioners to continue in effect and maintain in force for a period of two years from April 8, 1912, a charge for pre-cooling and pre-icing oranges transported in carloads from shipping and producing points in Southern California to points in other states in the United States as designated in said above-mentioned tariffs, which should not exceed \$7.50 per car. Whereupon, on June 4, 1912, petitioners filed an amended and supplemental petition, which is the one now being heard, wherein this court is asked to annul and set aside the orders of January 14, 1911, and April 8, 1912, so far as they compel petitioners to permit shippers of citrus fruit to pre-cool and pre-ice their shipments, and in so far as they reduce the charge from \$30 per car to \$7.50 per car.

Criticism is made of the use of the words "pre-cooling" and "pre-icing" in the report and orders of the Commission complained of. We think the confusion, if any, of the different terms is fully explained when we appreciate the fact that the Commission treated and held that the pre-cooling and pre-icing of citrus fruit for shipment, by the shippers, was all one act—that is, that pre-cooling and pre-icing was in fact a pre-cooling of the shipment—and when the Commission speaks of the charge for pre-cooling oranges it is to be understood that the word "pre-cooling" includes the act of pre-cooling as well as pre-icing. In order to free the case of undisputed questions, we quote from the brief of counsel for petitioners as follows:

"The carriers never claimed that the shippers have not a right to pre-cool their fruit in their own warehouses. They have all along admitted that the shipper may do as he pleases with his fruit before offering it to the carrier for transportation, save only that it be tendered to the carrier in a condition not inherently unfit. So, also, the carriers have always admitted that a shipper may pre-ice a shipment so long as he does it in his own package, as where he ices a box of fish or a keg of oysters, in which case the rate of transportation covers the entire package, including the ice as freight. But the carriers deny that the shipper has any right in law to ice or refrigerate the cars of the carriers, and thus take out of the hands of the carriers a part of the transportation service which the first section of the interstate commerce law requires them to provide; the 'refrigeration or icing' being specifically named in the law as included within the 'transportation' which the carrier is required to furnish."

Along the same line we may say that, if the orders of the Commission do give rise to discriminations between shippers, that is a matter concerning which petitioners may not complain. *I. C. C. v. C., R. I. & P. Ry.*, 218 U. S. 88, 30 Sup. Ct. 651, 54 L. Ed. 946. We also have no doubt but that the withdrawal of the right to pre-cool and

pre-ice upon payment of \$30 per car was a new practice which affected the rate upon citrus fruits, and that the Commission had full authority under section 15 to make the orders suspending such practice. We think it also clearly appears from the record that, under the pre-cooling and pre-icing rate established by the Commission, the carrier gets a greater revenue per car than under standard refrigeration, and also a greater revenue per ton of ice and load than under the standard refrigeration rate. The Commission found that in the case of a pre-cooled and pre-iced shipment the average weight of ice carried from point of origin to destination was approximately 5,000 pounds; that under standard refrigeration the average weight of ice carried in the bunkers was approximately 8,000 pounds. This would make the gross weight of the pre-cooled and pre-iced shipment, including ice and load, 38,000 pounds; while the gross weight of the refrigerated shipment, including ice and load, is about 35,200 pounds. For transporting the former weight, the carrier, under the Commission's order, gets \$387; for transporting the latter, under standard refrigeration rates, it gets \$345.30. These figures are based with reference to shipments from California to Chicago, and upon the fact that a car under standard refrigeration will carry about 27,200 pounds of revenue-paying load, while a car of pre-cooled and pre-iced fruit will load approximately 33,000 pounds. This difference is caused by the fact that, where the fruit is pre-cooled and pre-iced, the boxes of fruit are placed close together in the car, whereas in shipments under standard refrigeration it is necessary that the boxes be not placed close together. In view of the foregoing, we do not think that the petitioners have any valid complaint to make of the charge of \$7.50 per car established by the Commission.

The case is thus narrowed down to a single question, namely: Have the shippers who desire to pre-cool their own fruit, which it is conceded they have the right to do, the right to place ice in the bunkers of the car for the purpose of making their pre-cooling effective and of preserving the fruit pre-cooled until it reaches its destination? or is the placing of the ice in the bunkers, where the fruit is pre-cooled by the shipper, a transportation service which the carrier has the right to perform to the exclusion of the shipper?

The claim of petitioners that the placing of ice in the cars by shippers of pre-cooled fruit is a transportation service is based upon the language of section 1 of the act to regulate commerce, which reads as follows:

"'Transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

It must be observed that the language used with reference to icing is, "Icing * * * of property transported." It is important, therefore, that we consider the findings of the Commission with reference to the pre-cooling of fruit as practiced by the shipper and the exact conclusions reached by it as a result of such findings. In the report

made in connection with the order of January 14, 1911, the Commission found as follows:

"It was suggested upon the argument that, inasmuch as these bunkers were filled with ice in case of pre-cooled shipments as well as in standard refrigeration, the carrier had the right to insist upon furnishing the ice, even though the grower might pre-cool his fruit. A moment's consideration will show that this contention is without merit, and would, if sustained, be without benefit to the carrier. The ice with which these bunkers are filled is not manufactured by the railroad at the point where it is used. It would be necessary to fill the bunkers with ice at San Bernardino or Colton and move the car when iced to the packing house. By the time it reached there the ice would have been partially exhausted, and this would render it necessary to open and refill the bunkers. This service should be performed in the most economical manner, and it is evident that the ice can be best supplied by the same parties who load the car and prepare it for shipment. The filling of the bunkers with ice is a part of the preparation of the car for shipment, and is not a part of the transportation service which is rendered by the railroads. It should also be noted that great importance is attached to the filling of the bunker completely and with large cakes of ice which will melt slowly.

"To allow the carrier to fill these bunkers would be a source of no profit to it, and would introduce an element of discord into the transaction. If the car arrived in bad condition, the shipper would be apt to say that the bunkers had not been properly re-iced or that the car had not been properly sealed. That uncertainty is removed where the shipper makes the car ready for transportation and the service rendered by the carrier is purely one of transportation. It seems clear that the carrier itself would prefer that this icing should be done by the shipper rather than attempt to do it at anything like what would be the actual cost to the shipper plus a reasonable profit to the carrier. * * * The matter, therefore, stands like this: The United States government has suggested, and these shippers, acting upon the suggestion, have perfected, a system of handling these oranges by which they can be carried during all heated months to destination at an expense of \$32.50 per car, approximately. The carriers offer an alternative system at a charge of \$62.50, or probably slightly more on the average, and this charge for that service has been found to be reasonable. May the carrier insist that the shipper shall pay this higher charge, or has the shipper the right to avail himself of the modern method?" 20 Interst. Com. Com'n R. 106.

In the report made in connection with the order of April 8, 1912, the Commission found as follows:

"But, while in our opinion the process of pre-cooling as above defined is not a transportation service, since it is performed by the shipper and cannot be performed by the carrier, it does nevertheless take the place of refrigeration, and if these defendants had provided and were prepared to furnish refrigeration which would answer the same purpose as pre-cooling at substantially the same price, then it might perhaps be held that the shipper should avail himself of the refrigeration which the carrier was prepared to furnish; but that situation is not here presented. This record shows that the cost to the shipper of refrigeration when furnished by the railroad in any one of the several forms offered is upon the average from \$30 to \$35 a car greater than the cost of pre-cooling. The complainants urge that they have the legal right to pre-cool and that this right cannot be denied them by this Commission. Without expressing any opinion upon that proposition, we are clear that until the carriers offer a substitute for pre-cooling which is fairly its equivalent in cost and in efficiency, it is the right of the shipper to avail himself of this privilege. As stated in our former opinion, the difference in expense applied to all the car loads of citrus fruits which are now refrigerated in transit would equal \$600,000 per year." 23 Interst. Com. Com'n R. 267.

The result of the whole matter is that the Commission found that the pre-cooling service performed by the shipper could not be performed by the petitioners for the reasons stated in the report, and that petitioners offer no substitute for such pre-cooling which is fairly equivalent in cost and in efficiency. The Commission expressed no opinion upon the absolute legal right of the shipper to pre-cool (including icing) his fruit, but decided only that, until petitioners offer a substitute for pre-cooling as practiced by the shipper which is fairly its equivalent in cost and in efficiency, it was the right of the shipper to avail himself of this privilege. We think this was an administrative ruling, clearly within the power and jurisdiction of the Commission, and with which this court may not interfere.

As it is conceded by counsel for the petitioners that the shippers have the right to pre-cool their fruit, with the exception of placing ice in the bunkers of the car in connection with such pre-cooling, and that it is not necessary to furnish any different car than the one provided for standard refrigeration or pre-cooling by the carrier, and that the ice placed in the car is furnished by the shipper prior to the time at which the car is delivered to the carrier for transportation, the matter of pre-cooling by the shippers becomes a practice which the Commission could condemn or indorse without interference by the courts.

The petition, therefore, will be dismissed, and it is so ordered.

THE HELEN.

(District Court, D. New Jersey. April 10, 1913.)

1. COLLISION (§ 61*)—TUG WITH TOWS AND OVERTAKING SCHOONER—NEGLIGENCE OF TUG.

A tug which, with a tow of seven barges on a hawser, the entire length being about 2,000 feet, in the daytime, stopped and directed the barges to lengthen their hawsers to double their former length when an overtaking schooner was approaching on a tack, heading almost directly toward the rear barge, and within a quarter of a mile, was solely in fault for a collision between the schooner and such barge, both for failure to exercise ordinary care under the circumstances, and for violation of article 21 of the Inland Rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), which required her to keep her course and speed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 78; Dec. Dig. § 61.*]

2. COLLISION (§ 59*)—OBSERVANCE OF RULES—TUGS WITH LONG TOWS.

Tows of 2,000 feet or more in length, when navigating frequented waters, are held to an extremely strict observance of all precautionary requirements to prevent collisions.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 72; Dec. Dig. § 59.*]

In Admiralty. Suit by Charles C. Sparks, as master of the barge Kathleen, against the tug Helen. On final hearing. Decree for libelant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Willard M. Harris, of Philadelphia, Pa., for libellant.
Howard M. Long, of Philadelphia, Pa., for respondent.

CROSS, District Judge. The libellant in this case seeks to recover damages which the barge Kathleen, owned by his wife, but of which he was master, received April 15, 1906, towards evening, in a collision with the schooner Mary E. Morse, in Hampton Roads, at or near Old Point Comfort, Va. The day was clear, and when the accident occurred it was still perfectly light. The tide was ebb, and running about two miles an hour, and the wind fresh, and blowing about eight miles an hour. The tug Helen had in tow the barge Kathleen, with six others, all heavily laden with lumber; the injured barge being the last of the tow. The tow was made up at Norfolk, Va., and was bound for Philadelphia. The barges, including the Kathleen, were without motive power. The Kathleen was under the care of the libellant and a boy about 16 years old. The tow as first made up, and as it remained until just prior to the accident, was about 2,000 feet in length. The Morse was a three-masted sailing vessel, just putting to sea, bound for Colon, Isthmus of Panama.

Before giving the particulars of the collision, it should be stated that the question of whether or not the schooner was responsible for the damage done the Kathleen on the occasion just mentioned was adjudicated by the United States District Court for the District of Massachusetts between the following parties and under the following circumstances: It appears that, shortly after the collision, Sparks, the libellant herein, employed counsel at Norfolk, Va., to whom he gave the facts pertaining thereto as he understood them; that they thereupon employed counsel in Boston, who filed a libel for damages in behalf of Sparks against the schooner Mary E. Morse. By the allegations of that libel, the fault and blame of the collision were wholly placed upon the schooner, and the tug Helen was impliedly exonerated. Upon final hearing, however, the libel against the schooner was dismissed, upon the ground, as given by Judge Dodge, that she was not at fault, but that the tug was. That case is reported in 179 Fed. 945.

The libellant's explanation of his reason for not proceeding against the tug in the first instance is in substance as follows: That he fully stated the facts concerning the collision to his counsel at Norfolk, and thereupon left it with them to proceed against whichever party they deemed liable; that he at no time, prior to the institution of his suit in the Massachusetts court, had any interview with their Boston correspondent, nor had he ever seen or read, or heard read, the libel therein, which was signed and verified by such correspondent as proctor, until it was shown him upon cross-examination during the taking of his testimony in this suit. This explanation of the matter by Capt. Sparks seems fair and reasonable, and leaves the libellant untrammelled to tell his story afresh, and that, too, without having it viewed from the very outset, as otherwise it might have been, with more or less of suspicion and prejudice.

The facts as they have been made to appear in the two cases are

substantially the same, notwithstanding they have not been testified to by identically the same witnesses; consequently the clear and carefully prepared opinion of Judge Dodge is of much service to this court, and all the more, perhaps, because in this case, as in that, the attempt has been made by the respondent for the time being to put the entire blame upon the party not represented in court.

[1] Returning, now, to the period just preceding the collision, it appears from the evidence that, when the middle of the tow was about three quarters of a mile below the Rip Raps, the tug signaled the bargemen to lengthen their hawsers. Before this signal was given the tow had passed the schooner *Morse*, which was then moving rather slowly in a light breeze on the starboard tack. Later, the wind having freshened, the schooner, then on the port tack, had overtaken the tow, and, with its course directed nearly towards the *Kathleen*, was within a quarter of a mile of that barge when the tug gave a signal to lengthen the hawsers, as above stated. The master of the tug admitted that the schooner was on the port tack, and headed as nearly as he could tell for the forward part of the stern barge (*Kathleen*), when he stopped his engine to permit the bargemen to lengthen their hawsers. The following questions and answers then appear upon his cross-examination:

"Q. How far away was the schooner at that time from the last barge? A. The schooner was overtaking us all the time. Q. Had she gotten nearer than a quarter of a mile to you? A. When we first slowed down she was about a quarter of a mile from the stern barge, and at the time of the collision she was right close to it. Q. At the time you stopped, I want you to give me the relative positions of the schooner with respect to your last barge? A. You mean at the time the tug was stopped? Q. Yes, sir. A. I should say she was maybe a little bit less than a quarter of a mile from us at the time. Q. She seemed to be gaining on you all of the time, did she? A. Yes, sir; she seemed to be getting a little bit nearer to us all of the time. Q. The wind was freshening, was it? A. Yes, sir; it was."

It elsewhere appears that at this time the schooner was going about twice as fast as the tug, so that this situation was presented: The schooner sailing, according to the evidence, at the rate of 4 or 5 miles an hour, and twice as fast as the tug with its tow 2,000 feet long; the schooner less than a quarter of a mile away, and constantly and with some rapidity drawing nearer to the tow, when the tug is suddenly stopped almost under the bow of the advancing schooner for the purpose of doubling the length of an already unusually long and unwieldy tow. The evidence shows that the schooner struck the *Kathleen* on her stern port quarter, and that, had the position of the barge been advanced at the time by only 20 or 30 feet, she would have escaped the blow. I agree with Judge Dodge that the master of the schooner had the right to assume that the tug and her tow would maintain their course and speed, which, as he had shown, they were required to do under article 21, which then controlled them.

The evidence furthermore shows that, at the time the collision happened, the wind was blowing from N. N. E.; that the tug was heading northwardly towards Thimble Light; that the tide, as above stated, was ebb; and that, as the tug slowed up to permit the barge-

men to lengthen their hawsers, the barges in the rear of the tow, under the influence of the wind and tide, naturally drifted southwardly, while the tug headed northward toward Thimble Light, whether stopped or, as the master at one time says, moving at half speed, held the barges nearest it somewhat firmly in position, and thus the tow was made to form a barrier across a considerable portion of the channel. Indeed, several witnesses say in substance, if not specifically in words, that the tug and tow obstructed the channel; that they formed an arch well across it, whereby the schooner's movements were cramped so that under the circumstances it was impossible to have maneuvered her otherwise than she was.

In view of the situation thus described, and of the testimony of the captain of the tug above quoted, I am not inclined to accept his testimony to the effect that the engine was not stopped at the time, but was only slowed down to one bell, or half speed, and that the hawsers were at all times kept taut; but, were the fact otherwise, he would still have been to blame for the collision in doubling the length of his already long tow when, as, and under the circumstances he did.

As stated above, article 21 controlled the tug and its tow at the time of the collision; but, even had that not been the case, and were there no such article in existence, it would still have been manifestly negligent for a tug, having in charge an unusually long and unwieldly tow, to stop suddenly almost in front of a schooner's bow, lengthen the hawsers throughout the tow, and thereby double, or more than double, its length. In the case at bar, it was plainly the duty of the master of the tug to have maintained his course and speed until the schooner had passed to the stern of the tow. Common prudence and article 21 both required this.

[2] As already noted, the tow was unusually long, so long, indeed, that when the hawsers were lengthened it was fully three quarters of a mile, and perhaps more, in length. As said by Judge Dodge:

"Tows of such length, when navigating frequented waters, are held to an extremely strict observance of all precautionary requirements"—citing *The Gertrude*, 118 Fed. 130, 55 C. C. A. 80; *The Admiral Schley*, 131 Fed. 433, 65 C. C. A. 417; *The Bee*, 138 Fed. 303, 70 C. C. A. 593; *The Gladys*, 144 Fed. 653, 75 C. C. A. 455.

To which may be added *The Plymouth*, 186 Fed. 108, 108 C. C. A. 217, of this circuit, with the cases therein cited.

Proctor for claimant insists that the fault was that of the schooner, which under article 24, as the overtaking vessel, which he claimed she was, was bound to keep out of the way of the overtaken vessel. But, if that were admitted, still the schooner would be blameless for colliding with a barge which so suddenly stopped in the schooner's course, and so near to its bow, that it was impossible to avoid it. Article 24 does not pretend to deal with such a situation.

A decree will accordingly be entered in favor of the libelant, with an order of reference to a commissioner to ascertain and report the amount of his damages.

UNITED STATES v. GENERAL INSPECTION & LOADING CO.

(District Court, D. New Jersey. March 15, 1913.)

INTERNAL REVENUE (§ 9*)—SPECIAL CORPORATION TAX—PENALTY FOR NON-PAYMENT—NOTICE.

Under Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), imposing a special excise tax on corporations, the notice of the assessment required to be given to the corporation by subdivision 5 may lawfully be given by mail, and a notice so sent by the collector in a franked envelope bearing a return card, addressed to the corporation at the place of its principal office, and not returned, was presumptively received, and the burden rests on the corporation to prove to the contrary, to avoid the penalty for nonpayment within the time prescribed.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

Action by the United States against the General Inspection & Loading Company. Trial to the court. Judgment for plaintiff.

For prior opinion, see 192 Fed. 223.

H. P. Lindabury, U. S. Dist. Atty., of Newark, N. J.

Edward Q. Keasbey, of Newark, N. J., for defendant.

CROSS, District Judge. This cause came before the court in the first instance on demurrers filed on behalf of the government to certain special pleas interposed by the defendant in addition to the general issue. The demurrers were sustained, and, no additional or amended pleas having been filed, the plea of the general issue alone remains. The case has been brought to trial before the court without a jury, a jury having been waived, upon a statement of facts agreed upon by the attorneys of the respective parties.

With the exception of one point, nothing need be added by the court at this time, to what was said in sustaining the demurrers. The additional point now raised is whether or not the penalties for nonpayment of the tax provided by the fifth subdivision of section 38 of the act in question can, under the facts, rightfully be imposed in this case. The subdivision referred to provides that:

"All assessments shall be made and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, * * * and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due."

The statement of facts, so far as it relates to the notices given to and demands made upon the defendant in respect of the taxes in question, is as follows:

"That the Commissioner of Internal Revenue, on May 11, 1910, made an assessment of \$1,731.75 against said defendant upon said return, being an

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 204 F.—42

assessment of 1 per cent. of the net income of \$173,174.66, as shown by said return, and on May 19, 1910, sent by mail a notice of such assessment and demand for payment thereof, addressed to the defendant at the place of the principal office of said defendant in Newark, N. J., at the time of dissolution, which said notice was received by the person who was at the time of its dissolution the agent in charge of the principal office of said defendant; that on the 30th day of June, 1910, a second notice of said assessment and demand for payment thereof, contained in a franked envelope addressed to the said defendant at the place of its principal office at the time of its dissolution in Newark, N. J., and bearing the return address of the said collector, was mailed in the post office at Newark, N. J., by the collector of internal revenue for the fifth district of New Jersey, which notice contained a statement that, unless payment of said tax so assessed should be made within 10 days thereafter, a penalty of 5 per cent. would attach, and interest at the rate of 1 per cent. per month from the expiration of said 10 days. The person who was the agent in charge of the principal office of said defendant at the time of its said dissolution has no record nor recollection of the receipt of this notice, and it has not been returned to the said collector by the Post Office Department."

The provision of the statute concerning the imposition of penalties for nonpayment of the tax is given above. The debatable question is whether the notice, as given by the collector on June 30, 1910, was an adequate and sufficient compliance with the law to warrant their exaction. The notice itself complied with the terms of the statute. It was, however, not served personally, but by mail, in a franked envelope addressed to the defendant at the place of its principal office at the time of its dissolution, which envelope bore thereon the return address of the collector. The envelope and contents were never returned to the collector by the Post Office Department, and the agent in charge of the principal office of the defendant, at the time of its dissolution, has no record or recollection of the receipt of said notice. The well-settled presumption is that the letter was received. *Rosenthal v. Walker*, 111 U. S. 185, 193, 4 Sup. Ct. 382, 28 L. Ed. 395. See, also, the large number of cases therein cited. The presumption thus arising is not overcome by anything appearing in the statement of facts. The receipt of the notice is not denied. That its receipt was not made a matter of record by the defendant's former agent, or that he had no recollection of its receipt, are insufficient to overcome the presumption, and particularly must this be so when, as in this case, the envelope bore a return notice to the collector, but was never returned.

Furthermore, the third paragraph of the eighth subdivision of section 38 of the act under which the tax was imposed is as follows:

"All laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section."

Section 3184 of the Revised Statutes (U. S. Comp. St. 1901, p. 2072), relating to the notice and demand pertinent to the collection of internal revenue taxes, permits notice to be given to the person liable therefor, by leaving the same at his dwelling or usual place of business, or by sending the same by mail. In the absence of any prescribed method of giving the notice now in question, this section is applicable.

Counsel for the defendant contends, however, that notice to the

statutory agent, in view of the fact that the corporation had previously been dissolved, was insufficient and nugatory. His position, however, rests upon a misconception of the facts. The notice was addressed to the *defendant at the place of its principal office* at the time of its dissolution. This was sufficient, particularly as there is an uncontradicted and consequently prevailing presumption that it was received. As neither the tax nor any part of it has been paid, judgment will be entered in favor of the plaintiff, and against the defendant, as follows:

Amount of tax.....	\$1,731.75
5 per cent. penalty.....	86.59
Interest from July 11, 1910, to March 11, 1912, 20 months, at 1 per. cent. per month.....	346.35
	<hr/> \$2,164.69

—besides costs of suit to be taxed.

PEACHY v. FRISCO GOLD MINES CO.

(District Court, D. Arizona. April 12, 1913.)

No. 87.

1. MINES AND MINERALS (§ 24*)—LOCATION—"ABANDONMENT."

The term "abandonment," as used in mining law, includes both the intention to abandon and the act by which the abandonment is carried into effect. There must be a concurrence of intention to abandon and actual relinquishment of the property, so that it may be appropriated by the next comer.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 60; Dec. Dig. § 24.*

For other definitions, see Words and Phrases, vol. 1, pp. 4-13; vol. 8, p. 7559.]

2. MINES AND MINERALS (§ 26*)—CLAIMS—ABANDONMENT—RELOCATION.

Plaintiff in ejectment to recover certain unpatented mining claims alleged that defendant's predecessors in 1907 conspired to do no work for that year and to relocate the claims as abandoned; that they agreed to abandon the same on December 31, 1907, and on January 1, 1908, relocated them, plaintiff claiming that after such abandonment defendant's predecessors were incompetent to lawfully relocate them. Defendant's answer alleged that its predecessors in title, in preparing the notices of relocation, had not been advised and did not know of a change in the state law by which it was no longer necessary in cases of relocation to state the land located was abandoned ground; that they, without any intention of abandoning the claims, inserted such statement in their notices, believing it to be necessary to make a valid relocation, and for no other reason, but they did not then or thereafter or ever abandon the claims or intend to abandon them or any part thereof; and that between January and March, 1908, they caused to be sunk on the ground embraced within the claims a shaft of specified dimensions which disclosed mineral-bearing rock, and that this was sufficient to save the claims for forfeiture for failure to perform the assessment work for 1907, as provided by Civ. Code Arizona 1901, par. 3241, as amended by Act March 12, 1907 (Laws 1907, c. 22), without reference to the question of abandonment. *Held*, that the declaration of abandonment inserted in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the notices of relocation, under the allegations in the answer, was insufficient to show as a matter of law that the claims had been in fact abandoned.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 61-63; Dec. Dig. § 26.*]

3. JUDGMENT (§ 949*)—CONCLUSIVENESS—BAR.

Where a former judgment is pleaded as a bar, it is essential that it be alleged, not only that the issues were the same, but it must also be alleged that the cause of action was the same; but, where a judgment is only pleaded as res judicata of certain issues previously determined, it is sufficient that the pleading allege that the issues were the same.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1794, 1795-1803; Dec. Dig. § 949.*]

4. JUDGMENT (§ 720*)—RES JUDICATA—ISSUES.

A fact or question which was actually and directly in issue in a former suit, and was there judicially passed on and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies, in the same or any other court of the same jurisdiction on the same or a different cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.*]

At Law. Ejectment by Fred S. Peachy against the Frisco Gold Mines Company. On motion by plaintiff for judgment on the pleadings, and in the event the motion is denied, then to strike out paragraph 13 of the defendant's answer, pleading a state court judgment in a case between plaintiff and defendant's predecessors in interest (Peachy v. Gaddis [Ariz.] 127 Pac. 139) as res judicata of certain issues raised in the present action. Motion denied.

William M. Seabury, of Phoenix, Ariz., for plaintiff.

E. S. Clark, of Prescott, Ariz., and Walter Bennett and Kibbey, Bennett & Bennett, all of Phoenix, Ariz., for defendant.

MORROW, Circuit Judge. The action is in ejectment to recover possession of certain unpatented mining claims in the San Francisco mining district, in Mohave county, in this state.

1. It is conceded by the plaintiff that on December 31, 1907, one D. M. Gaddis and W. E. Sauls, the defendant's predecessors in interest, were the undisputed owners and in possession of the claims in controversy under valid locations, but it is alleged, in substance, in the bill of complaint that during the year 1907 Gaddis and Sauls conspired and agreed together to do no work and perform no labor upon or for the benefit of said mining claims or any of them for and during the year 1907, but, instead of performing the work and labor required upon said claims for said year, they conspired and agreed together to abandon the same, and each of them, on December 31, 1907, and on January 1, 1908, to relocate each and every one of said claims, and thereafter, under and by virtue of their said pretended relocations of January 1, 1908, and not under and by virtue of the former titles to said claims and of each of them, owned by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said Gaddis and Sauls, to hold the ground and premises embraced within said mining claims, and each of them, to the exclusion of all other citizens of the United States who might lawfully enter upon and develop the same; that pursuant to said agreement and conspiracy between Gaddis and Sauls they performed no labor and made no improvements upon the said claims, nor did they cause the same to be done during the year ending December 31, 1907, as required by section 2324 of the Revised Statutes; that at no time thereafter did they, or their successors in interest, resume work upon said claims as required by said section; that they abandoned said claims on December 31, 1907, and surrendered all right, title, and interest in and to said claims. It is alleged, further, that thereupon said claims reverted to the ownership of the government of the United States and became a part of the public domain, open to entry as lode mining claims by any qualified citizen of the United States, *save and except said Gaddis and Sauls, each of whom, by reason of his abandonment of said claims, became disqualified and incompetent to lawfully relocate said claims or any part thereof*; that notwithstanding such disqualification Gaddis and Sauls assumed to relocate each of said mining claims on January 1, 1908, by adopting the former boundaries of the claims, together with the then existing discovery of mineral in place upon each of said claims, and the discovery shaft upon each of said claims, but applying to each of said claims a different name from that previously applied to each of them; that about March 12, 1908, Gaddis and Sauls recorded the relocation notice of each of said claims in the office of the county recorder of Mohave county; that in each of said notices the said Gaddis and Sauls declared and stated that they had relocated each of said claims as abandoned ground; that thereafter, through various mesne conveyances, the defendant became the successor in interest of said Gaddis and Sauls; that on September 27, 1910, the plaintiff peaceably and openly entered into and upon a part of said premises and located the same by erecting thereon three certain location notices, and by making on each of said claims a discovery of mineral in place, and by sinking upon each of said claims a discovery shaft at the point and place of discovery; that the plaintiff then and there began the erection and construction upon each of said claims of his discovery monuments, and that he placed in each of said discovery monuments notices of location; that said notices and each of them were duly posted at the discovery point and points of each of said claims, and that at said points there then was, and still is, a well-defined vein or crevice in rock and place carrying gold and other precious metals; that the plaintiff thereupon began the work of perfecting the locations by measuring the boundaries of said claims and by placing monuments thereon, as required by the statute, but that while so engaged the agents and representatives of one Joshua R. Clair, who on August 12, 1909, obtained from Gaddis and Sauls an option to purchase said claims, and afterwards became the successor in interest of Gaddis and Sauls, and the predecessor in interest of the defendant, and who was then in possession of the premises adjacent to the claims in con-

troversy, with force and arms prevented the plaintiff from continuing the completion of his said locations, or any of them, demolished one of plaintiff's location monuments erected by him, and by threats of violence and physical injury against the plaintiff drove, expelled, and ousted the plaintiff and his assistant from said premises.

It is further alleged by the plaintiff that for the protection and preservation of his rights in the premises, he instituted a suit in equity on December 10, 1910, in the then territorial court of the Fourth judicial district of the territory of Arizona, to quiet his title to said mining claims; that a general demurrer based upon the ground that plaintiff's complaint failed to state facts sufficient to constitute a cause of action was interposed by the defendant, and sustained by the court; that a judgment was entered thereon dismissing the plaintiff's complaint upon such ground, and thereafter, on or about September 28, 1912, the said judgment was affirmed by the Supreme Court of the state of Arizona, which said judgment of affirmance became final on November 8, 1912, at which time said Supreme Court denied plaintiff's application for a rehearing of said cause. But plaintiff alleges that the complaint herein is wholly and materially different from his complaint in said action in the state court, and supplies each and all of the defects and deficiencies contained in the former complaint.

Plaintiff further alleges that during the month of October, 1911, he first learned that early in September, 1911, the predecessors in interest of the defendant had so far proceeded with the construction of a mill upon the said premises that the defendant was able to operate the same and reduce the ores contained in said premises, and to extract therefrom the gold and other precious metals contained therein; that said mill has a capacity of 40 tons of ore every 24 hours; that it is the intent and purpose of the defendant to continue the operation of said mill and to increase its capacity, thereby depleting, destroying, and exhausting plaintiff's property and estate in said premises; that the defendant is now converting the product of the ores so reduced as aforesaid to its own use and benefit. It is further alleged that, under an order of court, the defendant was restrained from interfering with the plaintiff in the completion of his location of the claims in controversy, and under this order plaintiff was permitted to perform the work and improvements required by the statute for the year 1911.

The relief demanded by the plaintiff is the recovery of possession of the premises; that the defendant be ejected from the possession and occupation of the premises; that the plaintiff recover damages for the use and occupation thereof, and for the value of the ores and precious metals extracted from said premises by the defendant.

The defendant in its answer denies specifically the charge made in the complaint, that Gaddis and Sauls conspired together and agreed and determined between themselves not to do or perform any work or labor upon or for the benefit of said mining claims, or any of them, during the year 1907; denies that they conspired together and agreed and determined between themselves to abandon said claims or any

of them on December 31, 1907, or at any other time, or to relocate the said claims, and to hold the ground and premises embraced within said mining claims under such relocation; denies that pursuant to such agreement between Gaddis and Sauls they did not do or cause to be done or performed any labor or work or improvement upon said claims for the benefit of said claims; denies that at no time after January 1, 1908, the said Gaddis and Sauls resumed work on said claims; denies that pursuant to any agreement or conspiracy they did on December 31, 1907, or at any other time, or at all, abandon said claims or any or either of them, or surrender the right, title, and interest in said claims; denies that said claims on the 1st day of January, 1908, or at any other time, reverted to the unqualified ownership of the government of the United States, and became part and parcel of the unappropriated public domain, open to entry by any qualified citizen of the United States.

The defendant admits that Gaddis and Sauls did attempt to relocate each of said claims, and the ground embraced in the exterior boundaries thereof, under certain names set forth in the answer; but denies that in making said locations said Gaddis and Sauls adopted the discovery shaft upon each of said claims, and the location work theretofore done and performed upon each of said claims; denies that said Gaddis and Sauls did not cause to be done upon the ground embraced within said locations the amount of work required by law to be done and performed upon mining locations to constitute a valid location thereof; admits the recording of notices by Gaddis and Sauls as alleged in the complaint.

The defendant alleges that between the 1st day of January, 1908, and the 12th day of March, 1908, Gaddis and Sauls caused to be sunk upon the ground embraced within each of said claims a shaft 4 feet wide by 6 feet long, with a depth of at least 10 feet below the lowest part of the rim at the surface, each of which shafts disclosed at the bottom mineral in place carrying gold, silver, and other precious metals, except that on one of the claims the tunnel then existing thereon was between said last-mentioned dates driven for a distance of at least 10 feet further than the same existed on the 1st day of January, 1908, and that the tunnel disclosed on its face mineral in place carrying gold, silver, and other precious metals. The defendant further alleges that during the months of February and March, 1909, Gaddis and Sauls performed and caused to be performed upon the ground embraced within the boundaries of said claims, and another claim contiguous thereto, but in the same group, and for the development and benefit of all of said claims, work, labor, and improvements of the value of at least \$300, and thereafter, during the months of August, September, October, November, and December of said year Gaddis and Sauls performed and caused to be performed work and labor upon said claims, and upon another claim contiguous thereto, all of which claims were improved, developed, and benefited thereby, work, labor, and improvements of the value of \$5,000. Defendant further alleges that during the year 1910, and prior to the 28th day of September of that year, Gaddis and Sauls expended and caused to be expended upon the

ground embraced within the boundaries of said claims, and another claim in said group contiguous thereto, the sum of \$70,000 in the development, opening, and improvement of the ground embraced within the boundaries of said mining claims, and for the benefit thereof, and at least \$15,000 of said sum was expended upon said claims in the development of each and every one of them in mining exploration and in the extraction of ores and metals therefrom; that the balance of said sum was expended for the construction of a mill, and the installation of the machinery, appliances, and apparatus therewith connected, for the treatment, reduction, and milling of the ores and minerals contained in the ground embraced within the boundaries of said mining claims. The defendant admits the transfer of title as alleged in the complaint under which the defendant has become the successor in interest of Gaddis and Sauls in said mining ground.

The defendant denies that on September 27, 1910, or at any other time, the plaintiff made any valid location of any part of the ground embraced within the boundaries of the claims mentioned and described in the complaint, but alleges the facts to be that on the 28th day of September, 1910, and while the predecessors in interest of the defendant were in the actual, peaceable, and undisputed possession of said claims, and each of them, and all of the ground embraced therein, and while the predecessors in interest of the defendant were expending and causing to be expended the sums of money mentioned in the answer, and preparing to expend other and much greater sums of money in the development and improvement of said claims, and engaged in good faith in holding, developing and working said claims, and each of them, the plaintiff unlawfully, wrongfully, and in violation of equity, morals, and good conscience entered upon said claims as a trespasser, in violation of the equities and rights of the predecessors in interest of the defendant, and pretended and attempted to locate a part of the said premises by erecting thereon three certain location notices, but that said plaintiff did not perform, nor undertake in good faith, or with due diligence, to perform, and has not yet performed, any other act of location required by law within the time limited or at any other time.

The defendant admits that prior to September, 1911, and on or before the 28th day of September, 1910, the predecessors in interest of the defendant, at an expense exceeding \$50,000, constructed a mill upon the premises embraced within the boundaries of said claims; that ever since said date the defendants and its predecessors in interest have been in the sole and exclusive possession of said premises and of the whole thereof, and have been extracting from the ores contained within the boundaries of said mining claims gold and other precious metals contained therein; admits that it is the purpose of the defendant to continue to operate said mill and to take out the ores containing precious metals upon said mining claims, and to extract the precious metals therefrom. The defendant admits that on or about December 23, 1911, one of the justices of the Supreme Court of the territory of Arizona granted the plaintiff in a suit then pending in the Supreme Court of the territory of Arizona the right to perform the annual as-

assessment work and labor upon the ground embraced within his alleged locations thereof; but denies that the plaintiff pursuant to said order or at all has ever performed any work or labor upon said premises amounting to the sum of \$300, or any other sum. The defendant admits that it is now in the exclusive occupation of the whole of the premises so located by Gaddis and Sauls.

The defendant alleges that on September 28, 1910, the predecessors in interest of the defendant were, and theretofore had been, in the actual, exclusive, and undisputed possession of all the ground embraced within the mining claims so located by the said Gaddis and Sauls and each of them, by whatever names said claims have been known or called, since November, 1903; that they have paid all taxes lawfully levied thereon. The defendant denies that the said mining locations and the ground embraced therein, or any or either of them, have ever been forfeited or abandoned by the predecessors in interest of the defendant; denies that the plaintiff has ever acquired or now has any right, title, or interest, or any right to the possession of any portion of said mining claims embraced within the boundaries thereof or any part thereof. The defendant alleges that Gaddis and Sauls during the year 1907 were informed and believed that the Congress of the United States had enacted or was about to enact a law exempting all mining claims from assessment work or annual labor during that year; that, relying in good faith upon such information and belief, the said Gaddis and Sauls did not perform such annual labor or assessment work upon said claims; that, when they discovered that no such law had in fact been passed by Congress, they had no time within which to do such work within said year, and in good faith, and because of having been misled and misinformed as aforesaid, they believed it necessary to relocate said claims, neither of said parties then knowing that a resumption of work upon said claims before the intervention of adverse rights would secure and preserve to them their said claims; that in preparing notices of relocation said Gaddis and Sauls had not been advised and did not know that the Legislative Assembly of Arizona of 1907 had amended the law relative to the relocation of mining claims that it was no longer necessary to state that the same was located as abandoned ground, and therefore said parties and each of them, without any intention of abandoning said claims or the ground embraced therein, or any part thereof, believed it to be necessary to state in said location notices, and for that reason and no other they did state therein, that the said claims were relocated as abandoned ground, but the defendant alleges that said Gaddis and Sauls did not then, or thereafter, or ever, abandon said claims, or intend to abandon the same or any part thereof, but that they continued from the 1st day of January, 1908, as before, in the possession, enjoyment, and development of said claims, and since said 1st day of January, 1908, and prior to the attempted location thereof by plaintiff, they had done and caused to be done upon said claims many times the amount of assessment work required to be done in the year 1907, and for each and every year subsequent thereto.

The defendant admits the bringing of the suit mentioned in the complaint, and alleges that in said cause the issues were identically the

same as the issues in this case; that a judgment was duly made and entered therein in favor of the defendants and against the plaintiff therein, dismissing the plaintiff's said bill of complaint upon the merits; that the plaintiff thereupon took an appeal from said judgment to the Supreme Court of the territory of Arizona, and such proceedings were thereupon had upon said appeal that the judgment was by said Supreme Court in all things affirmed; that said judgment of said District Court and the Supreme Court of the territory, now remain of record in said courts, and is unreversed, not appealed from, and in full force and effect.

It is contended by the plaintiff that these allegations of the complaint and answer do not raise any questions of fact, but only questions of law, and that upon the determination of such questions of law he is entitled to a judgment for the possession of the claims in controversy. Reduced to its simplest terms, the plaintiff's contention is this: Gaddis and Sauls having failed to do any work or perform any labor or make any improvements upon the claims in controversy during the year 1907, and having declared in their relocation notices that they had relocated abandoned ground, it followed as a legal consequence that such ground had reverted to the government of the United States and had become a part of the public domain, open to location and entry by any qualified citizen of the United States, save and except Gaddis and Sauls, each of whom, by reason of his abandonment of said claims, became disqualified and incompetent to lawfully relocate said claims or any part thereof. Can this contention be sustained?

It is provided in section 2324 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1426) that:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

Congress in the year 1893, by Act Nov. 3, 1893 (28 Stat. 6, c. 12), and again in the year 1894, by the Act July 18, 1894 (28 Stat. 114, c. 142), suspended the provisions of section 2324, requiring \$100 worth of labor to be performed or improvements made during the years 1893 and 1894. The defendant in its answer, in addition to denying the plaintiff's charge of a conspiracy in 1907 on the part of Gaddis and Sauls to abandon and relocate the claims in controversy, alleges that during the year 1907 they had been informed and believed that Congress had enacted or was about to enact a law exempting all mining claims from assessment work or annual labor during that year; that, relying in good faith upon such information and belief, the said parties did not perform such annual labor or assessment work upon said claims, and, when they discovered that no such law had in fact been passed by Congress, they had no time within which to do such work within said year and in good faith, and because of having been misled

and misinformed as aforesaid they believed it necessary to relocate said claims, neither of said parties then knowing that the resumption of work upon said claims before the intervention of adverse rights would secure and preserve to them their said claims.

But it is alleged in the defendant's answer that Gaddis and Sauls continued from the 1st day of January, 1908, as before, in the possession, enjoyment, and development of said claims, and since said 1st day of January, 1908, and prior to the attempted location thereof by the plaintiff, they had done and caused to be done upon said claims many times the amount of assessment work required to be done in the year 1907, and for each and every year subsequent thereto. In other words, this allegation is in effect a declaration on the part of the defendant that it, and its predecessors in interest, and particularly Gaddis and Sauls, upon their failure to comply with the provisions of section 2324 of the Revised Statutes of the United States, with respect to the requirement of labor and work to be performed upon said claims for the year 1907, resumed work upon said claims on January 1, 1908, and before the alleged location by the plaintiff on September 28, 1910, and did the work and performed the labor required by the statute for each and every year after the year 1907.

Prior to March 12, 1907, section 3241 of the Revised Statutes of Arizona, so far as it is material to this case, provided:

"The relocation of forfeited or abandoned lode claims shall only be made by sinking a new discovery shaft and fixing the boundary in the same manner and to the same extent as is required in making an original location; or the relocater may sink the original discovery shaft ten feet deeper than it was at the date of the commencement of such location, and shall erect new or make the old monuments the same as originally required. In either case a new location monument shall be erected, and the location notice shall state if the whole or any portion of the new location is located as abandoned property, else it shall be void."

By Act March 12, 1907 (Session Laws of Arizona 1907, c. 22m, p. 27), that part of section 3241 of the Revised Statutes heretofore referred to was amended as follows:

"The location of an abandoned or forfeited claim shall be made in accordance with the provisions of paragraph 3232 * * * of the Revised Statutes of Arizona, 1901, except that the relocater may, if he so elect, perform his location work by sinking the original location shaft ten feet deeper than it was originally."

This amendment, so far as it is material to the present inquiry, consisted in providing that the location of an abandoned or forfeited claim should be made in the same manner as the original location (required by section 3232), except that the relocater might, if he so elected, perform his location work by sinking the original location shaft 10 feet deeper than it was originally. There was this further difference in the amended section. It omitted the following clause of the original section:

"And the location notice shall state if the whole or any part of the new location is located as abandoned property, else it shall be void."

With respect to this change in the requirements of the location notices, the defendant alleges in its answer that:

"In preparing the notices of relocation, the said Gaddis and Sauls had not been advised and did not know that the Legislative Assembly of Arizona of 1907 had so amended the law relative to the relocation of mining claims that it was no longer necessary to state that the same was located as abandoned ground, and therefore said parties and each of them, without any intention of abandoning said claims or the ground embraced therein, or any part thereof, believed it to be necessary to state in said location notices, and for that reason and no other, they did state therein that the said claims were relocated as abandoned ground; but the defendant says that the said Gaddis and Sauls, the predecessors in interest of this defendant, did not, then or thereafter, or ever, abandon said claims or intend to abandon the same, or any part thereof."

But it is alleged in defendant's answer that between the 1st day of January, 1908, and the 12th day of March, 1908, said Gaddis and Sauls caused to be sunk upon the ground embraced within each of said claims a shaft 4 feet wide by 6 feet long, to a depth of at least 10 feet below the lowest part of the rim at the surface, each of which said shafts disclosed at the bottom mineral in place, carrying gold, silver, and other precious metals. In other words, this allegation taken in connection with the other allegations of the answer is an equivalent of an allegation that they complied with the requirements of section 3241 of the Revised Statutes of Arizona, as amended by Act March 12, 1907, with respect to forfeited or abandoned claims, notwithstanding the fact that they never intended to abandon or forfeit such claims, but had continued, without interruption, to possess and develop the same.

[1] The first question to be determined is this: Was there an abandonment of these claims by Gaddis and Sauls, as the facts are alleged in the complaint and not denied in the answer? In 1 Snyder on Mines, § 509, the term "abandonment" as used in mining law is defined, upon the authority of cited cases, as follows:

"Abandonment includes both the intention to abandon and the act by which the abandonment is carried into effect. To constitute an abandonment there must be a concurrence of the intention to abandon and the actual relinquishment of the property so that it may be appropriated by the next comer."

In section 512 of the same work the term "abandonment" is defined with respect to possessory titles in connection with the annual labor acts, as follows:

"To constitute an abandonment there must be a going away, and a relinquishing of rights, with the intention never to return. A voluntary and independent purpose to surrender whatever claim the person has to the next comer is essential. It is thus a question of act and intention, and the fact is to be found from the intention and the act, when considered together, in connection with all the circumstances in the case. The testimony of the fact of abandonment by a former owner is conclusive evidence thereof; and evidence upon this question is admissible under the general issue. But there must be an abandonment in fact. A mere belief on the part of the relocater that such is the case is not sufficient to establish one."

[2] It appears very clearly from these definitions that the abandonment of the claims in controversy by Gaddis and Sauls, or their successors in interest, is not established as a conclusion of law to be drawn from the allegations of the complaint and the admissions of the answer. The declaration of abandonment alleged to have been inserted in the notices of relocation, in ignorance of a change in the law in that

respect, is not sufficient to overcome the direct and positive allegations of the answer that an abandonment was not intended by Gaddis and Sauls and that said claims were not in fact abandoned.

The remaining question is, Was there a resumption of work under the provisions of section 2324 of the Revised Statutes of the United States, after failure to do the annual work required for the year 1907, and that is a question of fact to be determined upon the trial of the case. The motion for a judgment on the pleadings is therefore denied.

2. The plaintiff's motion to strike out paragraph 13 of the defendant's answer is upon the ground that the same fails to state facts constituting a defense to the action. The paragraph in question sets up a judgment in the state court in a case wherein the plaintiff herein was the plaintiff, and the predecessors in interest of the defendant herein were the defendants. The paragraph alleges that in the action in the state court the issues were identically the same as the issues in this cause, and that a judgment was duly made and entered in the first-mentioned cause in favor of the defendants therein, and against the plaintiff therein and herein, dismissing the said plaintiff's bill of complaint upon the merits.

[3] The objection is that it is not sufficient that the issues in the first case were the same as in the present case; the cause of action must be the same. This objection would be good if the judgment in the state court were pleaded as a bar to a judgment in this case, but I do not so understand the allegation of the answer. What is set up is that certain issues in the present case were in the former case, and, having been determined, such issues cannot be again be litigated in this case.

[4] The rule, as stated in 23 Cyc. 1215, is as follows:

"A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon the same or a different cause of action."

With respect to the bar of a former judgment the rule is stated in 23 Cyc. 1216, as follows:

"A former judgment between the same parties is a bar to the maintenance of the second action only when the causes of action in the two suits are identical. But it will be conclusive and final as to any issue litigated and determined in the former suit, and coming again in question in the second suit, although the latter is brought upon an entirely different cause of action."

These two rules are supported by abundant authorities.

The court has been furnished with the pleadings and briefs in the case in the state court, and the decision of the Supreme Court of the state upon the issues in that case has been cited (*Peachy v. Gaddis* [Ariz.] 127 Pac. 739); but it is not within the scope of the present inquiry to determine what the issues were in that case, or whether any of those issues are involved in the present case. The court is now dealing with a question of pleading, and upon that question the court

is of the opinion that paragraph 13 is sufficient to set up a defense upon such issues in the present case as may be found, upon the trial, to have been determined in the former case.

The motion to strike out paragraph 13 of the answer is therefore denied.

DUNLEVY v. NEW YORK LIFE INS. CO. et al.

(District Court, N. D. California, Second Division. March 10, 1913.)

No. 15,041.

1. INSURANCE (§ 211*)—LIFE POLICY—ASSIGNMENT—DELIVERY.

Where insured executed an assignment of a life policy to his daughter in duplicate, as required by the insurer's rules, and both copies were sent to the insurer's home office, after which one copy was retained by the insurer and the other returned to the insured, who kept it with the policy in his possession, the formal execution and sending of the assignment to the insurance company was presumptively for the benefit of the assignee, and, as between her and the assignor, in the absence of anything to evince a contrary intention, constituted a sufficient delivery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 480; Dec. Dig. § 211.*]

2. INSURANCE (§ 211*)—ASSIGNMENT TO INFANT—DELIVERY.

Where a father executed an assignment of a policy on his life to a minor daughter, who was living with him, he being her natural guardian and the custodian of her property and effects, no actual physical delivery of the assignment to her was necessary to render it effective.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 480; Dec. Dig. § 211.*]

3. INSURANCE (§ 212*)—ASSIGNMENT—EFFECT—CONTINUED PAYMENT OF PREMIUMS.

Where a father assigned a policy on his life to his minor daughter, who was living with him, the fact that he continued to pay the premiums was not evidence that he did not regard the assignment as absolute, or that he intended it should be conditional and ineffective unless he died before the policy matured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 481, 482; Dec. Dig. § 212.*]

4. INSURANCE (§ 219*)—POLICY—ASSIGNMENT—MISTAKE.

Where a father executed an absolute assignment of a policy on his life to his minor daughter, the fact that he directed the insurance company's agent who drew the assignment, to make it conditional on his dying before the policy matured, which the agent failed to do, and that insured signed the assignment without reading it, relying on the agent's assurance that it was all right, was ineffective to defeat the rights of the daughter as assignee.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 488, 489, 494-496; Dec. Dig. § 219.*]

5. JUDGMENT (§ 17*)—SERVICE WITHOUT THE STATE—JURISDICTION.

Plaintiff's father having assigned a tontine insurance policy on his life to her while she was a resident of Pennsylvania, judgment was recovered by a creditor against her in that state in 1907. In 1909, after plaintiff had removed to California, a writ of execution attachment was issued on the judgment and served in Pennsylvania on the local agent of the insurance company and on plaintiff's father; plaintiff being served

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

only by delivery of a copy of the process to her without the state. She did not appear, and on a feigned issue to determine the ownership of the fund, which the insurance company paid into court, it was determined that it belonged to plaintiff's father, and not to her. *Held* that, while the Pennsylvania court acquired jurisdiction by its garnishee process to determine, as between plaintiff and her creditors, the rights of the latter to subject to their judgment any debt due plaintiff or other property of plaintiff in Pennsylvania to the extent of the judgment, it had no jurisdiction, without plaintiff's personal presence, to try her rights in the policy as between her and her father and the insurance company, the feigned issue raising such question being independent of the garnishment proceeding; and hence the judgment therein was not conclusive on plaintiff against her right to recover the amount of the policy on its maturity, as against the insurance company and her father.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33, 157, 422; Dec. Dig. § 17.*]

At Law. Action by Effie J. Gould Dunlevy against the New York Life Insurance Company and another. Judgment for plaintiff.

Frank W. Taft, Clarence Coonan, and Nat Schmulowitz, all of San Francisco, Cal., for plaintiff.

Page, McCutchen, Knight & Olney, of San Francisco, Cal., for defendant New York Life Ins. Co.

VAN FLEET, District Judge. Plaintiff brings this action to recover \$2,479.70, the cash surrender value accrued under the tontine provisions of a policy of life insurance issued by the defendant insurance company on the life of its codefendant, Joseph W. Gould, the father of plaintiff; the policy being alleged to have been assigned by Gould to plaintiff.

The defenses of the insurance company are: (1) That there was no valid or perfected assignment of the policy to the plaintiff; and (2) that plaintiff is concluded by a judgment recovered against the company by its codefendant, Gould, on the same demand in the court of common pleas of the state of Pennsylvania, under which judgment the amount involved has been fully paid to the latter. The answer of the defendant Gould, while silent as to the judgment, sets up that the assignment counted on never became perfected, for reasons that will be hereafter noticed.

[1] 1. As to the validity of the alleged assignment. The policy was issued to Gould, then a resident of Pittsburgh, Pa., in 1889. In 1893, while his daughter, the plaintiff, was a child of 13 years, living with him and under his protection and maintenance, he went to the office of the local agent of the company and executed an assignment of the policy to her, absolute and unconditional in form, purporting to transfer to her "all dividend, benefit, and advantage to be had or derived therefrom." The assignment was executed in duplicate with all the formality required by the company, and acknowledged before a notary. As required by the rules of the company, both copies were sent to its home office in New York, to be viséed by the company before becoming effective; whereupon one copy was retained by the company and the other returned to Gould, who kept it, with the policy, in his posses-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sion, and thereafter continued to pay the premiums until the expiration of the tontine period and the payment to him of the amount due thereon, as hereinafter stated, when it was surrendered to the company.

It is claimed that these facts fail to disclose a valid transfer of the policy, for want of any delivery of the assignment and the policy to the plaintiff. If by this is meant that an actual physical delivery of the documents was essential to complete the transaction, the claim is untenable. In the first place, the formal execution and sending of the assignment to the insurance company, although in obedience to the requirement of its rules, is presumptively for the benefit of the assignee, and as between the latter and the assignor, in the absence of anything to evince a contrary purpose, will be regarded as a sufficient delivery. *McDonough v. Aetna Life Ins. Co.*, 38 Misc. Rep. 625, 78 N. Y. Supp. 217; *Hurlbut v. Hurlbut*, 49 Hun, 189, 1 N. Y. Supp. 854.

[2] But, in the next place, no actual delivery was required under the circumstances disclosed in this case, because the assignee was incapable of receiving it. She was a minor, under the care and protection of the assignor, her father, and the latter was therefore the natural custodian of her property and effects, as he was of her person. Under these circumstances, no actual physical delivery was called for to perfect the title of the assignee. *Burges v. New York Life Ins. Co.* (Tex. Civ. App.) 53 S. W. 602.

[3] It is urged that the fact that Gould continued to pay the premiums on the policy is evidence that he did not regard the assignment as complete. This is without force. In making the assignment to his daughter, a minor, and so far as appears without estate, Gould knew that if the premiums were not paid by him they would not be paid at all, and the presumption will not be indulged that he entered upon the transaction with the purpose of doing a thing which would result in a forfeiture of all right under the policy for want of payment of the premiums. The presumption will be preferred that in continuing to pay them it was his purpose to pay them for the benefit of his daughter.

[4] The further claim that the assignment was a conditional one, and never became effective, is based upon the testimony of Gould that he had no intention to make an absolute assignment to his daughter; that he told the agent of the company, when he went to the office to execute it, that he wished to make it conditional upon his dying before the policy was paid, desiring to reserve to himself the right to collect anything to be paid on the policy at its maturity, should he be alive; that the agent instead drew the assignment in the absolute form, and it was signed by him without reading it, relying on the assurance of the agent that it was all right. This evidence is not sufficient to defeat the plaintiff's title. There is no suggestion of fraud in the transaction. If his evidence is true, Gould might perhaps have maintained an action to have the instrument reformed for mistake; but he has not done so, and no such relief is asked or may be had in this action. I am satisfied that the transfer of Gould's rights under

the policy was a complete and valid transaction, and that neither he nor the insurance company can successfully assail it here. It must be borne in mind that we are not dealing with a case like those relied on by the defendants, where the rights of creditors, or innocent third parties with superior equities, are involved, but are concerned only with the rights of the assignor and his assignee as between themselves.

[5] 2. Is plaintiff concluded by the judgment pleaded in bar? The record discloses these facts: In 1907 Boggs & Buhl, creditors of the plaintiff, the latter then residing in Pennsylvania, recovered a judgment against her in the court of common pleas of Allegheny county in that state. That the court obtained jurisdiction of this plaintiff in that case no question is made; due service being had upon her in accordance with the laws of Pennsylvania. In November, 1909, knowledge of the interest claimed by the plaintiff in the policy in suit having come to the judgment creditors, a writ of execution attachment issued on the judgment and was served upon the local agent of the defendant insurance company in that state and upon Joseph W. Gould, the other defendant here. At this time the plaintiff had removed from Pennsylvania to this state, and taken up her residence here, and no service of the writ was had on her. Gould appeared in response to the garnishment, denying any assignment of the policy to the plaintiff here, and alleging a sole right in himself to the amount due thereon. The insurance company also answered, admitting its indebtedness under the policy, but setting up that the fund was claimed by both Gould and this plaintiff, and prayed to be advised as to its rights. Other creditors of the plaintiff having levied garnishments upon the insurance company against the fund, the latter filed a petition in the court of common pleas, asking leave to pay the money into court, and praying that the several claimants be required to interplead and have their respective rights determined. Leave was granted, the fund paid into the hands of the prothonotary, and thereafter, in February, 1910, the court granted a rule as prayed, requiring the several claimants to the fund to interplead for the purpose of determining their respective rights. It being made to appear that the plaintiff here was then a resident of California, the court directed that the rule be served upon her here by delivery of a copy to her personally, which was done, but plaintiff did not appear. The other parties having appeared, the court thereafter entered a rule that a feigned issue be framed and tried to determine whether Gould had made a valid gift of the policy to the plaintiff here. A trial of this issue was had before a jury, without the presence or appearance therein of the plaintiff, and the jury found that no assignment or gift of the policy had been made to plaintiff. Upon this verdict the court of common pleas entered its order or judgment directing the prothonotary to pay over the fund to Joseph W. Gould, and held that neither the plaintiff here nor her creditors had any right therein. This is the adjudication upon which the defendant company relies as a bar to plaintiff's recovery.

I think it quite obvious that this judgment in no wise concludes plaintiff's rights involved in this case. The court of common pleas, by

virtue of the existence upon its records of a valid unsatisfied judgment against the plaintiff, undoubtedly acquired jurisdiction by its garnishee process to determine as between plaintiff and her creditors the rights of the latter to subject to the satisfaction of their judgment any debt due plaintiff, or other property of hers in Pennsylvania, to the extent of such judgment (Louisville, etc., Ry. Co. v. Deer, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. Ed. 426; Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023, 3 Ann. Cas. 1084; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565); but I regard it as equally certain that that court was without jurisdiction to proceed, without the personal presence of the plaintiff, to try the question of the rights of plaintiff in the policy in suit as between her and Gould and the insurance company. The proceeding of interpleader at the instance of the insurance company, in which the feigned issue stated was sought to be tried, was in this respect quite independent of the proceeding on garnishment. Ruff v. Ruff, 85 Pa. 333. As to the former, the Pennsylvania court was without jurisdiction of the person of the plaintiff, since the method of service upon her was wholly ineffectual for the purpose—a proposition so thoroughly settled that the authorities need not be referred to. A court must, to render an effectual judgment, have jurisdiction either of the person of the defendant or the res. Pennoyer v. Neff, *supra*. The judgment of the court of common pleas itself determines that it had no jurisdiction of the latter, since it is adjudged that the debt levied upon, and which alone would give it jurisdiction, was not the debt of plaintiff, but of a third party, as against whom the creditors of plaintiff had no rights.

I am satisfied, therefore, that it must be held that the judgment pleaded is not conclusive upon the plaintiff, and constitutes no bar to a recovery on the policy.

Judgment must accordingly go in favor of plaintiff for the amount sued for, with interest and costs, as prayed.

In re WENATCHEE HEIGHTS ORCHARD CO.

(District Court, W. D. Washington, N. D. April 22, 1913.)

No. 5,025.

BANKRUPTCY (§ 63*)—GROUNDS—INSOLVENCY—APPOINTMENT OF RECEIVER.

On petition to a state court of competent jurisdiction alleging that a corporation was insolvent, an order appointing a receiver of the corporation's property, on a finding of insolvency, coupled with a subsequently proven fact of insolvency at the time the receiver was appointed, was sufficient to justify an adjudication in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 3, 30 Stat. 546, 547 (U. S. Comp. St. 1901, p. 3422), providing that an application for a receiver or trustee of an alleged bankrupt while insolvent, and the appointment of such receiver or trustee, shall constitute an act of bankruptcy, though the state court, after the filing of the bankruptcy petition, modified its former order by reciting that it was made on grounds other than the insolvency of the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 63.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Bankruptcy. In the matter of bankruptcy proceedings against Wenatchee Heights Orchard Company. On exceptions to a master's report, advising that petitioners were entitled to an adjudication in bankruptcy. Exceptions overruled. Adjudication granted.

Henry W. Pennock, of Seattle, Wash., for receiver.

Shank & Smith, of Seattle, Wash., for Wenatchee Heights Orchard Co.

Raymond D. Ogden and Walter Schaffner, both of Seattle, Wash., for petitioning creditors.

CUSHMAN, District Judge. A petition was filed by creditors of the Wenatchee Heights Orchard Company in the superior court of the state of Washington, charging the above-named corporation and its officers with having transferred all, or the greater portion, of its assets to another corporation for the fraudulent purpose of concealing said property and causing the above-named corporation to become insolvent, and for the purpose of defrauding its creditors; that such action stripped said company of substantially all of its assets, and made it impossible for it to perform its contracts; that it did not intend to perform its contracts; that indebtedness in a large amount had accumulated against it; that it was unable to pay its obligations as they matured, and was in imminent danger of insolvency, if not already, in fact, insolvent. The complaint prayed the appointment of a receiver.

On January 17, 1913, the state court, in which said petition was filed, appointed a receiver of the property of the corporation; the court reciting in the order, as the ground therefor, that the corporation was insolvent. On January 18, 1913, creditors of said corporation filed a petition in this court, praying for an adjudication of its bankruptcy, and alleging as an act of bankruptcy that, "while insolvent and within four months last preceding the date of filing" the petition "because of insolvency, a receiver was put in charge of its property."

January 25, 1913, after the filing of a petition in this court praying an adjudication in bankruptcy, an order was made in the state court purporting to modify the order theretofore made therein, and reciting that the first order appointing a receiver was made upon grounds other than the insolvency of the corporation. The latter order was made after representations to that court by counsel in said cause that, if the original order was not so changed, an adjudication of bankruptcy would be founded thereon, and the assets administered in a court of bankruptcy.

The corporation answered the petition herein, and denied that petitioners were its creditors, denied that it had committed the act of bankruptcy alleged, and denied that it was insolvent. The receiver, appointed by the state court, made a like denial, and denied, further, that the company had committed any act of bankruptcy whatever.

Upon these issues, testimony was taken before a special master, at which hearing notice was given by the petitioning creditors that, when the matter was heard before this court, they would ask leave to amend

the petition to charge, as an additional act of bankruptcy, that the "Wenatchee Heights Orchard Company had, while insolvent, applied for a receiver for its property." Upon the hearing before this court, the amendment was allowed.

The master found that the said corporation had, with intent to hinder, delay, and defraud its creditors, transferred substantially all of its property. He further found, concerning the appointment of a receiver in the state court, as above recited, that at the time of the appointment of the receiver in the state court, and on the date of the filing of the petition herein for an adjudication in bankruptcy, said company was insolvent; that, on account of such insolvency, the suit was instituted in the state court. The master concluded that the petitioning creditors were entitled to an order adjudicating the corporation a bankrupt. The matter is now before the court on exceptions to the findings and conclusion of the master.

The petitioners rely upon the following authorities: *Exploration Mercantile v. Pacific Hdwe. & Steel Co.*, 177 Fed. 825, 101 C. C. A. 39; *In re Watts & Sachs*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933; *In re Electric Supply Co. (D. C.)* 175 Fed. 612; *Hooks v. Aldridge*, 145 Fed. 865, 76 C. C. A. 409; *Beatty v. Mining Co.*, 150 Fed. 293, 80 C. C. A. 181; *Collier on Bankruptcy* (7th Ed.) pp. 77-184.

Respondents rely upon the following authorities: *Sivyer v. Lawyer*, 25 Wash. 360, 65 Pac. 529; *O'Bryan v. Am. Inv. & Imp. Co. et al.*, 50 Wash. 371, 97 Pac. 241; *Geo. M. West & Co. v. Lea Bros. & Co.*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098; *In re Spalding*, 139 Fed. 244, 71 C. C. A. 370; *Moss Nat. Bank v. Arend*, 146 Fed. 353, 76 C. C. A. 629; *In re Golden Malt, etc., Co.*, 164 Fed. 326, 90 C. C. A. 258; *In re Ellsworth Co. (D. C.)* 173 Fed. 699; *Blue Mountain, etc., Co. v. Portner*, 131 Fed. 57, 65 C. C. A. 295.

Section 3 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 546, 547 [U. S. Comp. St. 1901, p. 3422]) provides:

"Acts of bankruptcy by a person shall consist of his having conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them, * * * or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory or of the United States."

Section 1 of the Bankruptcy Act, defining "insolvency," provides:

"(15) A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, *exclusive of any property which he may have conveyed*, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

Respondent, in support of its exceptions, relies upon the case of *In re Golden Malt Cream Co.*, 164 Fed. 326, 90 C. C. A. 258, but an examination of that case will show that it is not applicable to the situation now before the court. In that case the state court first appointed a receiver, reciting the corporation's insolvency. After the appointment of such receiver, a petition was filed in the bankruptcy court, alleging an act of bankruptcy other than the appointment of a receiver

for its property. Thereafter, in the state court, the order appointing a receiver was modified, to show grounds other than insolvency, as defined in the bankruptcy law, after which modification of the order a petition was filed in the bankruptcy court, seeking an adjudication in bankruptcy and alleging, as an act of bankruptcy, the appointment of a receiver on account of the corporation's insolvency. It was held that the record in the state court did not support the allegation concerning the act of bankruptcy, and, in deciding it, the court pointed out that insolvency, as defined by the state law and as defined in the Bankruptcy Act, differed materially, and that therefore, as a matter of law, the determination of the state court did not establish an act of bankruptcy.

It will be seen that the order was modified by the state court before the jurisdiction of the bankruptcy court was invoked on account of the appointment of a receiver for its property, and that the question turned on a matter of definition, purely a question of law—neither of which obtains in the case now before the court. The preponderance of evidence is with the petitioners in both the act of bankruptcy alleged in the original petition and the petition as amended.

It is not necessary to consider the effect of a proven existence of insolvency alone, nor the appointment of a receiver by the state court for causes other than insolvency, in the absence of insolvency. The fact that, upon a petition alleging insolvency in effect, an order of a court of competent jurisdiction was made, appointing a receiver of its property upon the recital of a finding of insolvency, coupled with the now proven fact of insolvency at that time, is sufficient to warrant an adjudication of bankruptcy. The one establishes a compliance with the letter of the law; the latter, with the spirit of the law.

A state of facts actually existing that warranted the first order of the state court, appointing a receiver on account of insolvency, and which order was sufficient to require an adjudication of bankruptcy by this court, and the jurisdiction of this court having been invoked upon the strength of that order, it is not necessary to consider the effect, in the state court, of the modification of the order, and a changed recital of the appointment of a receiver on other grounds than that of insolvency. The final judgment of the state court is not required in this particular to authorize an adjudication of bankruptcy. That part of section 1 of the Bankruptcy Act above quoted clearly shows that the assets of the corporation transferred by it cannot be considered assets upon a hearing for adjudication of bankruptcy.

Without discussing at length the testimony taken concerning respondent's insolvency, it is sufficient to say that no other conclusion could have been reached than that arrived at by the master. The findings and conclusions of the master are found to be justified, and the exceptions thereto are overruled. *Exploration Merc. Co. v. Pacific Hardware & Steel Co.*, 177 Fed. 825, 101 C. C. A. 39.

**REAL ESTATE TRUST CO. OF PHILADELPHIA v. WASHINGTON-
VIRGINIA RY. CO.**

(District Court, E. D. Pennsylvania. May 8, 1913.)

No. 1,980.

1. COURTS (§ 274*)—FEDERAL COURTS—ACTION AGAINST CORPORATION—RESIDENCE WITHIN DISTRICT.

The fact that a foreign corporation maintains an office and has a resident agent with limited authority for particular purposes in the federal district in which it is sued is not sufficient to justify the inference that the corporation is within the district, so as to authorize service on it there.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.*]

2. COURTS (§ 274*)—FEDERAL COURTS—ACTION AGAINST CORPORATION—RESIDENCE WITHIN DISTRICT.

Plaintiff brought suit in the federal court of Pennsylvania against defendant, a Virginia corporation, operating certain electric railways in Virginia and the District of Columbia, serving the writ on defendant's president at an office maintained by it in Philadelphia. Defendant's treasurer also maintained his office in Philadelphia, where both the president and treasurer lived, and where all the corporation's executive, administrative, and official business was accomplished. *Held*, that such facts were sufficient to show that the corporation was present within the district, so as to authorize service on it there.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.*]

At Law. Action by the Real Estate Trust Company of Philadelphia against the Washington-Virginia Railway Company. On rule to vacate service of writ. Denied.

Joseph De F. Junkin and John G. Johnson, both of Philadelphia, Pa., for plaintiff.

Norman Grey, of Camden, N. J., and Wm. A. Glasgow, Jr., of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. Suit in assumpsit was brought by the plaintiff, a Pennsylvania corporation, against the defendant, a Virginia corporation. The marshal's return of service sets forth that the writ was served on the defendant—

"at its office, No. 1307 Real Estate Trust Building, Broad and Chestnut streets, city of Philadelphia, by handing a true and attested copy thereof to Frederick H. Treat, president of said company, and making known the contents of the same to him."

The manner of service as set out in the return is therefore in accordance with the Pennsylvania act of July 9, 1901 (P. L. 614), in that it sets out service upon the president and at the defendant's office. The suit is brought in this district under the provisions of section 51 of the Judiciary Act of March 3, 1911 (36 Stat. 1101, c. 231 [U. S. Comp. St. Supp. 1911, p. 150]), which provides that:

"Where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff is a resident of this district, and the question to be determined, from the pleadings and the depositions taken under the rule, is whether the defendant, at the time of service of the writ, was or was not doing business in the district in such manner and to such extent as to warrant the inference that through its agents it was present here. *Green v. Chicago, B. & O. Railway Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; *St. Louis Southwestern Rwy. Co. of Texas v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. —. As was said by Mr. Justice Day in the latter case:

"This court has decided each case of this character upon the facts brought before it, and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process."

[1] The fact that a foreign corporation maintains an office and has a resident agent of limited authority in the district for some special purpose has been held in numerous cases not sufficient to justify the inference of the presence of the corporation within the district.

[2] The evidence in this case discloses that the defendant is the successor by merger of two electric railway companies, one of which was the Washington, Alexandria & Mt. Vernon Railway Company, which issued bonds upon which the present suit is brought, which bonds are payable at the office of the plaintiff in the city of Philadelphia. The defendant company operated an electric railway running from Mt. Vernon to Alexandria, in Virginia, and from that point into the city of Washington, D. C. Under the laws of Virginia, the defendant may have offices outside of the state. The Virginia office of the company, which it is obliged to maintain by the laws of that state, was at Mt. Vernon, Va., where there was a ticket agent upon whom service could be properly had under the Virginia statutes, and where there is a room where the annual meetings of its stockholders are held. The company also maintained a general office at Washington, D. C., where the business of conducting the physical operation of its road, through its manager, was carried on. At its Washington office were kept the cash books of the company, showing daily receipts of operation and the collection of accounts due, its operating record, pay roll time record, a statement of claims accruing and their payment as made, a book record of car hours, mileage, etc. No books concerning the business of the company were kept at the Mt. Vernon office. The commercial account of the company was kept at the Commercial National Bank at Washington, D. C., and the receipts from the operation of the road were deposited and checks for operating expenses were drawn upon that bank. The company also kept three small accounts in Alexandria, Va.

For some time prior to the merger, the Washington, Alexandria & Mt. Vernon Railway Company, the defendant's predecessor, maintained an office at 1307-1310 Real Estate Trust Building, Philadelphia,

which office was leased by Clarence P. King, who was the president of the company, and subsequently became president of the merged company until he was succeeded by Frederick H. Treat, who was president of the defendant company at the time of the service of the writ. The defendant company paid rental to Mr. King at the rate of \$50 per month, which covered the right of desk room for its president, treasurer, and bookkeeper, and the use of the furniture, fixtures, and telephone in the office. There appears to have been no formal authority by any action of the directors for maintaining any office, except that at Mt. Vernon, Va.; but the by-laws of the company provide that its stock shall be transferred only on the books of the company at the office of its treasurer. Upon application for listing its stock on the Washington Stock Exchange, the Washington, Alexandria & Mt. Vernon Railway Company, through its president, declared that:

"The principal office of the company is located at Mt. Vernon, Va., with branch offices in Washington and Philadelphia."

After the merger, the defendant applied to the Philadelphia Stock Exchange for the listing of its securities, and declared in its application:

"Stock is transferred at the company's general office, 1307 Real Estate Trust Building, Philadelphia, and registered by the Girard Trust Company, Philadelphia, registrar."

And it declared its offices to be as follows:

"Offices: Principal, Mt. Vernon, Virginia; general and transfer, 1307 Real Estate Trust Building, Philadelphia; Washington, 1202 Pennsylvania Avenue."

The name of the defendant company appeared in the City Directory for the years 1911-1912, which was in pursuance of information obtained from the treasurer of the company. At the office in Philadelphia the corporation kept its regular business ledgers, its stock transfer books, and stock ledgers. The bookkeeper of the company had his desk in the office in Philadelphia, made his entries in the corporation books kept there, and conducted general correspondence in relation to the company's business at that office. The treasurer of the company maintained the only treasurer's office of the company there, and had there his desk, papers, and treasurer's books. The company kept four bank accounts in Philadelphia, in the Girard Trust Company, Bank of North America, Corn Exchange Bank, and the Central Bank, into which accounts, from time to time, was deposited the surplus of cash not needed in the active operation of the company. Out of these accounts were paid interest on its mortgages, dividends, and its larger bills, by checks drawn at the Philadelphia office by the treasurer, and the deposit and check books on such banks were kept at the Philadelphia office.

The president, who, under the by-laws, had custody of the seal of the company, kept that seal at the Philadelphia office. The president and treasurer lived in Philadelphia, and the president had his desk at the office 1307 Real Estate Trust Building, where he was present two

days in each week, and went to Washington once or twice a week. While in Philadelphia, the president transacted at the office such business of the company as came to his attention, and conducted the correspondence of the company upon official stationery headed with the name of the defendant company, the address, 1307 Real Estate Trust Building, and the words "Office of F. H. Treat, President, Philadelphia," or "Office of the President, Philadelphia." All of the bills of the company, after approval in Washington by the manager of the railroad, were sent to Philadelphia for examination and approval, and the checks for payment were drawn at the Philadelphia office and forwarded to the Washington office. No one at the Washington office had authority to draw checks. No money was paid out at the Washington office, excepting petty cash for daily expenses, small bills, etc. While the company's entire physical business as a common carrier was transacted in the District of Columbia and the state of Virginia, it is apparent from the above facts that it was maintaining an office for the conduct of a large part of its executive, administrative, and financial business in this district, at which were the offices of its president and treasurer as such. It is not essential, to establish the presence of a corporation by the doing of business within this district, that all of its business should be transacted here.

I think sufficient has been shown to establish the fact that the defendant maintained an office in this district at which, through its president, treasurer, and bookkeeper, it carried on an important and essential part of its business in its corporate capacity. The facts in this case clearly distinguish it from those cases in which a subordinate agent, with limited authority, conducts some special business, which does not involve the exercise of corporate functions.

The rule is therefore discharged.

HYAMS v. OLD DOMINION CO.

(District Court, D. Maine. May 5, 1913.)

No. 702.

1. EQUITY (§ 117*)—BILL—MOTION TO DISMISS—DEMURRER.

Under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), abolishing demurrers, and providing that every defense arising on the face of the bill, which might previously have been made by demurrer or plea, shall be made by motion to dismiss or in the answer, an objection that a corporation not joined was an indispensable party to the bill was properly taken by motion to dismiss.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 246, 285-292; Dec. Dig. § 117.*]

2. EQUITY (§ 117*)—BILLS—PARTIES—RULES.

Equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix), providing that in all cases where it shall appear to the court that persons who might otherwise be deemed parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, the court in its discretion may proceed in the case without making such persons parties, did not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

change the principles of law or equity, or authorize the court to proceed in the case without having indispensable parties before it, to authorize a decision of the whole controversy involved and to make an adequate decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 246, 285-292; Dec. Dig. § 117.*]

3. JUDGMENT (§ 16*)—ABSENT PARTIES—RIGHTS.

The federal courts enforce the rule that the court cannot adjudicate directly on rights of a person not actually or constructively before it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 22, 24; Dec. Dig. § 16.*]

4. CORPORATIONS (§ 190*)—MANAGEMENT—STOCKHOLDER'S SUIT—PARTIES.

Complainant, a minority stockholder in a New Jersey mining company, sued defendant, a Maine corporation, alleging that defendant owned the majority stock in the New Jersey company and was undertaking to dissipate a part of the New Jersey company's capital by unlawful payment of dividends, that it had acquired wrongful dominion of the New Jersey company by means of its control of the stock of a third corporation, and had caused great and irreparable injury to the stock owned by complainant and to the New Jersey company as a corporation, and that such acts and conduct, if continued, would cause great and irreparable injury, both to complainant as a stockholder in such corporation and to the corporation itself, which injury and damage could not be computed and estimated, and prayed that defendant be enjoined from voting its stock in the New Jersey company, and from electing any person as director thereof who was a director or officer of defendant company. *Held*, that the New Jersey company was an indispensable party to the suit, and, being beyond the court's jurisdiction, the bill could not be maintained.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 723-731; Dec. Dig. § 190.*]

In Equity. Suit by Godfrey M. Hyams against the Old Dominion Company. On defendant's motion to dismiss bill for want of equity. Granted.

Isaac W. Dyer, of Portland, Me., and Edward M. Colie, of Newark, N. J., for complainant.

Brandeis, Dunbar & Nutter, of Boston, Mass., for respondent.

HALE, District Judge. This case now comes before the court upon the defendant's motion to dismiss the bill. The complainant, the holder of 3,056 shares of the capital stock of the Old Dominion Copper Mining & Smelting Company, a corporation of New Jersey, brings this bill in equity, in behalf of himself and of such other stockholders of his company as shall join in the prosecution of the suit, against the defendant corporation, the holder of a majority of the stock of the New Jersey corporation. The complainant seeks to enjoin the defendant corporation from voting its stock in the New Jersey company, and from electing any person a director of the New Jersey company who is a director or officer of the Maine company. The bill alleges that the New Jersey corporation is a mining company, with a capital stock of 162,000 shares, having a mine in Globe, Ariz., immediately adjoining the mine of a company called the United Globe Mines, incorporated under the laws of New York;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the Maine company, the defendant, is merely a holding company, holding a majority of the stock of the New Jersey company, and substantially all of the stock of the United Globe Mines; that the New Jersey company and the United Globe Mines have certain relations with each other, existing by contract, and fully stated in the bill; that the Maine company is controlled by persons who control certain other corporations enumerated in the bill, with which the New Jersey company has dealings; and that these corporations and the defendant have directors in common; that the New Jersey company has three out of seven directors in common with the defendant, but has no directors in common with the United Globe Mines, or with the other companies set out in the bill. The bill contains an allegation that the defendant, the holding company, has acted in an illegal and fraudulent manner in its control and management of the New Jersey company, by so exercising its control that some of the capital of the New Jersey company is in danger of being dissipated in dividends, and that this fraud taints the other transactions set up in the bill. The learned counsel for the complainant state fully the principles upon which they claim the bill is founded. Among the principles upon which they rely are the following:

"That a corporation must carry on its business by its own agents, and not through the agency of another corporation.

"That a corporation can only act through its officers and directors, and that the acts of the directors are the acts of the corporation.

"That the complainant is entitled to have the affairs of the corporation, of which he is a stockholder, managed by a board of directors uncontrolled by another corporation, which holds a majority of the stock of his corporation, acquired for the purpose of control, which corporation also owns all the stock of an adjacent and kindred corporation producing the same character of ore, and in fact worked in part through the shaft of his company, and having large inter-relations with his company, the majority of the directors of which holding corporation also own and control other corporations having large inter-relations with his company.

"That such control, as is demonstrated by the allegations in the bill, exercised by a corporation so acquiring a majority of the stock, for the purpose of control, is unlawful.

"That where such a control has been so acquired, the corporation so acquiring it constitutes itself, and virtually becomes, the trustee for the minority stockholders, and as such it is its duty not to place itself in a position where it assumes a position inconsistent with such trust relation; that where the trust relation is established, every act involving inter-relations can stand only upon the condition that the trustee satisfies the court fully and completely that the beneficiary has received a full equivalent for that which he parted with, and that the burden of proof in all such cases rests upon the trustee to clearly free himself from the imputation of fraud arising from the fact of the trust relation.

"That where a holding company has agreed, as here, to compel the complainant's company to dissipate a part of its capital as dividends, and has caused complainant's company to undertake to so dissipate the capital of the company, such flagrant fraud upon the complainant's rights characterizes the control and domination by the holding company of the complainant's company."

The charging part of the bill concludes with the allegation:

"That the conduct and the matters herein set forth on the part of the said defendant have caused great and irreparable injury to the said stock owned by him, and to the Old Dominion of New Jersey as a corporation, and that

said acts and conduct, if continued, and against which an injunction is hereby sought, would cause great and irreparable injury to the said stock, and to your orator as a stockholder in said corporation, and to the said corporation itself; that such injury and damage to him, and to said corporation, cannot be computed and estimated, and cannot be compensated in damages at law; and that your orator has no adequate remedy in law for the matters herein complained of."

The defendant moves that the bill be dismissed: First, because it is brought expressly on behalf of the complainant as a stockholder, and of all other participating stockholders of the New Jersey company; that said New Jersey company is an indispensable party to the bill, but is not joined as a party; and that the suit cannot proceed without such joinder.

[1, 2] The motion is to be treated as a demurrer would have been treated previous to the present equity rules, since equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) abolishes demurrers, and provides that every defense, arising upon the face of the bill, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss, or in the answer. The thirty-ninth equity rule (198 Fed. xxix, 115 C. C. A. xxix) provides that in all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, the court may, in its discretion, proceed in the cause without making such persons parties. The general purpose of this rule is undoubtedly to broaden the old rule, and to give jurisdiction wherever the court has before it such parties as will enable it to make an effective decree. Can this court, then, make an effective decree, without the joinder of the New Jersey company?

By speaking of proper parties, it is clear that rule 39 did not intend to change the principles of equity law, or to provide that the court might proceed in a cause without having before it such necessary or indispensable parties as would enable the court to fully decide the whole controversy involved, and to make a competent and adequate decree. The general rule of equity is that the bill must bring before the court all persons interested in the relief sought, and who may be affected by the proposed decree, or whose concurrence is necessary to a complete hearing of the cause. The effort of the court should be to reach a hearing of the whole of a controversy, and to make a complete decree between the parties, so as to prevent future litigation. *Adams' Equity*, § 312; *Story's Equity Pleadings*, § 72; *Story's Equity Jurisprudence*, § 1526; *Daniell, Chancery*, § 190; *Michigan State Bank v. Gardner*, 3 Gray (Mass.) 308.

[3] The federal courts enforce the elementary principle that the court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. *Mallow v. Hinde*, 12 Wheat. 193, 6 L. Ed. 599; *Shields v. Barrow*, 17 How. 130, 141, 15 L. Ed. 158; *Gregory v. Stetson*, 133 U. S. 579, 586, 587, 10 Sup. Ct. 422, 33 L. Ed. 792; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 246, 22 Sup. Ct. 308, 46 L. Ed. 499; *De Neufville v. New York, etc., Co.*, 81 Fed. 10, 12, 13, 26 C. C. A. 306; *Talbot J. Taylor*

& Co. v. Southern Pacific Co. (C. C.) 122 Fed. 147, 152; United States v. Northern Pacific R. Co., 134 Fed. 715, 718, 67 C. C. A. 269.

[4] It is urged on the part of the complainant that the New Jersey company is not an indispensable party, nor directly affected in its property by the result of the litigation in this suit; that the sole issue is between the complainant and the Maine company, as to the right to vote the defendant's majority shares, in order to perpetuate its control in the New Jersey company; that, although the New Jersey company may be held to have some interest in the controversy, it will not be directly affected by the decree made in its absence, and hence is not an indispensable party, under the rule, stated in *Williams v. Bankhead*, 19 Wall. 563, 571, 22 L. Ed. 184, that it may come in and be made a party to the proceedings, if it desires to do so, but, if made a party, its interests indicate that it must be a party complainant; and that in equity, especially under the enlarged rules of the federal court, the New Jersey company is not so indispensable a party as to prevent the controversy from proceeding without it.

Upon a careful examination of the bill in equity before me, I cannot sustain the complainant's contention. Equity rule 39 and section 50 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 149]) are not intended to change the principles of equity, or of equity practice. It is still true that a court in equity can make no decree which so far involves the rights of an absent party that complete and final justice cannot be done between the parties present without affecting the rights of the absent party. The bill in equity in this case is based upon the charge that certain action upon the part of the defendant company is illegal and fraudulent, in that, by its control of the New Jersey company, the defendant is undertaking to dissipate a part of the capital of the New Jersey company by an unlawful payment of dividends; that the defendant has acquired a wrongful domination of the New Jersey company by means of its control of the entire capital stock of the United Globe Mines, and its ownership of a majority of the stock of the New Jersey company; that the defendant's conduct has caused great and irreparable injury to the stock owned by the complainant, and to the Old Dominion Company of New Jersey as a corporation, and that such acts and conduct, if continued, will cause great and irreparable injury, both to the "complainant as a stockholder in said corporation, and to the said corporation itself; that such injury and damage to him, and to said corporation, cannot be computed and estimated." It is clear, then, that the injury complained of, and sought to be enjoined, is an injury, not only to the complainant, but to the complainant's company, the New Jersey corporation; that, if the complainant's stock is to be diminished in value, it is because the property and rights of his company, the New Jersey corporation, will be diminished in value. It can hardly be denied that the "damage and injury to said corporation" must refer to an actual damage to the property and rights of that corporation. If, then, the New Jersey corporation has suffered, and is in danger of suffering, such injury and damage, it ought to be heard in court to say whether it charges the same unlawful acts which the complainant

charges in his bill in equity. If it does make such allegations, and if it shares the apprehensions of the complainant in this suit, it should be a party to this controversy, and be recognized and protected in the decree of this court. If it takes a different view of its rights, and of its injuries and damages, then it clearly should be a party to this action, in order that the court may try the whole controversy, and not some part of it. If this were a law suit, the New Jersey company would have to be made a plaintiff in order to protect its rights; but in equity it may be brought before the court as a defendant, and as such defendant will receive the protection and be entitled to the decree of the court. If it is adjudged in this suit that the defendant has been guilty of fraudulent and inequitable conduct, it may also be adjudged in another suit, brought by the New Jersey company, that the present defendant has been guilty of the same inequitable and fraudulent conduct towards the New Jersey company. And if a suit is brought by the New Jersey company, not now in court, against the present defendant, the decree in the present suit will not protect the defendant. *Wall v. Thomas* (C. C.) 41 Fed. 620, 622.

It is clear, then, that without the presence in court of the New Jersey corporation the whole controversy cannot be tried out, and that whatever decree the complainant obtains in this suit will be no bar to a suit of the New Jersey corporation founded upon the same inequitable acts of this defendant. In my opinion the court cannot pass adequately upon the questions presented by this bill without having before it the corporation of which the complainant is a minority stockholder, in order that the whole controversy may be settled. In an equitable action, all sides of the controversy should be adequately represented and fully heard; and when it appears that a case, otherwise presenting ground for action, cannot be dealt with because of the absence of essential parties, it is usual for the court to grant leave to the complainant to amend by bringing in such parties; but when it also appears that indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, it is useless for the court to grant leave to amend. *Minnesota v. Northern Securities Co.*, 184 U. S. 246, 22 Sup. Ct. 308, 46 L. Ed. 499. In *Gregory v. Stetson*, 133 U. S. 579, 586, 10 Sup. Ct. 422, 424 (33 L. Ed. 792) the Supreme Court said:

"The point was made in the court below that, Mrs. Pike being a nonresident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to this suit, and that it was, therefore, unnecessary to attempt to do so. The court below ruled against the complainant on this point; and we see no error in that ruling. The general question involved therein has been before this court a number of times, and it is now well settled that, notwithstanding the statute referred to, and the forty-seventh equity rule, a Circuit Court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby."

The present thirty-ninth rule in equity and section 50 of the Judicial Code impose no different duty upon the court. I must sustain the motion to dismiss the bill in equity on account of the absence of the Old Dominion Copper Mining & Smelting Company of New Jersey as an indispensable party. Inasmuch as my ruling upon this point results

in the dismissal of the bill, it is not necessary to discuss the other grounds upon which the motion is based.

The bill in equity may be dismissed, with costs.

LYDEN v. WESTERN LIFE INDEMNITY CO.

(District Court, W. D. Washington, S. D. April 10, 1913.)

No. 1,276.

INSURANCE (§ 26*)—ACTION AGAINST INSURANCE COMPANY—PROCESS—SERVICE ON INSURANCE COMMISSIONER—VALIDITY.

Under Insurance Code Wash. (Laws 1911, c. 49) §§ 13, 13½, entitled "An act to regulate the government of insurance companies and insurance business," requiring the appointment of an insurance commissioner, and declaring that in any action or proceeding against a foreign insurance company authorized to do business within the state process may be served on such commissioner with the same effect as if the company were a domestic company having its principal office in the county where the suit is instituted, service on the insurance commissioner is not limited to actions on policies, but was proper in an action against a foreign insurance company for breach of an insurance agency contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 33; Dec. Dig. § 26.*]

At Law. Action by B. L. Lyden against the Western Life Indemnity Company. On motion to quash service of summons on State Insurance Commissioner, on the ground that the action was not based on an insurance contract. Motion denied.

L. I. Lefebvre and J. W. Selden, both of Tacoma, Wash., for plaintiff.

H. W. Lueders, of Tacoma, Wash., for defendant.

CUSHMAN, District Judge. This matter is before the court upon motion to quash the service of summons, after removal from the state court.

The complaint alleges that plaintiff is a resident of the state of Washington; that the defendant is an Illinois insurance company, regularly licensed and doing business pursuant to the laws of the state of Washington; that plaintiff moved from Washington to Pennsylvania to enter the service of the defendant in Pennsylvania, incurring certain expenses in moving, all under contracts with the defendant, by the terms of which the defendant agreed to pay such expenses. Recovery of damages is asked for the breach of the contracts.

The motion to quash service is upon the ground that the contract was made in Illinois for the performance of services by the plaintiff in Pennsylvania; that it in no way arises out of any insurance contract; that it is a transitory action, upon which suit can only be had in Illinois; that the service of summons on the Washington State Insurance Commissioner was without effect and should be quashed.

The return of service is not contained in the transcript from the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

state court; but it appears from the motion to quash and the affidavit supporting it that service of summons was made upon the Insurance Commissioner.

"That prior to the time and up to the time that said transaction, out of which said cause of action arose, was entered into, B. L. Lyden (the plaintiff) was the agent for said company in Pierce county, Wash., but removed therefrom and went to Pennsylvania. That at no time since has said company had any agent to transact business for said company, excepting that J. W. Selden, plaintiff's attorney, was authorized to receive premiums on commission and forward the same to the home office in Chicago, and that said Selden was acting in such capacity at the time said suit was commenced."

From the affidavits in opposition to the motion, which are undenied, it appears that the defendant had, in accordance with the laws of the state of Washington, constituted the Insurance Commissioner of the state of Washington its attorney in fact for the purpose of receiving any and all services of process; that from the business of insurance heretofore written by the defendant, it is, at the present time, collecting from the residents of the state of Washington, in premiums, approximately the sum of \$1,000 per month.

The plaintiff cites the following authorities: *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; section 13, p. 173, Washington Session Laws 1911.

The defendant cites the following authorities in support of its motion to quash: *Galveston, H. & S. A. Ry. Co. v. Gonzalas*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248; *In Re John O. Shaw, Jr.*, 145 U. S. 445, 12 Sup. Ct. 935, 36 L. Ed. 768; *Clarke v. New Jersey Steam Nav. Co.*, Fed. Cas. No. 2,859; *Frawley v. Penn. Cas. Co. (C. C.)* 124 Fed. 259; *Olson v. Buffalo Hump Min. Co. (C. C.)* 130 Fed. 1017; *Connor v. Vicksburg Ry. Co. (C. C.)* 36 Fed. 273, 1 L. R. A. 331; *Jessup v. Ill. Cen. Ry. Co. (C. C.)* 36 Fed. 735; *Bensinger v. Nat. Cash Reg. (C. C.)* 42 Fed. 81; *Eagle Life Ass'n v. Redden*, 121 Ala. 346, 25 South. 779; sections 206 and 207, Rem. & Bal. Code; *Hammel v. Fidelity Mut. Aid Ass'n*, 42 Wash. 448, 85 Pac. 35; *McMaster v. Thresher Co.*, 10 Wash. 147, 38 Pac. 760; Act Aug. 13, 1888, c. 866, 25 Stat. at Large, 434, § 1; U. S. Compiled Stat. 1901, p. 508; *Rose's Code*, vol. 1, §§ 401, 407.

The title to the Washington Insurance Code provides:

"An act to provide an Insurance Code for the state of Washington, to regulate the organization and government of insurance companies and insurance business, to provide penalties for the violation of the provisions of this act, to provide for an insurance commissioner and define his duties, and to repeal all existing laws in relation thereto." Laws of 1911, p. 161.

In the body of the act it is provided:

"The commissioner shall not issue a certificate of authority to transact any business of insurance in this state to any foreign or alien insurance company until it has executed and filed in his office a written appointment of the insurance commissioner to be the true and lawful attorney of such company in and for this state, upon whom all lawful process in any action or proceedings against such company commenced in any county in this state may be served with the same effect as if it were a domestic company having its

principal office in such county. The service upon such attorney shall thereafter be deemed service upon the company. * * * Section 13, pp. 173, 174, Laws 1911.

"Any insurance company may be sued upon a policy of insurance in any county within this state where the cause of action arose, by serving the summons and a copy of the complaint upon the company, if a domestic company, or upon the commissioner, as attorney in fact of the company, if an alien or foreign company, or upon any duly licensed agent of the company residing in the county where the cause of action arose." Section 13½, p. 174, Laws 1911.

The motion to quash will be denied. There is nothing in the foregoing statute to show any intention to limit the suits brought in the state courts against nonresident corporations to those involving transactions growing out of business carried on within the state. The title shows the act to be one to "regulate * * * the government of insurance companies and insurance business." If it was only for the regulation of insurance business, there would be more plausibility in the contrary contention. The body of the act provides for service of process "in any action or proceeding against such company commenced in any county in this state * * * with the same effect as if it were a domestic company having its principal office in said county." This language is broad enough to include the present suit. Section 13½, above quoted, by making special provision for the venue in suits upon insurance policies, shows that the former provision was not intended to limit suits to those founded on transactions arising in the state.

The affidavits show that the defendant is doing business in the state. *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987.

The case of *Olson v. Buffalo Hump Min. Co. (C. C.)* 130 Fed. 1017, heretofore decided by this court, does not support defendant's contention. In that case, the plaintiff was a nonresident of the state, and the statute there considered required a foreign corporation, before doing business in the state, to have a representative agent authorized to accept service of process "in any action or suit pertaining to the property, business or transactions of such corporation within this state, to which said corporation may be a party." *Pierce's Code of Washington*, § 7216; 1 *Ballinger's Ann. Codes & Statutes*, § 4293; 1 *Hill's Code*, § 1526.

IN RE QUAKER DRUG CO.

(District Court, W. D. Washington, N. D. April 10, 1913.)

No. 4,969.

BANKRUPTCY (§ 314*)—CLAIMS—LEASE—SURRENDER—FORFEITURE—SUBSEQUENTLY ACCRUING RENT.

A lease of an installed cash carrier system provided that in case of a breach by the lessee, or in case the lessee became a bankrupt, the balance of the rental for the entire term should be considered as at once due, and that the lessor, at any time after such a breach of the lease,

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might enter the premises and take possession of the system, and thereby terminate all rights and interest of the lessee therein. *Held*, that the lessee's breach of the lease, as distinguished from bankruptcy, only authorized a forfeiture of the lease; and hence, the lessee having become a bankrupt, the act of the lessor in taking possession of the system was without authority, waived a forfeiture, if any, and effected a surrender of the lease, so that it could not thereafter maintain a claim for rent after adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. § 314.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Quaker Drug Company. On review of a referee's decision allowing a claim of the Lamson Consolidated Store Service Company for rental of a cash carrier system. Order modified, and claim for rent accruing after the filing of the petition in bankruptcy disallowed.

McClure & McClure, of Seattle, Wash., for trustee.

Walter Metzenbaum, of Seattle, Wash., for claimant.

CUSHMAN, District Judge. This matter is before the court for review of the decision of the referee, allowing a claim of the Lamson Consolidated Store Service Company in the sum of \$1,205.29. Review is asked and error assigned by the trustee on the ground that the claim is based upon an executory contract and the allowance of a demand for rental of a cable cash carrier system, accruing after the date of filing the petition for adjudication of bankruptcy.

The lease contained, among others, the following provisions:

"(3) The lessee agrees to pay on said date of installation rental to the regular quarter day next ensuing, and thereafter in advance upon the 1st days of March, June, September, and December in each and every year at the rate of \$230.54 for the first year and \$230.54 for each succeeding year. Lessee agrees to pay all local taxes levied upon said system. If any installment of rental shall remain unpaid for 60 days after it becomes due, the entire rental to the end of this lease shall become at once payable without demand. * * *

"(6) And those presents are upon this condition that in case of a breach by lessee of any of the covenants or agreements herein, or in case the lessee becomes bankrupt, insolvent, or makes an assignment for the benefit of creditors, or discontinues business in the premises for any other reason whatsoever, the balance of rental for the entire term of this lease shall be considered at once due and payable without notice or demand on the part of the lessor; and it is also provided that the lessor may at any time after such a breach of this lease occurs enter the premises, take possession of said system, and thereby terminate all rights and interest of the lessee in said system."

The trustee cites the following authorities: *Connor v. Bradley*, 1 How. 217, 11 L. Ed. 105; *Prout v. Roby*, 15 Wall. 471, 476, 21 L. Ed. 58; *Henderson v. Coal Co.*, 140 U. S. 25, 33, 11 Sup. Ct. 691, 35 L. Ed. 332; *In re Pittsburg Drug Co.* (D. C.) 20 Am. Bankr. Rep. 227, 164 Fed. 482; *Lamson Con. Store Ser. Co. v. Bowland*, 114 Fed. 639, 52 C. C. A. 335; *In re Winfield Mfg. Co.* (D. C.) 15 Am. Bankr. Rep. 25, 137 Fed. 984; *Wilson v. Penn. Trust Co.*, 8 Am. Bankr. Rep. 169, 114 Fed. 742, 52 C. C. A. 374; *In re Shaffer* (D. C.) 10 Am. Bankr.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Rep. 633, 124 Fed. 111; *Slocum v. Soliday* (C. C. A. 1st Cir.) 25 Am. Bankr. Rep. 460, 183 Fed. 410, 106 C. C. A. 56; 1 *Loveland on Bankruptcy*, 648-649; *Parks v. Hays*, 92 Tenn. 161, 22 S. W. 3; *Smith v. Whitbeck*, 13 Ohio St. 471; 18 Am. & Eng. Enc. Law, p. 375; 1 *Remington, Bankruptcy*, pp. 400, 401; *Collier, Bankruptcy* (1912 Ed.) 880.

The claimant cites the following authorities in support of its contention: In *re Stotts* (D. C.) 1 Am. Bankr. Rep. 642, 93 Fed. 438; In *re Samuel Wilde's Sons*, 16 Am. Bankr. Rep. 386, 144 Fed. 972, 75 C. C. A. 601; In *re Swift* (D. C.) 9 Am. Bankr. Rep. 237, 118 Fed. 348; In *re Grant* (D. C.) 9 Am. Bankr. Rep. 93, 118 Fed. 73; *Stone v. Auerbach*, 133 App. Div. 75, 117 N. Y. Supp. 734; *Rand v. Iowa*, 186 N. Y. 59-61, 78 N. E. 574, 116 Am. St. Rep. 530, 9 Ann. Cas. 542; *Lowell on Bankruptcy*, § 169, and cases cited; *Hall v. Gould*, 13 N. Y. 127; *Morgan v. Smith*, 70 N. Y. 537; *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576; *Giles v. Comstock*, 4 N. Y. 270, 53 Am. Dec. 374; *Learned v. Ryder*, 61 Barb. (N. Y.) 552; *Mackellar v. Sigler*, 47 How. Prac. (N. Y.) 20; *Gugel v. Isaacs*, 21 App. Div. 503, 48 N. Y. Supp. 594, affirmed 162 N. Y. 636, 57 N. E. 1111; *Platt v. Johnson*, 168 Pa. 47-49, 31 Atl. 935, 47 Am. St. Rep. 877, 26 L. R. A. 755, 57 Am. St. Rep. 261; *Greenleaf v. Allen*, 127 Mass. 248-253; *Hovey v. Newton*, 11 Pick. (Mass.) 421; *Bradford v. Patten*, 108 Mass. 153; *Goodwin v. Sharkey*, 80 Pa. 149 at 153; *Owen v. Shovlin*, 116 Pa. 371, 9 Atl. 484; In *re Goldstein* (D. C.) 2 Am. Bankr. Rep. 603; In *re Ells* (D. C.) 98 Fed. 967, at 969.

The first installment of rent due under the lease became payable September 1, 1912. The Quaker Drug Company was adjudicated bankrupt on September 30, 1912. The claimant, the lessor, upon the adjudication of bankruptcy, resumed possession of the leased property. Bankruptcy intervened before the expiration of 60 days after default, for which provision is made in section 3 of the lease, above quoted. Upon the reasoning and authority of *Lamson Consolidated Store Service Company v. Bowland*, 114 Fed. 639, 52 C. C. A. 335, the referee's order will be modified, and all rental accruing after the filing of the petition for adjudication in bankruptcy is disallowed.

The language in paragraph 6 of the lease:

"And these presents are upon this condition, that in case of a breach by lessee of any of the covenants or agreements herein, or in case the lessee becomes bankrupt * * *

—shows that the lessee's bankruptcy was in no sense a breach of the lease. The latter part of the same section, providing:

"That the lessor may at any time after such a breach of this lease occurs enter the premises, take possession of said system, and thereby terminate all rights and interest of the lessee in said system"

—shows that it was a breach of the lease, and not lessee's bankruptcy, that was to authorize the lessor's taking possession of the leased property. At any rate, the intention to authorize a forfeiture is not shown with sufficient clearness, and, if authorized, the lessor's taking possession of the leased property before there was any right to do so, under the terms of the lease, waived the forfeiture, and effected a surrender of the lease.

Claimant's contention that, by removal from the store building, the carrier system was necessarily much damaged, is not without consideration of an equitable nature; but the lease and its effect must be construed as made. The rule must be the same in interpreting it and arriving at its meaning and effect, whether it covers fragile property, liable to injury in case of removal and alteration, or that which would not be so subject.

THE VIRGINIA BELLE.

(District Court, E. D. Virginia. March 21, 1913.)

1. SEAMEN (§ 2*)—WHO ARE "SEAMEN"—ENGINEER ON FISHING BOAT—LIEN FOR WAGES.

A libellant, who was employed as engineer of a motor boat, not registered, engaged in fishing in Chesapeake Bay, the business being conducted from a place on shore, where the crew remained nights, going out each morning, *held* entitled to a maritime lien as a seamen for his wages.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 1-3; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6374, 6375.]

2. ADMIRALTY (§ 6*)—JURISDICTION—VESSELS SUBJECT TO JURISDICTION.

A motor boat engaged in fishing, although of less than five tons and not registered, is subject to the admiralty jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 86-98; Dec. Dig. § 6.*]

3. SEAMEN (§ 27*)—EFFECT OF CONVEYANCE OF VESSEL.

A maritime lien for wages, promptly asserted, takes precedence of a sale and conveyance of the vessel in payment of a debt, made before the commencement of suit to enforce the lien, but after the lien accrued.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 4, 141, 157-169; Dec. Dig. § 27.*]

In Admiralty. Suit by Martin Jenkins against the sloop Virginia Belle to enforce a maritime lien for wages as a seaman. Decree for libellant.

The libel in this case was filed on the 15th day of July, 1912, to recover the sum of \$170, \$50 of which was claimed for supplies furnished the sloop, and \$120 for services rendered by libellant as a seaman on the Virginia Belle, at \$30 per month, from the 18th of January to the 18th of May, 1912. On the 17th of August a decree by default was entered for the libellant for the full sum claimed, to wit, \$170, with interest from the 18th day of May, 1912, and costs, and the sloop ordered sold by the marshal for cash to the highest bidder, and the proceeds deposited in the registry of the court. On the 24th of August, 1912, E. Harry Rowe and Mrs. D. R. Craig respectively appeared and filed their answers, setting up that said Rowe, the owner of the Virginia Belle at the time libellant's services were rendered, had sold and disposed of the same to Mrs. D. R. Craig, along with other property, namely, the entire fishing outfit and plant, and also a tract of about four acres of land, at the price of \$600, being the amount of the indebtedness theretofore due and owing by said Rowe to Mrs. Craig, as evidenced by a bill of sale for the property, dated on the 29th of June, 1912, and duly recorded in the clerk's office of Gloucester county on the 8th day of July, 1912, several days prior to the filing of the libel. Upon the presentation of these answers, treating them as intervening petitions, the following consent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

order was entered on the 24th day of August, 1912: “* * * And from the said answers it appearing that they contest the right of the libelant to have the libel on sloop Virginia Belle, and as no bond has been given by above-named defendants and the said sloop Virginia Belle may injure and costs accumulate before the issue made between libelant and defendants can be heard and determined, now the court, by consent of parties, doth adjudge, order, and decree that the sale of the sloop Virginia Belle, advertised for sale on Tuesday, August 27, 1912, be proceeded with, and the proceeds of sale be held as directed by decree of sale of August 17, 1912, and so much of said order of sale as gave a judgment for libelant against sloop Virginia Belle be set aside, and the issue made between the libelant and parties defendant be heard and determined on 29th day of October, 1912.” On the 27th of August, 1912, pursuant to advertisement, the marshal regularly sold the sloop at the price of \$100, and deposited the money in the registry of the court.

Jeffries, Wolcott, Wolcott & Lankford, of Norfolk, Va., for libelant.
J. N. Stubbs, of Woods Crossroads, Va., for interveners.

WADDILL, District Judge (after stating the facts as above). The pleadings present for the consideration of the court the questions of (a) whether libelant has a maritime claim; (b) whether the sloop Virginia Belle is subject to the admiralty jurisdiction of the court; and (c) the effect of the bill of sale given for the sloop recorded prior to the filing of the libel. These questions will be considered in the order named.

[1] First. The \$50 claimed as an advance for supplies by the libelant to the vessel having been abandoned, the residue of the claim of \$120 will only be considered. That was due libelant for services rendered respondent in connection with the conduct of his fishing business, and for work as engineer on the Virginia Belle, used in the venture. The Virginia Belle was a gasoline motor boat, 38 feet long, under five tons burden, was not registered nor entered at the custom house, and used by the intervener, Rowe, for the purpose of fishing in the waters of Chesapeake Bay. She was three years old, said to be worth from \$250 to \$400, and cost, when new, the engine \$450, and hull, etc., \$200. The libelant was engaged as engineer of the boat, and assisted in fishing. The business was conducted from a place on the York river, in Gloucester county, known as Thoroughfare, at the mouth of Sarah's creek, and the fishermen stayed on shore at night, where the seines and nets were reeled, going out some 10 or 12 miles to the bay in the early morning to fish, and returning at night. The fishing crew consisted of four persons, other than Mr. Rowe, the master, owner of the Virginia Belle, and who, with the libelant as engineer, navigated the sloop.

On first impressions, it would appear that the libelant might be termed a fisherman, rather than a seaman, and hence not entitled to proceed in admiralty as for a maritime claim. But the maritime law treats persons engaged in fishing enterprises upon waters as seamen, and accords them the same rights, privileges, and remedies afforded seamen; and particularly is this true of one occupying the position of the libelant, namely, engineer of the boat used in the service. The *Minna* (D. C.) 11 Fed. 759, a decision of Judge Brown, of the Eastern district of Michigan, afterwards Mr. Justice Brown, of the Supreme

Court of the United States, is a case strikingly like the one under consideration; the facts in that case being as follows: The libel was for services performed as a fisherman on board the Minna. The testimony showed the Minna was employed solely in fishing, running out from Alpena every morning 15 or 18 miles to the fishing grounds, throwing their nets, and making a lift or catch of fish, and returning the same evening to port, where the fish were discharged and prepared for market. The crew consisted simply of the master and engineer. The libellant took no part in the navigation of the vessel, but was employed solely as a fisherman. His contract required him to go out with the tug every day, to stay and lift the nets, clean fish, discharge the catch, and return the nets on shore. He also lodged ashore at night. Mr. Justice Brown, in deciding the case, said:

"At first blush I was inclined to the opinion that libellant's services, not being maritime in their character, were not such as to create a lien upon the vessel. The earlier cases collated in 2 Parsons, Shipping, 135, indicate that mere landsmen have no lien, unless their labors contribute to the preservation or navigation of the ship, or to the sustenance or health of the crew. See, also, *Gurney v. Crockett*, Abb. Adm. 490, Fed. Cas. No. 5,874; *Cox v. Murray*, Abb. Adm. 340, Fed. Cas. No. 3,304. But, upon reflection, I am satisfied the sounder principle is that stated in Ben. Adm. § 241, and *The Ocean Spray*, 4 Sawy. 105, Fed. Cas. No. 10,412, viz., that all hands employed upon a vessel, except the master, are entitled to a lien if their services are in furtherance of the main object of the enterprise in which she is engaged. Any other rule would put large classes of persons employed upon steamboats outside the pale of admiralty law. * * * The test is whether the services are for the benefit of a vessel engaged in commerce and navigation. If there be a failure in either respect, viz., in the character or in the nature of the ship's employment, there is no lien. I do not regard the fact that libellant slept upon shore at night, and there reeled out and mended the nets, as qualifying in any way the nature of his contract. These services were merely incidental and subsidiary to his main contract. *The Canton*, 1 Spr. 437, Fed. Cas. No. 2,388; *The Mary*, 1 Spr. 204, Fed. Cas. No. 9,190. Upon the facts, I think that libellant is entitled to recover."

To this case, including those cited therein, and in the note at the foot of the decision, special reference is made as conclusive of the law of the present case. Indeed, if there was no decision other than that of Mr. Justice Brown, the same would be followed, as no higher authority can be found respecting maritime matters.

[2] Second. The claim that the libeled vessel is not the subject of maritime jurisdiction is not well taken, as the size of the vessel, or whether it was actually entered in the custom house, does not determine this question.

[3] Third. The claim of the libellant being maritime in character, as established by the proof, and the vessel sold, as above stated, for the purpose of meeting the same, the bill of sale, made in payment of the debt due by Mr. Rowe, along with the other property, will not operate to relieve the vessel from its maritime obligations, timely and appropriately asserted as in this case.

A decree will be entered in favor of the libellant for \$120, the amount of his claim, together with his costs.

TAYLOR v. MUNSON S. S. LINE.

(District Court, S. D. Alabama, S. D. April 23, 1913.)

No. 487.

1. MASTER AND SERVANT (§ 185*)—INJURIES TO SERVANT—FELLOW SERVANTS.

Complainant, a stevedore, while engaged in stowing timber in the hold of a vessel, was injured by the fall of a stick of timber, due to his effort to escape another stick of timber being lowered into the hold in a sling. He alleged that he was injured by reason of the superintendent's negligence in giving orders to rush the work of loading, causing the stick to be carried into the hold by the sling before the timber he carried had been stowed away; that plaintiff, while bearing another stick, was compelled to make an effort to escape the stick in the sling, and was thereby caused to fall, and was injured by the stick he was carrying falling on him. *Held*, that plaintiff could not recover for any negligence of the men in executing the order of the superintendent to hurry the work; such negligence, if any, being that of plaintiff's fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

2. MASTER AND SERVANT (§ 96*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

Plaintiff's injury not being the probable or natural result of the superintendent's order, it could not be regarded as the proximate cause of plaintiff's injury, so as to make the superintendent's negligence in giving such order, if any, actionable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 157, 158, 162; Dec. Dig. § 96.*]

At Law. Action by Ezekiel Taylor against the Munson Steamship Line. On demurrer to complaint. Sustained.

Alex T. Howard, of Mobile, Ala., for plaintiff.

Hanaw & Pillans, of Mobile, Ala., for defendant.

TOULMIN, Judge. The complaint alleges that one Cooper was superintendent of the loading of the vessel, under employment of the defendant, with timber; that he "negligently gave orders" to the men at work in loading the ship to rush and hurry the work of loading, and did thereby (that is, by giving said orders) cause a stick of timber to be carried into the hold before the timber already carried had been stowed away. The complaint then alleges that, as a direct and proximate result of the "negligent hurrying" of said work, a certain stick of timber was carried into the hatch to be stowed away by the gang of men, of which plaintiff was one, and at work, before the gang had finished stowing away the timber already carried into said hold, and that the plaintiff, whilst assisting in stowing away a heavy stick of timber, and whilst bearing the same in his hands, was compelled to make an effort to dodge and escape a stick of timber then being carried in a sling, and he was thereby caused to fall, and said stick of timber so carried by him was caused to fall on him, by which he was bruised, injured, etc.

It will be observed the complaint alleges in substance that as a direct and proximate result of the negligent *hurrying* of the work a stick of timber was carried into the hatch to be stowed away, and that the

plaintiff, in getting out of the way in the hold of the vessel, fell, and the stick of timber which he was carrying fell on and injured him. It is not alleged that any one was hurrying (negligently or otherwise) except himself; but it does not appear that he was negligent. The allegation is that Cooper, the superintendent, negligently gave orders to hurry. In what respect the orders were *negligently* given does not appear. It is therefore uncertain whether the pleader intends to charge that the superintendent negligently *gave* the *orders* to hurry the work in such a negligent manner as not to be clearly understood by the men, or that in executing the orders to hurry they negligently did so. There are, however, questions of law involved in the case which control the case, whether the one or the other aspect of it be clearly and properly presented.

[1] First. If the negligence, which caused the injury of which the plaintiff complains, was that of the men in executing the orders of the superintendent to hurry the work, the plaintiff cannot recover, because of the negligence of his fellow servants.

[2] Second. If the superintendent, Cooper, negligently gave orders to the men to hurry the work of loading the timber, unless it appears that the injury was the natural and probable consequence of the alleged negligence, and that it ought to have been foreseen in the light of attending circumstances, then the plaintiff would not be entitled to recover, and unless in addition the orders complained of were the proximate cause of the injury the plaintiff cannot recover. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256.

"An injury that is not the natural consequence of an act or omission, and that would not have resulted but for the interposition of a new and independent cause, is not actionable." *Little Rock & M. R. Co. v. Barry*, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349, and numerous authorities cited therein.

"An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. * * * A natural consequence of an act is the consequence which ordinarily follows it—the result which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it." *Cole v. German Savings & Loan Soc.*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; *Chicago, St. P., M. & O. Ry. Co. v. Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582.

Can it be justly or reasonably claimed that from the order of Cooper to the men to hurry the work of loading it could have been foreseen or anticipated, reasonably anticipated, as the probable or natural result of such order, that it would have inflicted injury on the plaintiff, or any other person engaged in the work of loading the timber? Could it have been foreseen or reasonably anticipated by Cooper that, by his order to hurry the work (not an uncommon order), the man carrying a stick of timber to be lowered into the hatch should hold it in a sling in so threatening a manner over or above the head of the plaintiff as to frighten him, and cause him, in his flight to escape imaginary or real danger, to fall down and become injured by the stick of timber he him-

self was carrying? I hardly think it would be so contended. Moreover:

"There is no duty imposed upon a master to anticipate breaches of duty on the part of his servants," even if such was the act of the man who was lowering the timber into the hatch. The master "may lawfully reckon the natural and probable result of his actions upon the supposition that his servants will obey the law and faithfully discharge their duties. The legal presumption is that they will do so, and this is the only practicable basis for the measurement of the acts, rights, or remedies of mankind." *American Bridge Co. v. Seeds*, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041; *Little Rock & M. R. Co. v. Barry*, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349.

There would have been no injury to the plaintiff by or through Cooper's orders, unless the man who was lowering the timber into the hatch had been guilty of some act or omission; and it does not appear that there would have been any then, but for plaintiff's own unfortunate act of dodging and attempting to escape what he considered or believed to be impending danger, and which caused him to fall and be injured by the stick of timber he himself was bearing.

"The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded; and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. * * * If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. * * * If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action." 1 *Cooley on Torts* (3d Ed.) p. 99; *Chicago, B. & Q. R. Co. v. Richardson* (C. C. A.) 202 Fed. 842.

In no aspect of this case, as presented by the complaint, has the plaintiff, in my opinion, a right to recover.

Demurrers to the complaint sustained.

SICULA AMERICANA DI NAVIGAZIONE A VAPORE v. DALZELL et al.

(District Court, S. D. New York. April 17, 1913.)

1. TOWAGE (§ 15*)—LIABILITY FOR INJURY TO TOW—BURDEN AND MEASURE OF PROOF.

In the performance of a towage service, due care and maritime skill, such as the situation and conditions may reasonably require, must be exercised; and where injury results to the tow while under control of the tug, there is a presumption that the latter was in fault, and the tow is not required to prove a specific act of negligence.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 30-38; Dec. Dig. § 15.*]

2. TOWAGE (§ 11*)—INJURY TO TOW—LIABILITY OF TUGS.

The injury of a steamship by striking a pier while being swung into her berth by two tugs *held*, under the evidence, due to the fault of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

master of one of the tugs, who was on board in charge of her movements, in stopping one of her engines, but not the other; the effect being to swing her stern against the pier.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

In Admiralty. Suit by the *Sicula Americana di Navigazione a Vapore*, owner of the steamship *San Giorgio*, against Frederick B. Dalzell and W. Freeland Dalzell, doing business as Frederick B. Dalzell & Co. Decree for libellant.

Convers & Kirlin, of New York City (J. Parker Kirlin and William H. McGrann, both of New York City, of counsel), for libellant.

Burlingham, Montgomery & Beecher, of New York City, for respondents.

HAZEL, District Judge. This is a libel in personam to recover damages for negligent towing by the tugboats Dalzelline and C. P. Raymond, owned by the respondents. The question submitted for decision, on conflicting evidence, is whether the respondents, in negligently allowing the steamer to strike the side of Pier 22, Brooklyn, N. Y., while swinging into her berth, were solely at fault for the injuries resulting therefrom to her propeller blades. They deny that the steamer sustained any damage from negligent handling on the part of the tugs, asserting that the steamer was berthed in the usual way, and that, if there was a collision of the steamer with the pier, it occurred on account of the parting of the steamer's hawser or bowline, and in no other way.

There was some testimony on behalf of respondents, throwing doubt upon the claim of the libellant that the steamer struck the pier; but on this phase of the controversy I think it is shown by preponderating evidence that, during the course of the maneuvering to swing her into her berth, the steamer struck the pier, sustaining the injuries complained of. It is true that during the maneuvering the steamer's forward hawser, running from the forecandle to the end of the pier, parted; but I am satisfied by the evidence that such parting of the line occurred subsequent to the steamer's impact with the pier, at a time when she was parallel thereto, and moving astern. From the fact that the piles were damaged about 200 feet distant from the outer end of the pier, it may fairly be presumed that the steamer struck when her stern was about 200 feet inside the slip, since, if the striking had occurred when the bowline broke, the damage to the pier would no doubt have been considerably removed from the end.

The libellant has fairly shown that the injuries were received before the steamer was alongside the pier, and that they were received while she was in a position at an angle thereto. The steamer's build was such that she could strike the pier with her starboard quarter while her bow was swinging away from the pier line, and at the same time receive injuries to her propeller blades.

[1] Were the tugs negligent in the performance of the towage

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

service? The rule of law is that in the performance of such service due care and maritime skill, such as the situation and conditions may reasonably require, must be exercised. *The Webb*, 14 Wall. 406, 20 L. Ed. 774; *The Margaret*, 94 U. S. 494, 24 L. Ed. 146. Indeed, under the doctrine of the *W. G. Mason* (D. C.) 131 Fed. 632, it is unnecessary for libellant to prove a specific act of negligence on the part of a tug which engages to fulfill a towage contract.

[2] At the time of the accident the steamer *San Giorgio* was in charge of the master of the tug *Dalzelline*, the latter being on her port side forward, and the claim is that the contact with the pier was due to failure to seasonably direct the stopping of the port engine. The evidence shows that the tide was pushing against the steamer on her starboard side, and was assisting in swinging her forward, and that, while Capt. Keene of the *Dalzelline* ordered the stopping of the right engine, he negligently allowed the port engine to go full speed astern, which caused the steamer, because of opposite strains, to turn rapidly, and that, when the belated order to stop the port engine was given, impact with the pier could not be avoided.

This version of the occurrence, as narrated by the master of the steamer, is corroborated by the second officer, who was stationed aft, and by other witnesses. I am satisfied, by the evidence, that if the port engine had been stopped, or if the order "Half speed," had been given, the accident would not have occurred. Such improper maneuvering not having been explained or excused, the respondents must be held in fault therefor.

It is also claimed by libellant that the tugboats should have pushed against the port bow while the steamer was being swung to the pier, and that their failure to do so was a contributing cause of the accident, and enabled the steamer to get into an oblique position; but I think that the principal fault, as before stated, was the failure to seasonably stop the port engine, or at least to run it at half speed, and it is therefore unnecessary to pass upon any additional claims of negligence on the part of the respondents.

Upon examination, I find that the various contentions of respondents as to fault in several respects on the part of the steamer are not sustained by the evidence, and therefore a decree may be entered in favor of the libellant, with damages and costs.

JOHNSON LIGHTERAGE CO. v. WARNER SUGAR REFINING CO.

(District Court, S. D. New York. April 8, 1913.)

SHIPPING (§ 58*)—CHARTERS—LIABILITY OF CHARTERER FOR INJURY TO VESSEL.

Evidence considered, and *held* not to sustain the allegation of the owner that injuries to a barge resulted from the negligence of a charterer, but to indicate that they probably were received after the barge had been redelivered to a master sent by the owner to receive her.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233-244, 314, 327; Dec. Dig. § 58.*]

In Admiralty. Suit by the Johnson Lighterage Company against the Warner Sugar Refining Company. Decree for respondent.

James J. Macklin, of New York City, for libelant.

MacFarland, Taylor & Costello, of New York City, for respondent.

HAZEL, District Judge. The respondent entered into a written charter party by which it chartered libelant's barge No. 18, agreeing to return her to the owner at the end of the charter in good condition. It was agreed that the charterer should comply with the terms of the insurance policy (a copy of which was attached to the charter), which contained a provision that the barge should at all times have a competent watchman on board. As barge No. 18 was loaded at the time she was wanted by respondent, another barge—barge No. 19, insured under a policy containing the same conditions as to a watchman—was tendered the respondent and accepted. There was also a condition in the charter party to the effect that if, for any reason whatsoever, it should become necessary to take barge No. 18 out of commission, the libelant would furnish a barge to take her place during the period of her disability.

In view of such condition, I think the substitution of barge No. 19 for barge No. 18 was fairly within the terms of the charter party, and that the charterer was bound by the conditions of the insurance policy. The evidence shows that, after using barge No. 19 a week or more, the respondent asked that she be replaced by barge No. 18, in compliance with which request arrangements to exchange were made. When libelant's master, Webster, arrived at Wallabout Basin to relieve the respondent's master, Hansen, the barge was at the dock being unloaded of her cargo of sugar. He testified that he found broken planks on both sides of barge No. 19, and several knees crushed in, extending from one end to the other, and that such injuries were not received that night while he had charge of her. It is shown, however, that at about 4 o'clock the morning after his arrival a car float left the pier, making it necessary to shift the barge, and that another car float came to the pier and moored near the barge.

There was some evidence to show that Webster was in an intoxicated condition at the time of his arrival at the barge; but he made denial of this, and asserted that he never drank to excess. However that may be, I am disinclined to accept his testimony as to the condition of the barge when he relieved Capt. Hansen. If at that time the barge had had the specified breaks in her sides, as testified to by him, she very likely, in view of her load of 15 tons of sugar, would have taken on water, or at least would have revealed her condition to others, especially to the witness Kaufman, who had charge of the unloading, and with whom Webster had a conversation, in which, however, no mention was made of the injuries to the barge. To the contrary, Capt. Hansen testified that while the barge was in his custody she did not sustain any injuries, that there were no mishaps of any kind, and that when Webster relieved him the barge was in good condition, and without any broken planks or crushed knees.

The burden of proof was upon the libelant to establish that injuries were received by the barge prior to the time its agent took her in charge and assumed control. This burden has not been sustained, and I think the probabilities are that barge No. 19 received the injuries complained of during the night, either from crafts moving in the slip, or from some other unexplained cause or causes. If such was the fact, and, as said, it seems probable, the conditions contained in the insurance policy have no relevancy, and before the libelant can be permitted to recover there must be proof that the charterer was negligent, and that in consequence thereof injuries were sustained by the barge. *W. H. Beard Dredging Co. v. Hughes et al.* (D. C.) 113 Fed. 680; *Clark v. United States*, 95 U. S. 539, 24 L. Ed. 518.

It not being proven, either that the barge was in a damaged condition when the witness Webster took her in charge, or that the injuries were sustained through the negligence of the charterer, the libel is dismissed with costs.

In re BUCK.

(District Court, E. D. Arkansas, E. D. May 6, 1913.)

ALIENS (§ 69*)—NATURALIZATION—PRIOR CITIZENSHIP.

Since the naturalization laws of the United States apply only to aliens, and not to citizens of the United States, a petitioner, who has once been admitted to citizenship in a state court of competent jurisdiction, is not entitled to renaturalization, in order to prove citizenship, because of the destruction of the records of the court in which he was naturalized; his remedy being by proceeding in that court to restore the record.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 147-153; Dec. Dig. § 69.*]

Application by Frederick George Buck for naturalization. Denied.

TRIEBER, District Judge. The petitioner filed an application for naturalization, which shows that he is a native of Great Britain; that he has resided in the United States more than five years; that on the 31st day of August, 1896, he made his declaration of intention to become a citizen of the United States, in proper form, before the clerk of a court of record of the state of Illinois, where he then resided; that on the 15th day of June, 1905, he was duly naturalized by the order and judgment of the circuit court of McLean county, state of Illinois, a court authorized by the acts of Congress to naturalize aliens; that a certificate of naturalization was given to him by the clerk of that court, but the same was lost by him, so that he cannot produce it; that the records of the circuit court of McLean county, Ill., containing the judgment of naturalization, have been destroyed by fire, and the petitioner has been informed by the clerk of that court that it is impossible to furnish him with a certified copy of the judgment of naturalization, by reason of the destruction of the records of that court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The only question to be determined is whether the petitioner, having been once naturalized by a court of competent jurisdiction, and having therefore ceased to be an alien, is entitled to be again naturalized, for the purpose of enabling him to procure a certificate of naturalization, in order that he may have the evidence of his citizenship. His main object of requiring that certificate is that he has entered a homestead under the laws of the United States and is ready to make final proof, but is unable to do so, as he has no means of establishing his citizenship by a copy of the judgment naturalizing him.

The naturalization laws of the United States clearly apply only to aliens and not citizens of the United States. Title 30, Rev. Stat., and Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 529). As the petitioner has by the judgment of the circuit court of McLean county, Ill., a court of competent jurisdiction, been naturalized, and is now a citizen of the United States, he has ceased to be an alien, and for that reason I am of the opinion that the court is without jurisdiction to entertain his petition. The loss of the certificate of naturalization or the record of the court does not deprive him of his citizenship. Citizenship having been once acquired, he continues to remain a citizen, unless the judgment should be set aside by a court of competent jurisdiction, or his American citizenship renounced by his voluntary act.

Whether his naturalization may under these circumstances be established by oral proof, or in some manner other than by a certified copy of the judgment of the circuit court of McLean county, Ill., is not before the court. The proper proceeding for him to pursue would be to apply to the court which naturalized him to restore the record of the judgment in the manner provided by the laws of the state of Illinois.

The petition will be dismissed for want of jurisdiction.

UNITED STATES v. INTERNATIONAL MERCANTILE MARINE CO.

(District Court, E. D. Pennsylvania. March 7, 1913.)

No. 1,854.

ALIENS (§ 57*)—DEPORTATION—CARRIER'S EXPENSE—STATUTES—RETROACTIVE OPERATION.

Act Cong. March 26, 1910, c. 128, § 1, 36 Stat. 263 (U. S. Comp. St. Supp. 1911, p. 500), abrogating the three-year time limit for deportation of immoral aliens at the expense of the carrier by which they were unlawfully entered, does not operate retroactively, and hence did not entitle the United States to recover from the steamship company, by which an alien prostitute was brought to the United States, the expense of her deportation; the three-year limit having expired in September, 1908, and she not having been ordered deported until July, 1910.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 114; Dec. Dig. § 57.*]

Action by the United States of America against the International Mercantile Marine Company. On demurrer to plaintiff's statement of claim. Sustained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Walter C. Douglas, Jr., Asst. U. S. Atty., and John C. Swartley, U. S. Atty., both of Philadelphia, Pa.

Biddle, Paul & Jayne, of Philadelphia, Pa., for defendant.

J. B. McPHERSON, Circuit Judge. The government sues to be reimbursed the cost of deporting an alien prostitute, and the statement of claim sets out in substance the following facts:

On September 8, 1905, Louise Chomel, a native Frenchwoman, arrived at Boston from Antwerp on the *Manitou*, one of the defendant's steamships; on July 6, 1910 (nearly five years thereafter) the Acting Secretary of Commerce and Labor—being satisfied after due hearing that she had been a prostitute at the time of entry, and that she was still a prostitute, and had been found in the practice of that profession, having been found in the employment of, and in connection with, a house of prostitution since her entry into the United States—ordered her deportation at the expense of the defendant; proper demand upon the company was made and refused; and the government was therefore obliged to bear the necessary cost.

The statement is demurred to on the ground that the amendment of March 26, 1910 (36 Stat. 263, c. 128, § 1 [U. S. Comp. St. Supp. 1911, p. 500]), to the Immigration Act of 1907 (Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 [U. S. Comp. St. Supp. 1909, p. 448]), did not operate retroactively, so as to require a steamship company to pay the cost of deportation in a case like the present, where (at the time the amendment was passed) the company was already protected by the expiration of the three years' period of limitation within which proceedings to deport were confined by the legislation in force before 1910. As will be observed, this period expired in September, 1908, nearly two years before the amendment. The question has been decided by Judge Lacombe in *United States v. North-German Lloyd S. S. Co.* (C. C.) 185 Fed. 158, and 186 Fed. 672, especially by the decision in 186 Fed., which was rendered after the declaration in that suit had been so amended as to present the question that is now under consideration. The ruling in New York was then acquiesced in, but the government may now have reasons for desiring this indirect review, and I need not undertake the superfluous task of making an independent examination of the question. I shall therefore follow Judge Lacombe's decision and sustain the demurrer. If the government has any ground upon which to amend the statement, a motion to amend may be made within five days; in default of such motion, the clerk is directed to enter judgment for the defendant upon the demurrer.

THE MAREN.

(District Court, S. D. New York. April 8, 1913.)

SHIPPING (§ 86*)—LIABILITY OF VESSELS—APPLIANCES FOR DISCHARGING—CUSTOM OF PORT.

Evidence *held* not to establish a custom at the port of New York requiring a vessel to furnish planks or other material for the construction of staging for use in discharging sand ballast, but to show that in the

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

absence of special contract such appliances were customarily furnished by the contracting stevedores.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 343, 353-360; Dec. Dig. § 86.*]

In Admiralty. Suit by Amalfitano Pangrazio against the bark Maren. Decree for respondent.

Arthur B. Church, of New York City, for libelant.

Haight, Sandford & Smith, of New York City, for respondent.

HAZEL, District Judge. This is a libel to recover for personal injuries sustained by the libelant, a longshoreman in the employ of an independent contractor, on August 27, 1912. The injuries were received in falling from a staging on the deck into the hold of the Norwegian bark Maren. The liability of the vessel concededly depends (1) upon whether there existed in the port of New York a custom which made it a duty of the ship to supply stevedores with lumber necessary in the construction of staging for their use in discharging sand ballast; (2) whether the vessel failed to fulfill her duty; and (3) whether the libelant sustained injuries on account thereof.

The staging from which the libelant was precipitated into the hold of the bark extended from the hatch coamings of No. 2 hatch to the starboard side of the vessel. During its construction it was ascertained by the workmen that one of the planks to be used as a covering plank was too short to extend clear across. The witness Scala, who was in charge of the work, applied to the master of the vessel, informing him that he needed another plank to make the staging next to the hatch smooth and level. He was told by the master that the vessel carried no planks, and, upon finding a couple of boards on board, was told to get along with such boards as well as he could.

While there was testimony on behalf of the libelant tending to show that, in unloading such ballast, the vessel customarily supplied the materials for staging, yet there were many credible witnesses on behalf of the respondent by whose testimony it was proven that no such custom then existed or ever had existed in the port of New York. Evidence was given to show that, unless there was a special arrangement to the contrary, contractors loading or unloading vessels customarily furnished the appliances for staging, scaffolding, etc., necessary in the performance of their contracts. While the testimony as to the existence of a custom imposing a duty on a vessel to furnish planking is in conflict, still I am satisfied that the testimony tending to establish such a duty is outweighed by that of the respondent.

I therefore hold that there was no uniform custom obliging the vessel to comply with a request to furnish lumber or boards, and that no duty rested upon the vessel to do so. For this reason, there can be no recovery herein, and the libel is dismissed, with costs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

UNITED STATES v. LEHIGH VALLEY R. CO.

(Circuit Court of Appeals, Third Circuit. May 5, 1913.)

No. 1,712.

CARRIERS (§ 37*)—INTERSTATE COMMERCE—REGULATIONS—TRANSPORTATION OF ANIMALS — TWENTY- EIGHT HOUR LAW — VIOLATION — "KNOWINGLY AND WILLFULLY."

The Twenty-Eight Hour Law (Act June 29, 1906, c. 3594, §§ 1, 2, 34 Stat. 607, 608 [U. S. Comp. St. Supp. 1911, pp. 1341, 1342]) prohibits carriers in interstate commerce from confining animals in cars, boats, or vessels longer than 28 consecutive hours without unloading for rest, water, and feed, and provides that animals so unloaded shall be properly fed and watered during the rest. Section 3 declares that any railroad which "knowingly and willfully" fails to comply with the provisions of the act shall be liable to a penalty. *Held*, that the words "knowingly and willfully" are not synonymous with "negligently," but mean consciously and intentionally; and hence proof that merely warranted an inference that a carrier's employes negligently, but unintentionally, omitted to feed and water certain sheep during the hours of rest, was insufficient to subject it to a penalty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

For other definitions, see Words and Phrases, vol. 5, p. 3939.

Liability of carrier for failure to feed, water, and rest live stock, and for violation of Twenty-Eight Hour Law, see note to *St. Joseph Stockyard Co. v. United States*, 110 C. C. A. 435.]

In Error to the District Court of the United States for the District of New Jersey; Joseph Cross, Judge.

Action by the United States against the Lehigh Valley Railroad Company to recover a penalty for knowingly and willfully violating the Twenty-Eight Hour Law. From an order sustaining defendant's motion for judgment non obstante veredicto, the United States brings error. Affirmed.

The following is the opinion of Cross, District Judge:

This action is based upon what is popularly known as the Twenty-Eight Hour Law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1911, p. 1341]), an act intended to prevent cruelty to animals while being transported in interstate commerce. The question reserved at the trial was whether the time the animals were confined to the pens of the defendant at Jersey City should be included in the 28-hour period during which the stock was not fed. The questions of fact as to whether the animals were fed, and whether the defendant knowingly and willfully failed to comply with the provisions of the statute, were submitted to the jury, which found a verdict thereon in favor of the United States. The pertinent portions of the statute are as follows:

Section 1: "No railroad * * * carrying or transporting cattle, sheep, swine, or other animals * * * shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm," etc.

Section 2 provides that "animals so unloaded shall be properly fed and watered during such rest, either by the owner * * * or by the railroad * * * at the expense of the owner."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 204 F.—45

Section 3 provides that "any railroad * * * who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars."

The facts so far as we are at present concerned with them, are as follows: The animals, after having been unloaded, fed, and watered at Coxton, Pa., were reloaded by the defendant into its cars at that place at 6:15 p. m., February 18, 1911. At 3:15 p. m., February 19th, they were unloaded into the stock pens of the defendant company at Jersey City, but were not fed. They remained there in the stock pens of the company until February 20th, at which date, at 3:15 a. m., they were loaded on a barge of the defendant and conveyed to their destination, where they were delivered at 8 a. m., of that day. It thus appears that the animals were in charge of the plaintiffs in interstate transportation for a period of 37 hours and 45 minutes, without being fed. During 12 hours of that period, however, the animals were confined in the stock pens of the defendant at Jersey City, and not in its cars, boats, or vessels of any description.

The penalty of section 3 can, as expressly provided, be applied only when the carrier has failed to comply with the provisions of both sections 1 and 2; that is, the carrier must have confined the animals in cars, boats, or vessels for a period longer than 28 consecutive hours without unloading the same into pens for rest, water, and feeding, and it must also have failed to properly feed and water the animals so unloaded during such period of rest. The animals in question were not, however, confined in the cars, boats, or vessels of any description, of the defendant, for a longer period than 21 consecutive hours, or for a longer period in all than 25 hours and 45 minutes during their transportation from Coxton, Pa., to their destination. Consequently there was no infraction of the statute.

The statute under which this action is brought is penal, and must be strictly construed. At all events, it cannot be so construed as to create offenses and inflict penalties not in terms expressed, or necessarily implied from what has been expressed. It seems too plain for argument that no offense is created by this statute which does not contain as one of its elements the confinement of the animals being transported in the cars, boats, or vessels of the carrier, for a period longer than 28 consecutive hours, without unloading, etc. In order to make out a violation of the statute in this case, at least 7 hours of the period during which the animals were unloaded and resting in stock pens must be tacked to the 21-hour period of confinement in the cars of the defendant. Moreover, if we take the total period of confinement in the cars, boats, and vessels of the company, it only amounts to 25 hours and 45 minutes, made up of 21 hours' confinement in its cars and 4 hours and 45 minutes on its barge, which hours of confinement, furthermore, were not consecutive, as provided by the act.

The act neither in terms nor by necessary intendment embraces the case in question. Indeed, its language prohibits the construction which the government seeks to put upon it. If Congress had intended to cover a situation like that here presented, it could easily have done so by prohibiting the confinement in any manner of animals being transported in interstate commerce for a period longer than 28 hours without feeding, watering, and resting them, etc. Confessedly my inclination has been to so construe the act, if possible, as to make it cover the case in question; but it cannot be done, in my judgment, without an exercise of the legislative, rather than the judicial, function.

Accordingly judgment will be entered for the defendant non obstante verdicto.

John B. Vreeland, of Morristown, N. J., for the United States.

Collins & Corbin, of Jersey City, N. J. (George S. Hobart, of Jersey City, N. J., of counsel), for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This action against the Lehigh Valley Railroad Company was brought to recover a penalty for "knowingly and willfully" failing to comply with the Twenty-Eight Hour Law of June 29, 1906. We take the following summary of certain undisputed facts from the government's brief:

"On February 17, 1911, 226 lambs were shipped by C. F. and W. F. Pratt over the defendant's railroad, from Batavia, N. Y., consigned to Newton & Co., Jersey City, contained in a car initialed and numbered 'L. V. 89625,' and conveyed over said line of railroad in that car to Jersey City, and thence by a boat known as 'L. V. Barge 503,' owned and used by the company for purposes of transportation, to the Jersey City stockyards at Jersey City.

"It appears that the stock was fed at Coxton, Pa., at which place it was reloaded at 6:15 p. m., February 18, 1911, remaining in the car until 3:15 p. m., February 19, 1911, when the lambs were unloaded into the stock pens of the defendant company at Jersey City, remaining in the pens until 3:15 a. m., February 20, 1911, when they were loaded into the said barge and remained therein until 8 a. m., February 20, 1911, at which said last-mentioned time they were finally unloaded at the stockyards of the Jersey City Stockyards Company at Jersey City, the place of destination. * * *

"The time between the loading at Coxton, Pa., 6:15 p. m., February 18th, and the hour when unloaded into the pens of the railroad company at Jersey City, 3:15 p. m., February 19th, was 21 hours. The stock remained in the pens from 3:15 p. m., February 19, 1911, to 3:15 a. m., February 20, 1911, a period of 12 hours, and they were then loaded into the barge and unloaded therefrom at 8 a. m. on the same day, to wit, February 20, 1911, a period of 4 hours and 45 minutes, making the total period of time from the re-loading at Coxton, Pa., to the final unloading at Jersey City, the place of destination, 37 hours and 45 minutes as shown below:

Coxton to Jersey City.....	21 hours
In stock pens.....	12 "
On barge.....	4 1/4 "

Totaling 37 hours and 45 minutes
within which period of time the stock was not fed."

The company asked for binding instructions on three grounds:

- (1) That the act applies only to the confinement of animals in cars, boats, and vessels, and not to their confinement in stockyard pens.
- (2) That no evidence had been offered of a knowing and willful failure to comply with the statute.
- (3) That the overwhelming evidence had established the fact of feeding within the statutory period.

The trial judge submitted the second and third questions to the jury, but reserved the first for consideration later. After a verdict in favor of the government, he entered judgment for the defendant on the point reserved, giving the reasons stated in his opinion.

Of course the question before us on this writ is the correctness of the judgment, and if it may properly be supported upon any ground we should affirm it. The company asks for affirmance upon two grounds: (1) For the reasons given by the District Judge; and (2) because no evidence was offered that the company had knowingly and willfully failed to comply with the statute. It is not necessary to consider the first ground, as the second seems to us amply sufficient to support the judgment. We have carefully considered the relevant evidence, which was given by several witnesses whose testimony is

not referred to in the foregoing summary quoted from the government's brief. None of them had any recollection about the particular car in question. Their evidence was mainly devoted to proving the orders in force upon the subject of feeding animals in transit, the means provided by the company for carrying such orders into effect, and the course of conduct customarily followed at the yards in question. This evidence bore also upon the possibility, or probability, that such of the company's servants as were charged with the particular duty involved in the suit had failed for some reason to give the animals food. It appeared that thousands of animals of one kind and another reached the company's yards at Jersey City in the course of a year, but there is no suggestion of any other failure to comply with the law. It would serve no good purpose to detail what the witnesses said upon the foregoing subjects. It is enough to say we think that a careful examination of the stenographer's notes has satisfied us that the evidence can go no farther than to establish negligence in the care of this particular shipment on the part of one or more of the company's servants. The verdict requires us to assume that the lambs were not fed within the statutory period; but we repeat that in our opinion the fact is accounted for by negligence, and cannot be attributed to a "knowing and willful" disregard of duty.

These words mean something more than "negligent." A knowing and willful omission to perform a duty is not, as we think, the same as a merely careless omission. For example: Let us suppose that the man whose duty it was to feed these lambs had learned the length of their confinement from the card accompanying the shipment, but that his attention had been diverted, so that he forgot his task until the period limited by the statute had passed. No doubt this would be negligence, but to call it a "willful" failure of duty seems to contradict one of the essential facts supposed. It is not possible to omit an act knowingly and willfully, unless the act be consciously in the mind; if it be no longer in the mind, it cannot be within the range of either knowledge or intention.

In the absence of better evidence on the subject than was offered by the government, the presumption that the company did its duty and obeyed the statute must prevail. There is really nothing to rebut it, except another and a weaker presumption, namely, the presumption that the lambs were not fed because no report of their feeding appears in the company's records. We say that this presumption is weaker, because it is evident that the absence of the report is susceptible of at least three explanations: (1) That some one knowingly and willfully failed to feed the animals; or (2) that such failure was merely negligent; or (3) that they really had been fed, although the fact had not been reported. With the evidence in this condition, there was nothing to be submitted to a jury.

The courts have not fully agreed in their efforts to define the words under consideration, but we are disposed to adhere to the opinion that "knowingly and willfully" is not synonymous with "negligently." Without quoting from the following cases, we refer with approval to *United States v. Union Pacific R. R. Co.*, 169 Fed. 65, 94 C. C. A.

433; *St. Louis, etc., Co. v. United States*, 169 Fed. 69, 94 C. C. A. 437; *United States v. Stockyards Terminal Co.*, 178 Fed. 19, 101 C. C. A. 147; *St. Joseph Stockyards Co. v. United States*, 187 Fed. 104, 110 C. C. A. 432; *Chicago, etc., Co. v. United States*, 194 Fed. 342, 114 C. C. A. 334; *United States v. Sioux City Co. (C. C.)* 162 Fed. 556; *United States v. Atchison, etc., Co. (D. C.)* 166 Fed. 160. For a somewhat different view, see *New York, etc., Co. v. United States*, 165 Fed. 833, 91 C. C. A. 519, and *United States v. Atlantic, etc., Co.*, 173 Fed. 764, 98 C. C. A. 110.

The judgment is affirmed.

STUART v. REYNOLDS.

(Circuit Court of Appeals, Fifth Circuit. March 4, 1913.)

No. 2,310.

1. BANKRUPTCY (§ 446*)—PROCEEDING TO SUPERINTEND AND REVISE—MATTERS REVIEWABLE.

In a proceeding to superintend and revise in matter of law the proceedings of a court of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), the court cannot review findings of fact upon which the order of the lower court is based, but can only review questions of law arising on the record in the District Court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 446.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 136*)—ORDER REQUIRING BANKRUPT TO TURN OVER PROPERTY—SUFFICIENCY OF EVIDENCE.

A court of bankruptcy is without authority to make an order adjudging a bankrupt guilty of contempt for failure to obey an order of a referee requiring him to turn over property or money of the estate to his trustee, except on clear and convincing proof that he has present possession or control of the property or money and the ability to comply with the order.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

(Per Shelby, Circuit Judge, concurring.)

3. NATURE OF CONTEMPT—"DIRECT CONTEMPT"—"CONSTRUCTIVE CONTEMPT."

A "direct contempt" is one occurring within the presence of the court in session, or so near as to interrupt its proceedings, while a "constructive contempt" arises from matters not occurring in court. A refusal, when able, to comply with a lawful order of court, is a constructive contempt.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1468, 1469; vol. 3, pp. 2071, 2072.]

4. PUNISHMENT OF CONTEMPT—AFFIDAVIT OR RULE.

In a proceeding charging a constructive contempt, the affidavit, attachment, or rule, as the case may be, should be like an indictment to the extent of informing the contemnor of the charge against him, so as to give him an opportunity to defend.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. ORDER FOR SURRENDER OF PROPERTY OF BANKRUPT—PROCEEDING FOR CONTEMPT—BURDEN AND MEASURE OF PROOF.

A summary proceeding in a court of bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 41b, 30 Stat. 556 (U. S. Comp. St. 1901, p. 3437), for punishment of a bankrupt for contempt for failure to comply with an order of a trustee to turn over property, is criminal in its nature, especially since a concealment of the property constitutes a crime under section 29b (1), and is governed by the rules of evidence and presumptions of law applied in criminal cases. In such proceeding the rule in civil cases as to the shifting of the burden of proof is not applicable, and evidence that the bankrupt has recently had the property in his possession does not create a presumption that he still has it, and cast on him the burden of proving the contrary; but, to justify an order of commitment, the burden is on the trustee to prove his present possession to the exclusion of a reasonable doubt.

6. ORDER FOR SURRENDER OF PROPERTY OF BANKRUPT—PROCEEDING FOR CONTEMPT—EVIDENCE.

In such proceeding, while the sworn answer of the bankrupt is not taken as true, in the sense that it cannot be contradicted, his sworn denial of his present possession of the property is evidence in his favor, requiring incontestable evidence, or evidence proving present possession beyond a reasonable doubt, to overcome it.

7. IMPRISONMENT FOR DEBT—COMMITMENT OF BANKRUPT FOR CONTEMPT.

An order of a bankruptcy court committing a bankrupt for contempt for failure to comply with an order to surrender property or money of the estate, of which he has present possession or control, is not in conflict with a state constitutional provision against imprisonment for debt; but where the evidence does not justify a finding that he has present possession or control of the property or money belonging to the estate, and is able to comply with the order, a commitment under the guise of punishing for contempt, but in reality for the purpose of forcing him to pay into court such sum as he may obtain, to be applied on his debts, whether it is a part of the bankrupt estate or not, is illegal, under the general law relating to contempts, and is also in conflict with a state constitutional provision against imprisonment for debt.

8. ORDER TO SURRENDER PROPERTY OF BANKRUPT—PROCEEDINGS FOR CONTEMPT—RULES GOVERNING.

The language of the opinion of the court in *Re Purvine*, 96 Fed. 192, 37 C. C. A. 446, is not subject to objection, but the order of commitment in that case by the District Court was void, because the decree requiring the contemnor to pay \$7,400 did not show his ability to obey the order, and because the sum was greatly in excess of the debts of the bankrupt shown by the record; and the case should not be a controlling authority, for the additional reason that, subsequent to the decision, the contemnor was discharged upon his obtaining and paying to his trustee only \$1,465.39, thus showing that it was never judicially ascertained that he was able to comply with the order. The proper rules for the decision of like cases are announced in *Samel v. Dodd*, 142 Fed. 71, 73 C. C. A. 254.

9. ORDER TO SURRENDER PROPERTY OF BANKRUPT—PROCEEDINGS FOR CONTEMPT.

The fact that a bankrupt has committed some crime in connection with his property, by which it has passed out of his possession, may be grounds for prosecution against him, but will not justify a proceeding for contempt for failure to comply with an order to deliver property not in his present possession.

10. CONSTRUCTION OF BANKRUPTCY ACT—REMEDIES FOR WITHHOLDING ASSETS.

Bankr. Act July 1, 1898, c. 541, §§ 29b (1), 41a (1), and 41b, 30 Stat. 554, 556 (U. S. Comp. St. 1901, pp. 3433, 3437), should be construed so as to give both a field of operation and to conform to the legisla-

tive intention. The latter applies to the refusal of a bankrupt to surrender property in obedience to the court's order, the same being in his present possession; the former, to cases of concealment of assets from the trustee. When property of the estate is traced to the possession of the bankrupt, but not found in his immediate possession, if the evidence is sufficient, a case is presented for prosecution under section 29b (1). If in concealment cases an order can be made requiring the bankrupt to surrender the concealed property, then not in his possession, and he can be imprisoned until he complies with the order, there would be no need for section 29b (1); but all cases of concealment could be prosecuted as contempt cases, which would make useless a provision of the act and defeat the legislative intention that concealment cases should be prosecuted by indictment and jury trial.

11. CONCEALMENT OF ASSETS—REMEDY.

If a bankrupt conceals assets of his estate from his trustee, he may be indicted therefor within 12 months after the commission of the offense, and such cases should not, and cannot legally, be prosecuted as contempt cases.

12. PUNISHMENT FOR CONTEMPT—GRANTING OF RULE—DISCRETION OF COURT.

It is within the discretion of the court to grant or refuse a rule or attachment in contempt cases, and when there is another remedy the court should be reluctant to grant such rule, and should usually direct resort to the other remedy.

Petition for Revision of Proceedings of the District Court of the United States for the Middle District of Alabama; Thomas Goode Jones, Judge.

In the matter of C. W. Reynolds, bankrupt. On petition by George Stuart, trustee, to superintend and revise an order of the District Court. Affirmed.

For opinion below, see 190 Fed. 967.

This petition for review results from the following proceedings:

C. W. Reynolds, engaged in the general merchandise business at Clanton, Ala., was adjudged a voluntary bankrupt. After the appointment of a trustee for his estate he submitted to an examination by his creditors before the referee. After this examination, and an audit of his books kept in connection with his mercantile business, George Stuart, trustee, petitioned the referee for a rule against the bankrupt, Reynolds, requiring him to appear before the referee at a time fixed to show cause why he should not be forthwith required to turn over to his trustee goods, wares, and merchandise, or other equivalent in money, to the amount of \$19,249.35, which it was charged belonged to his estate, and were then in his possession or under his control.

This rule against the bankrupt, after hearings, resulted in orders being passed by the referee directing the bankrupt to turn over to the trustee "goods, wares, and merchandise, money, and other property, of the value of \$20,969.60." The bankrupt failed to comply with these orders, and the proceedings at last eventuated in a finding by the referee "that the said bankrupt, C. W. Reynolds, has now in his possession or under his control certain goods, wares, merchandise, or money, the proceeds thereof amounting to the sum of \$19,722.96, or that he has in his possession or under his control goods, wares, and merchandise in part, and money in part, to the aggregate value of \$19,722.96." On this finding the referee passed an order that the bankrupt, on or before the 7th day of February, 1911, should turn over and deliver to the trustee in bankruptcy "the sum of \$19,722.96 in goods, wares, and merchandise, or in money." The bankrupt, feeling aggrieved at this order, in due course and on the 4th day of February, 1911, petitioned for a review thereof by the judge. Thereupon there was certified to the judge the order passed against the bankrupt by the referee and the

fact of the bankrupt's failure to comply therewith; also a summary of the evidence upon which the action of the referee was based.

The judge, after hearing and consideration, found as follows:

"I cannot find, after careful examination of the evidence, that it sustains the findings of the referee that the bankrupt has now in his possession, or at the time the order was made, either the goods or the money proceeds amounting to \$19,722.96, or any other sum. While the evidence leaves no shadow of a doubt in the mind of the court that the bankrupt had goods of that value, for which he has not accounted, or has converted into money, which at one time he had under his control, I do not think the proof justifies the referee in finding that at the time of the order, or at the time of his examination, the bankrupt still had in his possession or under his control either the goods or the money. After a somewhat exhaustive investigation of his affairs, no evidence develops showing the disposition of any specific goods, or tracing to him the possession of any considerable sum of money, or other evidence of such conduct as indicates that he now has any of the goods, or money derived from their conversion, in his possession or under his control."

With this finding as a basis, the court, on October 18, 1911, passed an order reversing and holding for naught the order theretofore entered by the referee, requiring the bankrupt to pay over to his trustee in bankruptcy the sum of \$19,722.96 in goods, wares, and merchandise, or in money, and discharging the rule upon the bankrupt to show cause why he should not be punished for failure to comply with the referee's order.

John London and Henry Fitts, both of Birmingham, Ala., for petitioner.

Jones, Foster & Field, of Montgomery, Ala., and Tipton Mullins and J. Osmond Middleton, both of Clanton, Ala., for respondent.

Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

MEEK, District Judge (after stating the facts as above). [1] This proceeding is brought here under the provisions of section 24b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]). Therefore we are not authorized to determine questions of fact upon which the order of the lower court is based, but may only superintend, and, if need be, revise, its action in the matter of law. This is now the settled interpretation given section 24b. *Matter of Loving*, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725; *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; *First National Bank v. Title & Trust Company*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *Samel v. Dodd* (Fifth Cir.) 142 Fed. 68, 73 C. C. A. 254; *In re Purvine* (Fifth Cir.) 96 Fed. 192, 37 C. C. A. 446. The matter of law to be passed on is the validity of the order of the lower court of October 18, 1911, and this is to be determined on the record of the District Court. *Mueller v. Nugent*, cited *supra*.

[2] From the evidence before him, which was of a conflicting nature, the judge was unable affirmatively to find as a fact that the bankrupt, at the time of the making of the order against him by the referee, then had in his possession or under his control either the goods or the money he was directed to turn over to the trustee of his estate. Failing to find this, it was incumbent on the judge to reverse the action of the referee and discharge the rule against the bankrupt. No other

order than the one passed by him was compatible with or justified by the judge's view of the evidence and the conclusions entertained by him.

In view of the brief and argument submitted in behalf of the petitioner, we deem it appropriate to say the doctrine announced by this court in *Re Purvine*, cited *supra*, has neither been modified nor changed. The same doctrine was subsequently announced and sanctioned by the Supreme Court of the United States in *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. There is no departure from this doctrine in *Samel v. Dodd*, cited *supra*. In the latter case it was held the court, finding in a summary proceeding that bankrupts had in their possession or under their control goods and merchandise, the property of their estate in bankruptcy, had not the power lawfully to order them to pay over the value of such goods and merchandise in money under penalty of commitment for contempt; that in such a proceeding the court was restricted to ordering a return of the goods and merchandise in specie or kind, and this only when it was made clear by proof that the bankrupts were in possession or control of them.

The petition for a revision of the action of the judge will be denied.

PARDEE, Circuit Judge, concurs in the foregoing opinion and decision.

SHELBY, Circuit Judge (concurring). Stuart, the petitioner, was appointed trustee of the estate of the bankrupt, C. W. Reynolds, and from an examination of the bankrupt and of his books was speedily convinced that the bankrupt ought to turn over to him as trustee \$19,249.35 in goods or money. The trustee presented his petition to the referee in bankruptcy, praying for an order that the bankrupt be required forthwith to show cause why he should not turn over to his trustee "goods, wares, and merchandise, or other equivalent in money, to the amount of \$19,249.35," or such portion as the court might find the bankrupt had in his possession. The bankrupt answered under oath, denying that he had in his possession or under his control any goods, or money for which the same had been sold, and denying the averment that he did not deliver to his trustee all the goods, wares, merchandise, and money belonging to his bankrupt estate. These pleadings, briefly stated, made the issue. The trustee admitted receiving "stock inventoried at \$8,372.66" and book accounts for \$845.26. C. W. Harden, a clerk of the United States marshal, qualified as an "expert" accountant, and presented statements which he testified gave the status of the bankrupt's business as shown by his books, which statement closes with the ominous and convincing lines:

"Amount of goods or money now wrongfully withheld from his trustee, \$19,249.35."

Notwithstanding the failure of the evidence to show whether it was goods or money that was "now wrongfully withheld," and the failure to show what kind of goods, and where they were, or where the alleged money was held or deposited, if it was money that was withheld, or that the bankrupt had actual possession, and notwithstanding the

bankrupt's sworn denial, the referee found the evidence so convincing that he made an order that the bankrupt "was short in the further sum of \$20,969.60," and that he turn over and deliver to the trustee "the goods, wares, and merchandise, money, and other property, of the said value of \$20,969.60, or show cause why he should not do so." The bankrupt objected to the order as illegal, not based on sufficient evidence or sufficient finding of fact, and as not describing or designating the property he was alleged to withhold. The referee adhered to his order, alleging that the bankrupt had failed to pay over the money or deliver the goods, and had failed to "purge himself of the said contempt," and certified the case to the District Court "for such punishment or disposition as to said court may seem meet and proper." The District Court made no formal finding of facts, but, having briefly stated the case, disposed of it decisively as follows:

"Under the decision in the case of *Samel v. Dodd*, 142 Fed. 71 [73 C. C. A. 254], rendered by our Circuit Court of Appeals, it is not within the power of the court to render a judgment for the surrender of goods or their alternative value, and attach the bankrupt for contempt for failing to turn over the goods or the money; and although the proof may convince the court beyond all reasonable doubt that at one time the bankrupt had the goods or money, the order must not be made unless upon clear and convincing proof that the bankrupt has the goods or the property in his possession at the time of the making of the order, and has the ability to comply with it.

"Under the influence of that decision the order of the referee must be reversed, and the court must decline to commit the bankrupt for contempt in failing to obey the order."

The District Court thereupon made a decree reversing the referee's order that the bankrupt should pay over the money or the goods. The trustee brings the case to this court by petition for revision, and it is alleged in the petition that the District Court erred in not attaching the bankrupt for contempt for failing to turn over the goods or money; and it is also alleged that:

"The goods, wares, and merchandise having been shown to have been in the possession of the bankrupt, and he not having explained or accounted for them, they were presumed to continue in his possession or under his control."

[3, 4] 1. The courts of the United States have the inherent power to punish for contempt, a power that was long ago confirmed by statute (R. S. U. S. § 725 [U. S. Comp. St. 1901, p. 583]); and it, of course, extends to the willful refusal to obey lawful orders of the court. Bankruptcy Act, § 41. For a direct contempt—that is, one occurring within the presence of the court while in session, or so near to the court as to interrupt its proceedings—the judge may often act on the knowledge obtained by his own senses. *Ex parte Terry*, 128 U. S. 290. 9 Sup. Ct. 77, 32 L. Ed. 405. The contempt here charged is not a direct, but a constructive, contempt; that is, one arising from matters not transpiring in court, but by an alleged refusal to comply with an order of court. *Rapalje on Contempt*, § 22. In such cases, it is proper to adhere substantially to the method of criminal procedure, except in the matter of jury trial, and the attachment or rule should be like an indictment, to the extent of giving the contemnor an opportunity to defend by informing him concerning the nature and particulars of the

offense charged. *Bates' Case*, 55 N. H. 325; *Hurst v. Whitley*, 47 Ga. 366; *Langdon v. Wayne Circuit Judges*, 76 Mich. 358, 43 N. W. 310; *Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214; *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215.

[5] 2. The decision in the District Court is attacked on the ground that it did not observe the proper rules of evidence. The contention of the counsel for the petitioner is, in brief, that the recent possession of goods or money being shown in the bankrupt, such possession is presumed to continue, notwithstanding his sworn denial, and that, unexplained by the bankrupt, is sufficient to prove him guilty of contempt in refusing to obey an order to produce the money or goods. Numerous and familiar cases are quoted in reference to the burden of proof and the shifting of the burden in civil cases. For example, *Reeves & Co. v. Estes*, 124 Ala. 303, 305, 26 South. 935, which is an attack on a deed for fraud, in which the court enforced the rule that, the complainant's debt being proved, the defendant, to sustain the deed, was required to give evidence of the bona fides of the deed. Other cases are cited, differing in facts, but to the same effect in principle. The rule invoked, involving the shifting of the burden of proof, has no application to this case. This is a proceeding against the respondent for an alleged contempt of court—the alleged failure and refusal to surrender property in obedience to the order of the court. The act charged would constitute also a criminal offense under the bankruptcy law—the concealing of assets from his trustee in bankruptcy. Bankruptcy Act, § 29 (1). Even when a charge of contempt of court does not involve facts constituting another criminal offense, it is, nevertheless, criminal rather than civil in its nature; and, for stronger reasons, when it does involve another crime, it should be treated as a criminal rather than a civil case in applying the rules of evidence. In *Ex parte Kearney*, 7 Wheat. 38, 5 L. Ed. 391, it was impliedly held that a proceeding to commit for contempt was a criminal case. In *New Orleans v. Steamship Co.*, 20 Wall. 387, 392, 22 L. Ed. 354, which was a rule to show cause why the respondent should not be punished for the violation of an injunction, and in which the contemnor was fined \$300, the court said:

"Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case."

And it is an indictable offense to disobey a valid judicial order. 2 Bishop's New Criminal Law, § 242 (3). In criminal cases, the presumption of innocence accompanies the accused throughout the trial and until there is a verdict or judgment of guilty (*Underhill on Criminal Evidence* [2d Ed.] § 18); and there is no shifting of the burden of proof during the trial (*Id.* § 23). In civil cases, the burden of proof may shift during the trial. *Lilienthal's Tobacco v. United States*, 97 U. S. 237, 24 L. Ed. 901. But, "strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime." *Davis v. United States*, 160 U. S. 469, 487, 16 Sup. Ct. 353, 358 (40 L. Ed. 499).

In contempt cases, and especially in those which involve the charge

of another criminal offense besides the contempt, the rules of evidence applicable to civil cases in reference to presumptions and the shifting of the burden of proof do not apply; but the proceedings and "the rules of evidence and presumptions of law applied in criminal cases should be observed." *Bates' Case*, *supra*; *State v. Matthews*, 37 N. H. 450, 454; *United States v. Wayne*, Wall. Sr. 134, Fed. Cas. 16,654; *United States v. Jose* (C. C.) 63 Fed. 951; *In re Switzer* (D. C.) 140 Fed. 976.

The proceeding, in its primary stages, is sometimes likened to a civil execution; but the trial of the issue on the question of guilt is essentially a criminal proceeding.

The numerous recent cases that hold that the guilt of an accused charged with contempt must be proved, not by a preponderance of evidence, but beyond a reasonable doubt, show an application of the rules of evidence as they are applied in criminal cases.

3. But the counsel seek also to apply a rule that is in fact applicable to a class of criminal cases—that "the recent possession of stolen property casts upon the possessor a suspicion of guilt from which he should free himself." The argument, in effect, is that the recent unexplained possession of stolen goods would be sufficient to adjudge the possessor guilty of larceny, unless he rebutted the inference, and that therefore, by "analogy," the recent possession of the goods by the bankrupt is sufficient, unexplained, to show that he still has them, and therefore sufficient to prove, as required by law, that he is in contempt in failing to produce them. But the possession of stolen property, however recent and unexplained, creates no presumption of law that the possessor committed the larceny, and instructions to that effect, "casting the burden of proving the innocent character of the possession upon the accused," are erroneous. *Underhill on Criminal Evidence* (2d Ed.) § 299, and cases there cited. Such possession, in connection with proof of the larceny, is, of course, legal evidence from which the jury may infer guilt. But there is no analogy between the larceny case and the contempt case. The possession in the former case is evidence against the possessor only when the *corpus delicti* is proved. The inference against him is based on the fact that the property has been proved to have been stolen, and such possession, though it does not change the burden of proof, casts suspicion on the possessor. But the property that the respondent is charged with withholding has not been stolen. His possession is assumed to have been acquired so as to vest title in him. His former possession of it casts no suspicion on him. There is no analogy between the instant case and larceny cases that relieved the trustee from proving affirmatively and as required by law that the respondent presently had in his possession the property in question, and was therefore able to obey the referee's order. The fact that the property passed into the possession of the bankrupt is, of course, one step in the effort to prove that he still has it. But if the property consists of \$20,000 worth of "goods, wares, and merchandise," as indicated in one of the alternative recitals of the referee's order, this proceeding, of itself, is sufficient to show that he has not in his actual possession goods of such bulk and value; for, if he so held them, they would be taken from him by writ. If, when the referee's report and

finding says that the property withheld is "goods, wares, merchandise, money, and other property," it is meant that the goods, etc., shown by the "expert's" examination of his books, have been sold, and that he has in money the \$20,000, then, of course, to show guilt, proof is required that he has in present possession the \$20,000 in money. No case is made for the application of the doctrine of "presumptions," so as to dispense with the necessity for evidence.

[6] 4. The argument claims, in effect, that the trial judge should give no weight to the contemnor's sworn denial. Reynolds, by sworn answer, denied the charges against him. The answer of the contemnor is not taken as true, in the sense that it cannot be contradicted. It has been held by English common-law writers as unassailable, and some federal courts have followed that rule. *Rapalje on Contempt*, § 119, and cases cited. The cases on both sides of the proposition are too numerous for citation, but they may be found collected in the briefs and opinion in *United States v. Shipp*, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265, where the court decides that "when the acts alleged consist in taking part in a murder it cannot be admitted that a general denial and affidavit should dispose of the case;" but the opinion recognizes the fact that there may be cases in which the answer would be conclusive. "It may be that even now," said the court, "if the sole question were the intent of an ambiguous act, the proposition would apply." In cases, like the present case, where the bankrupt is accused of withholding and refusing to surrender large stocks of goods, and he answers on oath, denying possession and control of them, his control and possession being an affirmative allegation of the trustee, it is not at all unreasonable to look on his answer as sufficient to secure his discharge, unless evidence of the most convincing kind is offered to sustain the charge against him. The affirmative in such case would not be difficult to prove, if the charge were true. In cases where it is charged that he withholds large sums of money, and he makes sworn denial, it is not consistent with the admitted rule that his guilt, to authorize commitment, must be proved to the exclusion of reasonable doubt, to say that the burden can be put on the contemnor to prove his negative averment.

In such cases, the rule undoubtedly goes to this extent, to quote the words of an author, which he sustains by many citations of authority:

"It requires something like incontestible evidence, or evidence beyond a reasonable doubt, to overcome the denial." 1 *Remington on Bankruptcy*, § 1844.

[7] 5. Counsel contend that the imprisonment of the respondent would have involved no question of "imprisonment for debt."

The power of the United States courts to imprison for the nonpayment of money judgments is controlled by the Constitution and laws of the state. *In re Lacov*, 142 Fed. 960, 74 C. C. A. 130; *Mallory Mfg. Co. v. Fox* (C. C.) 20 Fed. 409; *Low v. Durfee* (C. C.) 5 Fed. 256; *In re Atlantic Mutual Life Ins. Co.*, 9 Ben. 337, Fed. Cas. No. 629; *The Blanche Page*, 16 Blatchf. 1, Fed. Cas. No. 1,524 (by Blatchford, Circuit Judge); *Catherwood v. Gapete*, 2 Curt. 94, Fed. Cas. No. 2,513 (by Curtis, Circuit Justice); *R. S. U. S. § 990* (U. S. Comp. St. 1901, p. 709).

The Alabama Constitution provides "that no person shall be imprisoned for debt." Article 1, § 20.

It is true that if Reynolds had had the goods in his actual possession, so that he had the ability to deliver them to the trustee, on his refusal to obey the order requiring him to do so, he could be imprisoned for contempt, and his confinement would not be imprisonment for debt. *Samel v. Dodd*, supra. But when the record shows that he had not such possession or ability, he cannot be legally punished for contempt. In *re Chiles*, 22 Wall. 157, 22 L. Ed. 819; *Samel v. Dodd*, supra. If, notwithstanding his inability, the court, under the guise of punishing the contempt, but for the purpose of forcing him to pay such sum into court or to his creditors as he may obtain, regardless of whether or not it is a part of the bankrupt estate in his present possession, it has been said, in cases arising under the bankruptcy law, to be a violation of constitutional provisions against imprisonment for debt. In *Samel v. Dodd*, Judge Maxey, speaking for this court, said:

"Such procedure would approach dangerously near the line, if it did not overstep it, of imprisonment for debt."

Judge Hammond said, in *Re Adler* (D. C.) 129 Fed. 502, 504, that an enforcement of the bankruptcy law that would permit such procedure "would be only to revive the long since abolished process of imprisonment for debt, which is both obsolete and unconstitutional."

In *Re Barton Bros.* (D. C.) 149 Fed. 620, 621, Judge Rogers said:

"If the court were to make the order for them to pay over when they were without the means of paying over, the court would then be requiring them to do an impossible thing, and the effect of such an order would be equivalent to imprisonment for debt."

And in *Boyd v. Glucklich*, 116 Fed. 131, 136, 53 C. C. A. 451, 456, Judge Caldwell, speaking for the court, said of such procedure:

"Plainly that would be imprisonment for debt, and the order is not relieved of that illegal and odious quality by calling it 'imprisonment for contempt.' The court that makes such an order is in contempt of the law and Constitution, and not the bankrupt in contempt of the court."

In a notable opinion, the Alabama Supreme Court declared, by Justice Somerville, Justice Stone concurring, that a statute authorizing the imprisonment of a debtor for contempt, who failed to comply with a court's order to deliver property into court to satisfy a debt, was unconstitutional, because it authorized imprisonment for debt. *Ex parte Hardy*, 68 Ala. 303. Chief Justice Brickell dissented, and counsel for the petitioner quote and rely on the dissenting opinion, which is one of marked ability. After an exhaustive discussion of the question, the Chief Justice concludes with these lines, which he puts in italics:

"Then the imprisonment is not for debt, but for the neglect and refusal to perform a moral and legal duty, performance resting in his ability."

Mark the last five words. If the Chief Justice had construed the statute as authorizing the imprisonment when performance did not rest in the ability of the contemnor, he, too, would have held it unconstitutional.

The case of *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, is not in conflict with these views. That case originated in the United States District Court for the District of Kentucky, where Nugent was committed for contempt (*Wayne Knitting Mills v. Nugent* [D. C.] 104 Fed. 530); the order of commitment was reversed by the Circuit Court of Appeals (*Mueller v. Nugent*, 105 Fed. 581, 44 C. C. A. 620); and the Supreme Court reversed the last decision, reinstating the order of commitment. It was not the bankrupt who was committed for contempt. Edward B. Nugent was the bankrupt. His son, W. T. Nugent, who was neither a bankrupt nor a debtor, was the man committed. He had received \$14,435.45 as the agent of his father, the bankrupt. In answer to the rule, he did not deny that he had the money. 104 Fed. 532. He contended that the court was without jurisdiction to enforce its payment by summary process—that a plenary suit must be brought against him for the fund. It was held by the Supreme Court that the summary process was admissible. It was in this case that Mr. Chief Justice Fuller said:

"The filing of the petition [in bankruptcy] is a caveat to all the world, and in effect an attachment and injunction"

—an observation that has since been limited and confined to the facts of that case. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 353, 26 Sup. Ct. 481, 484 (50 L. Ed. 782); *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 306, 32 Sup. Ct. 96, 56 L. Ed. 208. W. T. Nugent, the bankrupt's son, admitting that he had the money in hand and was able to comply with the order, was, of course, subject to be punished for failure to do so. The case has no application whatever to a proceeding against the bankrupt in reference to property which is not then in his actual possession. Its want of application as an authority in such cases is pointed out by Judge Gray in *American Trust Co. v. Wallis*, 126 Fed. 464, 61 C. C. A. 342, where it is said that:

"The Supreme Court carefully excluded any ground for an inference that the District Court had power to make an order upon a bankrupt for the delivery of property admittedly not in his possession or control."

When the contemnor is ordered to do the impossible, and this appears from the record, his commitment for failure to obey is arbitrary and illegal; and the order has no justification as a contempt proceeding. And, as it has no purpose except to force by imprisonment the payment of money on debts, it is difficult to see why it is not aptly called imprisonment for debt. When the imprisonment occurs under such circumstances, no matter what may be said to the contrary, it remains a fact that the debtor is arrested and imprisoned to force the payment of a debt in whole or in part.

[8] 6. The announced purpose of the elaborate argument for petitioner is not only to secure a reversal of the decree of the District Court, but "to induce this court to change or modify the opinion in *Samel v. Dodd*," supra, and "to return to the doctrine of the majority opinion in *Re Purvine*, 96 Fed. 192 [37 C. C. A. 446]."

It is evidently the opinion of counsel, who have given the matter such studious attention, that the action of the District Court is sustained by the former case, but is in conflict with the latter.

Purvine, having been adjudicated a bankrupt, a proceeding was instituted by his creditors, alleging that he had in his possession, and had refused to surrender to his trustee, \$8,300 in money. He filed a sworn answer, denying that he had such funds in his possession; but the referee made an order requiring him to pay to the trustee \$7,400. The matter came before the judge of the bankruptcy court on a rule requiring Purvine to show cause why he should not be punished for contempt. He again answered under oath that he did not have the money and could not pay it as ordered. He did not deny having previously had moneys in his possession, but claimed that the same had been lost or stolen. The District Court approved the order of the referee requiring Purvine to pay to the trustee \$7,400, and ordered that he be under the surveillance of the marshal and pay the costs of the marshal's attendance on him, and allowing him to "have freedom to go to such places in the district as he may desire." Purvine moved to vacate this order, alleging that he had sought to prove that the money had been lost by named witnesses, and that the "referee declined to permit said testimony, because he was not authorized to admit the evidence of any witness, except by permission of the District Judge first obtained." The court overruled the motion. The bankrupt not paying the money at a time fixed in which he was required to pay it, the court, reciting in the order that the "bankrupt now has in his possession and control the said sum of \$7,400," adjudged him guilty of contempt for failing to pay it to the trustee as ordered by the court, and ordered that he "be held and confined in the county jail of Dallas county, Tex., until he pay the said sum of \$7,400." Purvine was placed in jail, and filed a petition to review the order committing him. The case was heard by the court in vacation without oral argument, and the record was not printed; but the original record on which it was heard is in this court. The brief and clear majority opinion, in refusing to revise the order of the District Court, is predicated upon the conclusion that the record showed that Purvine had in immediate possession the \$7,400, and was therefore able to comply with the order of the court. Fault is not found in the language of the opinion if it were detached from the record of the District Court. The objection is that that record does not afford a basis for the application of the rules announced. The able and experienced judge who wrote the opinion asserted that, to decide differently would be "to admit that a bankrupt may sit in the very presence of the court with cash to any amount in his pocket." If the record had shown that Purvine had the \$7,400 in his pocket, no one would have questioned the authority of the court to make the order of commitment, except on the ground that such order would have been needless, as the marshal or jailer, on his arrest, could have secured the money. But the record, taken as a whole and looking at the orders of the court, fails to show that the court ascertained that he had the money "in his pocket" or in his immediate possession. Until that was shown, there was no authority to make the order to pay the money to the trustee. If the order to pay was without authority, the order of commitment based on it was unlawful and void. In *re* Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216. It is true that there is a recital

in the order that the contemnor has the money in possession and control, but that recital must be read in connection with the entire decree, and the question whether present possession is shown determined by the whole record. Money may be under one's "control," and yet not so in possession that he could deliver it or cause it to be delivered to others. The direction, when he was first arrested, that he be left free to go where he pleased in the district, accompanied by the marshal, is significant. It gave him an opportunity to obtain money, if he had friends who would aid him. No line is found in the record to indicate that he had the money in his immediate personal possession, nor that it was on deposit, or in the possession of others subject to his control. Clearly the order was made on the theory (contended for by counsel in the instant case) that he once had the money, and the burden of proof was on him to convince the court that he did not then have it. The order to pay the money was void, because it did not show the present power to pay it. *American Trust Co. v. Wallis*, 126 Fed. 464, 61 C. C. A. 342; *In re Chiles*, 22 Wall. 157, 22 L. Ed. 819; *Samel v. Dodd*, 142 Fed. 68, 73 C. C. A. 254; *In re Mize* (D. C.) 172 Fed. 945; *Rapalje on Contempt*, § 129.

The proceedings to commit Purvine for contempt were prosecuted by 3 creditors. The record discloses 35 creditors, whose aggregate claims amounted to \$4,648.94. If the construction of the record by the majority opinion in the Purvine Case was correct—that the District Court had determined that the contemnor had in his immediate personal possession and control \$7,400—what would the record have subsequently shown? Purvine was condemned to imprisonment "until he * * * shall pay to O. B. Colquitt, trustee aforesaid, * * * the sum of \$7,400," a sum largely in excess of the apparent indebtedness of the bankrupt. If the order had been made to vindicate the authority of the court, and was really based on a finding that he had that sum in possession, he would have been held till he complied with the order, or, at least, till he paid into court the amount of the bankrupt's indebtedness and costs. The court would have required the sum to be paid before the contemnor was released. On the other hand, if the creditors were using the contempt process to force Purvine to pay such sum as he could raise, then it would be expected that he would not be held longer than it was necessary to make him surrender such funds as he had or could procure. Here is what the record shows: On August 29th, the trustee reported that he had received \$43.22 to pay two small claims, and that he had been furnished receipts which indicated that the other creditors had been paid. He attaches an exhibit, which shows the payment to creditors of sums amounting in the aggregate to \$1,465.39. He also reported that E. R. Bumpas had paid to him \$100, to be applied to the trustee's fees. The record also shows the payment of \$138.75, additional costs of clerk and referee, making a total of \$1,747.36, which, so far as the record shows, was all that Purvine was required to pay to obtain his release.

How he obtained this sum does not appear, but the record shows that Purvine had claimed as exempt personal property of the value of \$1,695.

After the trustee made this report, the judge made the following order directing Purvine's release:

"It having been made to appear to the court that the creditors of A. S. Purvine, bankrupt, have released their claims against the said A. S. Purvine and his estate, and it further having been made to appear that provision has been made for the payment of all the expenses connected with the administration of the trust estate, it is therefore:

"Ordered, that said A. S. Purvine, heretofore committed by an order of this court for contempt, be, and he is hereby, released and discharged from further custody.

"It is further ordered that the attorneys for the petitioning creditors in the matter of A. S. Purvine, bankrupt, file their accounts for services rendered with the referee, and that the petitioning creditors also file their accounts for moneys advanced by them with the referee, for action thereon by him."

It thus appears that Purvine was not released because he obeyed the order of the court, for the failure to obey which he was committed. This last order shows, in effect, that it was not possible for him to obey it. If it had been shown that he really had in his personal possession \$7,400, the prosecutors would not have been satisfied with a payment of only \$1,747.36.

If the court had found that Purvine had in his possession a sum so much larger than his apparent indebtedness, it would not have ordered him to pay into court more than enough to pay the debts and costs.

No one questions the authority of the District Judge to make the order discharging Purvine, and it is quoted only to show the purpose of the imprisonment. But there is no authority in a District Court to imprison a bankrupt till he satisfies the claims of officers for costs and pays the creditors such sum as will cause them to agree to his release.

7. The case of *Samel v. Dodd*, supra, originated in the United States District Court for the Northern District of Georgia, and was decided in that court by the judge who wrote the opinion of the court in *Re Purvine*. An elaborate opinion was filed by him in the District Court, which is printed in the record here, but not reported. The judge found that amounts aggregating \$16,417.83 were withdrawn by the bankrupts from their business between January 1, 1904, and May 30, 1904, the day of the beginning of the proceedings in bankruptcy. The bankrupts were required to account for this sum. The judge said:

"If the highest amount mentioned in the evidence, however, as going into the possession of J. Saul & Co., should be taken as the truth of the matter, it would still leave \$2,417.83 unaccounted for in any way. This, I am satisfied, the bankrupts are able to turn over at this time."

The usual orders of commitment for contempt were made, and the case was brought to this court.

The finding that the bankrupts were able to turn over the \$2,417.83 at that time was not permitted to sustain the order. Taking the whole decree of commitment and the opinion, it was apparent that it was not shown that it had been found that the bankrupts were presently in possession of the sum in question. Judge Maxey's opinion, in reversal of the District Court, demonstrates by its result that the theory of peti-

tioner's counsel that the recent possession casts the burden of proof on the bankrupt cannot be sustained.

The Cases of Purvine and Samel v. Dodd, though differing, of course, in detail as to facts, involved the same principle. In each case the property or fund was traced to the recent possession of the bankrupt, and there the proof ended. In each case the District Court, in effect, held that the burden was on the bankrupt to account for the thing received by him. And in each case the bankrupt was committed for not making a satisfactory explanation. There the similarity ends. On petitions for revision, the Purvine Case was affirmed, and Samel v. Dodd was reversed. In the lower courts, both cases would support the petitioner's contention in the instant case as to the shifting of the burden of proof. But that theory has no support in this court in Judge Maxey's opinion in Samel v. Dodd.

[9] 8. A recent case (*In re Rogowski* [D. C.] 166 Fed. 165, 169) came before Judge Newman, in which he clearly and briefly states the doctrine urged by counsel, and decides that it is in conflict with Samel v. Dodd. The referee, in his first report, ordered the bankrupt to deliver \$10,580.74 worth of goods, or, in default, to be committed for contempt. The judge sustained exceptions to the report, and referred the matter back to the referee. In his second report, the referee refers to the case of Samel v. Dodd, *supra*, saying that the evidence was not sufficient to comply with the rule in that case. Commenting on the report, Judge Newman said (the italics are the writer's):

"If the rule be adopted, announced in some cases, that where a bankrupt, shortly before his failure, has on hand a large stock of merchandise, and, when proceedings in bankruptcy are instituted, he is found to have but a small amount of goods, the stock being depleted to such an extent that it could not have occurred in the ordinary course of business, *and there are circumstances to indicate that the goods have been purposely and fraudulently removed, so as to prevent their going into the hands of the trustee in bankruptcy, that then the court may require the bankrupt to produce the goods or give some reasonable explanation of their disappearance, and on his failure so to do may hold him for contempt*, then a case is made out by the record here."

That rule, instead of requiring proof of the contemnor's present possession beyond a reasonable doubt, would shift the burden of proof, and condemn the accused for his failure to produce evidence to show his innocence. Judge Newman refused to enforce such rule, on the authority of Samel v. Dodd, *supra*, and discharged the accused.

The fact that the bankrupt has fraudulently removed goods or has committed some crime in relation to them may subject him to penalties or to imprisonment for the offense; but it is not the subject of a contempt proceeding for the failure to surrender property not in his possession. He may have given the goods away, or destroyed them, or burnt them to get insurance. Such facts may excite indignation, but they are not to be considered in this proceeding. Such crime, instead of supporting the contempt process, may defeat it, because it may show inability to comply with the order.

In re Dickens (D. C.) 175 Fed. 808, by Judge Toulmin, and *In re Mize* (D. C.) 172 Fed. 945, by Judge Grubb, are cases in which the rules announced in Samel v. Dodd are aptly applied.

It should also be noted that *Samel v. Dodd* was recently approved by this court, and the lower court reversed for failure to be governed by it. *Miller v. Carlton*, 194 Fed. 1022, 114 C. C. A. 665.

For these reasons, it would not seem advisable to comply with the request of counsel, so earnestly sustained by argument, to modify or limit Judge Maxey's opinion, speaking for the court, in *Samel v. Dodd*, *supra*, and to return to the doctrine announced in the *Purvine Case*.¹

[10] 9. Cases like this depend, not only on the general law relating to contempt, but especially on the proper construction of the bankruptcy act. Section 41a (1) makes it a contempt for the bankrupt to "disobey or resist any lawful order, process or writ," and provides that such refusal to obey may be certified to the judge by the referee, and the judge may punish the accused as if the contempt had occurred before the court.

Section 29b (1) provides for the punishment, by imprisonment not to exceed two years, of the offense of having knowingly and fraudulently "concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy." These two parts of the act should be construed so as to give both a field of operation and to conform to the legislative intention.

Section 41a (1) applies to the refusal of the bankrupt to surrender property in obedience to the order of the court, the same being in his present possession. It is equally applicable to a third person so holding property of the estate of the bankrupt, if such person had no such adverse claim as would require plenary suit. *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

Section 29b (1) applies to cases of the concealment of the assets from the trustee. In cases like the present, where, by examination of the books of the bankrupt, it is claimed that the bankrupt has not ac-

¹ Note by SHELBY, Circuit Judge.

There are other facts connected with the decision of the *Purvine Case*, 96 Fed. 192, 37 C. C. A. 446, which, in view of the argument of counsel urging this court to "return to the doctrine" of that case, the writer thinks should be stated here:

The briefs and record of that case were first presented at Dallas, Tex., to Hon. A. P. McCormick, United States Circuit Judge. He advised the attorney representing the petitioner that the petition should be presented to the court, and it was submitted to the court at Atlanta, Ga., on the record and briefs and without oral argument. Judge McCormick not being present, Hon. William T. Newman, United States District Judge, was designated to sit in his place. After the case was decided and the opinions announced, copies of them were sent to Judge McCormick, who had first examined the case, but, being absent, could not participate in the decision. In returning the opinions, he wrote as follows:

"Dallas, Texas, July 27, 1899.

"My Dear Judge:

"I thank you for sending me copies of opinions in the *Purvine Case*, which I have read with deep interest. The decision of the majority is a surprise to me. I cordially concur in the views you so clearly present and strongly support in your dissenting opinion. Complying with your request, I herewith return the opinions.

Yours very truly,

"A. P. McCormick.

"Hon. D. D. Shelby, U. S. Circuit Judge,
"Huntsville, Alabama."

counted for goods of large value, and the same cannot be found, and the bankrupt on oath denies possession or control of them, if the proof is sufficient to warrant it, a case is presented for prosecution under section 29b(1) for concealing property from the trustee. If, in such cases, an order can be made requiring the bankrupt to surrender the concealed property, and the bankrupt be imprisoned until he complies with the order, there would be no need for section 29b(1). All cases of concealment could be proceeded against as contempt cases.

Where the property is not found in the immediate possession and control of the bankrupt, but is concealed, if he is in default about it, a case is presented, if the evidence is sufficient, under section 29b(1). The same is true where property of the bankrupt estate is traced to the recent possession of the bankrupt, but is not shown to be presently in his possession. The doctrine of "presumption" and "shifting the burden of proof" to the bankrupt is not applicable to such cases. To hold otherwise makes section 29b(1) useless, and attributes to Congress the intention to permit the charge of fraudulently concealing property of the bankrupt to be punished without indictment and jury trial.

[11, 12] 10. If a bankrupt conceals assets from his trustee, he commits an offense indictable under the bankruptcy law, and his trustee or his creditors may cause his arrest and prosecution at any time within 12 months from the commission of the offense. *Warren v. United States* (C. C. A.) 199 Fed. 753. When he is so accused, and on oath, makes denial, and the facts are not so plain as to remove all reasonable doubt, and do not affirmatively show that imprisonment would or should cause the surrender of designated and described property in the present possession of the accused, the court should decline to commit the contemnor, and the creditor or trustee could proceed through the regular channels to prosecute the bankrupt for concealing assets. Few bankrupts who have been in business for several years will be able to produce all the assets that creditors, aided by bookkeepers, may claim that they ought to produce. It is discretionary with the court to grant or refuse the rule (*Rapalje on Contempt*, § 9; *Wyatt v. Magee*, 3 Ala. 94; *Watrous v. Kearney et al.*, 79 N. Y. 496); and the more humane course, and the one more conformable to the just rights of the accused, is, except in cases of indisputable proof, to refuse the drastic and severe remedy, and give the accused the right of jury trial. That course will often meet the strenuous objections of trustees and creditors, for the jury has ever blocked the way of those who seek to profit by the exercise of arbitrary power. The citizen who is arraigned and tried for contempt under a statute which also provides for indictment with jury trial on the same facts justly feels that he has been deprived of a right given by the very statute under which he is arraigned. That this feeling of opposition to the unnecessary exercise of this drastic power is general and profound is shown by many judicial judgments, and by legislation, state and federal, limiting the court's power to punish for contempt, and by the frequent and often unjust charges against the judiciary for the unlawful exercise of such power. In *California Paving Co. v. Molitor*, 113 U. S.

609, 618, 5 Sup. Ct. 618, 622 (28 L. Ed. 1106) a proceeding for contempt for disobeying a decree, the court pointed out that there was another remedy, and said:

"The process of contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant's conduct."

But counsel argue that "this suggestion brings small comfort to creditors," and quote that "a criminal prosecution does not pay the claims of creditors." But prosecution by indictment and trial by jury is the regular and constitutional mode of punishing a citizen for crime. In the hurry of securing the collection of a debt due one man, we should not forget the rights of another. In the stress of the race for the dollar, the rights of the man himself should not be violated. The bankruptcy law is a boon to society, but it can be made a bane. There are some dishonest, fraudulent, and venal bankrupts. The act provides severe, but constitutional, means for dealing with them. There are many honest men, who, by incapacity or misfortune, have been stripped of vocation and property. The act was intended to give such men another chance. When they come to the court with idle hands and empty pockets, the court should protect them against baseless and oppressive accusations.

It is to the interest of the public that the courts should retain the power to punish for contempt. The District Courts, like this court, are the creatures of Congress, and their power is within legislative control. *Rapalje on Contempt*, § 11; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205. The way to preserve it is not to abuse it.

The District Court was right in refusing to commit the accused, and the petition to revise should be denied.

WILSON v. LE MOYNE.

(Circuit Court of Appeals, Fourth Circuit. March 6, 1913.)

No. 1,118.

1. LIMITATION OF ACTIONS (§ 100*)—FRAUD—DILIGENCE—ORDINARY DILIGENCE.

Code Pub. Gen. Laws Md. 1904, art. 57, limits an action for fraud to three years, and section 14 declares that, where a party has a cause of action of which he has been kept in ignorance by the fraud of the adverse party, the right to bring suit shall be deemed to have first accrued at the time at which such fraud shall, or with usual or ordinary diligence might, have been known or discovered. *Held* that, where plaintiff, believing that defendant held a particular outstanding title to certain large tracts of land in Virginia, purchased the same from defendant under a special warranty deed executed March 26, 1906, and though plaintiff's attorney was warned of facts that would have put an ordinarily prudent person on inquiry as to the validity of defendant's title, no inquiry or investigation thereof was made, by an examination of the records or otherwise, which would have fully shown the condition thereof, defendant, by an alleged statement that he owned such outstanding title, could not be said to have fraudulently prevented plaintiff's investi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

gation thereof, so as to suspend limitations against plaintiff's right of action for fraud until he ascertained that defendant did not own the title in question, which plaintiff ascertained by an investigation first made in 1911.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

2. LIMITATION OF ACTIONS (§ 100*)—FRAUD—"ORDINARY DILIGENCE."

Code Pub. Gen. Laws Md. 1904, art. 57, § 14, provides that, where a party is kept in ignorance of the fraud of the adverse party, the right to sue shall be deemed to have first accrued when the fraud shall, or with usual or ordinary diligence might, have been known or discovered. *Held*, that "ordinary diligence," as so used, implies that something must be done in order to enable a person to avail himself of the provisions of the statute, and that where opportunity is afforded a party to discover the true facts, and he makes neither inquiry nor effort to do so, he is not entitled to relief thereunder.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5043, 5044.]

McDowell, District Judge, dissenting.

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action by George B. Wilson against John V. Le Moyne. Judgment for defendant, and plaintiff's executor, George B. Wilson, Jr., brings error. Affirmed.

This is an action at law. The plaintiff in error was the plaintiff below. On March 26, 1906, John V. Le Moyne, a retired lawyer, then about 76 years old, executed and delivered at Baltimore, Md., in consideration of the payment to him of \$14,000 cash, a deed releasing and quitting claim unto one George B. Wilson, with special warranty, all the right, title, and interest in two tracts of land lying in Wythe and Grayson counties, Va., conveyed to said Le Moyne by a deed of November 2, 1892, from Benjamin E. Green and wife and by deed of November 4, 1892, from David W. Armstrong; the premises conveyed in said deed from said Armstrong to the party of the first part being described as follows: "A tract of 33,000 acres granted to James Swan by the state of Virginia August 27, 1795, and a tract of 150,000 acres granted by the state of Virginia to George Lawman on July 13, 1796. At the time the deed above mentioned was made, Le Moyne delivered to Samuel J. Randall, the agent of Wilson, the two deeds therein mentioned. The deed from Armstrong to Le Moyne is a deed of special warranty, conveying the grantor's right, title, and interest in the above-mentioned two tracts of land. It contains no recitals or other indication of the source of title in Armstrong. In his testimony Le Moyne said that he had paid Armstrong about \$5,000 for this conveyance and the conveyance from Green, which was obtained by Armstrong. In the deed from Le Moyne to Wilson, it is said that this deed from Armstrong was duly filed for record in Wythe county, Va., in 1892, and in Grayson county in 1893.

The deed from Green and wife to Le Moyne reads as follows: "Whereas, Darius B. Holbrook and Elizabeth T. Holbrook, his wife, did, by a certain deed dated and executed on the 20th day of August, 1855, convey to the said Benjamin E. Green and to Othniel De Forest, and to the survivor of them, as trustees for the Virginia and Kentucky real estate trust fund, a large quantity of lands, aggregating some 2,552,304 acres, situated in the aforesaid states of Virginia and Kentucky, and being the lands which had been conveyed by James Swan, of Massachusetts, to Samuel Allison, of Philadelphia, by a deed dated August 30, 1830; and whereas, by reason of the great lapse of time, the condition of the said lands, and other impediments, it has been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

heretofore impracticable to carry said trust into beneficial effect, and the said real estate trust fund is largely indebted to said Benjamin E. Green for services rendered and money advanced; and whereas, in consequence of the death of the said Othniel De Forest, the said Benjamin E. Green has become and is the sole survivor of the trustees nominated in the said deed, and as such survivor vested with the legal title in and to the lands conveyed by the said deed; and whereas, in consequence of the death of said Darius B. Holbrook and his wife, and in pursuance of the terms of his will, all the right, title, and interest of the said Holbrook in and to the said lands passed to and became vested in his daughter, Caroline E. Von Roques, and in trustees for her benefit; and whereas, in pursuance of certain deeds and contracts executed by the said Caroline E. Von Roques and her husband, and by the trustees under the aforesaid will of Holbrook, all the right, title, and interest of the said Holbrook has been conveyed to the said John V. Le Moyne, party of the second part herein: Now, in consideration of the premises, and of the sum of one dollar cash in hand paid to them, the said parties of the first part do hereby grant, convey, remise, release, and quitclaim unto the party of the second part, his heirs and assigns, forever, all the right, title, and interest of whatsoever kind that may be vested in them, the said parties of the first part, and in the said Benjamin E. Green, as trustee or otherwise, in and to the lands aforesaid in the said state of Virginia, or in West Virginia, and in and to each and every tract, parcel, and piece thereof, to have and to hold the same unto the said party of the second part, his heirs and assigns, forever. And the said parties of the first part will forever warrant and defend the title to the said lands against the claims of any and all persons claiming by, through, or under them, or either of them, and against the claims of no other person whatsoever."

According to the recitals in the deed from Le Moyne to Wilson, this deed from Green to Le Moyne was filed for record in Wythe and Grayson counties at the same time that the Armstrong deed was filed. So far as the record shows, these deeds from Armstrong and Green were the only muniments of title that Le Moyne had or that he had ever seen. Some time prior to 1906 Mr. Samul J. Randall, a lawyer living in Philadelphia, who had been employed by certain creditors of the so-called Swan estate, was informed that Le Moyne claimed some interest under the "Allison title" in the two above-mentioned large tracts of land in Virginia, which were also claimed by the Swan estate. With knowledge that there were in existence several conflicting claims to these lands, Randall in January, 1906, went to Baltimore, where Le Moyne lived, to ascertain if he could prevail upon him to join in an effort to vest in some trustee for the common benefit all of the claims of title derived or claimed to be derived from Swan to the lands in question. Le Moyne refused to become a party to Randall's plan, and shortly thereafter, Randall, acting for George B. Wilson, a retired real estate dealer of Philadelphia, proposed to Le Moyne that he sell his interest in the lands to Wilson. After some negotiation and haggling, a sale at the price of \$14,000 cash was made, and the deed of March 26, 1906, from Le Moyne to Wilson, supra, was executed and delivered.

In May, 1911, Wilson brought this action (tendering with the declaration a reconveyance to Le Moyne) to recover the purchase money and interest, on the ground that the purchase had been induced by fraudulent misrepresentations by Le Moyne as to his title to the lands conveyed. Later an amended declaration was filed, in which the allegations as to fraud are confined to a charge that Le Moyne falsely represented that he owned the "Allison title" to the lands in question. Pleas of general issue and of the three-year statute of limitation were filed. Plaintiff thereupon, replying generally to the tender of general issue and to the plea of limitations, declared "that he did not, by reason of defendant's fraudulent concealment, discover defendant's fraud and misrepresentations until within three years before the commencement of this suit." The defendant filed a rejoinder, denying the truth of the replication as to the alleged fraudulent concealment by the defendant. Upon the conclusion of the testimony the trial court, after refusing a prayer by the defendant for an instruction that there had been no sufficient evidence of fraud by

the defendant, granted an instruction as follows: "The court instructs the jury that there is in this case no legally sufficient evidence that the plaintiff had been kept in ignorance of the alleged deceit by the fraud of the defendant until within three years of the bringing of this suit, and their verdict must be for the defendant." Verdict having been accordingly rendered for the defendant, judgment was entered, and the plaintiff below sued out his writ of error, which is now prosecuted by his executor.

At this point it should be said that the so-called "Allison title" (as appears from the recitals in a deed from Darius B. Holbrook and wife to Green and De Forest, trustees) is a claim derived by deed of 1830 from James Swan to Samuel Allison, subsequently conveyed by deed of 1838 from Allison to Darius B. Holbrook. Evidence offered by the plaintiff tended to show that the trustees of the Swan estate had at least some semblance of title under Swan, supposed to have been created by act of the Virginia Legislature, which conflicted with the Allison title; that the trust created by the above-mentioned deed from Holbrook to Green and De Forest had failed; that Green had no power, after the death of De Forest, to convey; that Holbrook's title passed by his will to his wife and to his daughter, Caroline E. Von Roques; and that the conveyance from Armstrong was invalid. The testimony on this last point consisted of a statement by Randall that, when in 1911 an investigation was made, no deed from any one to Armstrong was found of record in either Wythe or Grayson counties, and of the following:

"Plaintiff offered in evidence, as Exhibit No. 4, a certified copy of a decree of the chancery court of the city of Richmond, Va., in the suit of Caroline E. Von Roques against David W. Armstrong, Harrison T. Groom, and others, dated February 3, 1909. Said decree set aside the conveyance of Caroline E. Von Roques, Florence E. Maybrick, and the trustees to Harrison T. Groom of certain lands, including the lands mentioned in the plaintiff's declaration, decreeing that the said Groom in said transactions was acting as a trustee for David W. Armstrong, one of the said defendants, who, at the time of said conveyance and long prior thereto, had been the attorney for said Caroline E. Von Roques, and further decreeing that Hill Montague, a commissioner of said court, should make and execute a conveyance to the said Caroline E. Von Roques and certain trustees of all lands lying in the state of Virginia, including the lands described in plaintiff's declaration, conveyed by said parties and others to the said Groom. Plaintiff offered in evidence, as Exhibit No. 5, a duly certified copy of the last will and testament of Darius Blake Holbrook, probated in New York City, New York. Said will devised and bequeathed one-half of his estate to his wife, Elizabeth Thurston Holbrook, in fee, and the other half to Frederick G. Thurston, William Read Holbrook, and Elizabeth Thurston Holbrook, in trust for his daughter, Caroline E. Von Roques. A duly certified copy of the deed of Hill Montague, conveying the property in controversy in these proceedings, amongst others, to Caroline E. Von Roques and certain trustees pursuant to the decree of the chancery court of the city of Richmond, referred to in 'Plaintiff's Exhibit No. 4,' was offered in evidence as 'Plaintiff's Exhibit No. 6.'"

It does not appear from the record whether or not Le Moyne had actual knowledge of the defect in his title. In the amended declaration it is alleged that Wilson discovered the falsity of Le Moyne's statements in July, 1910. In Randall's testimony it is said that it was early in 1911, from information acquired by him in Richmond, Va., that suspicion arose and that investigation was made.

The evidence on the question of the alleged fraudulent representation by Le Moyne to Randall need not be set out in full. Le Moyne denied that he had ever said that he had the Allison title, or that he had made any representations whatever as to his title. The correspondence between Randall and Le Moyne and between Wilson and Le Moyne, all of which antedated the delivery of the deed to Wilson, tends to support Le Moyne's testimony. Le Moyne also testified that he wrote to Randall in January, 1906, that the first step in the matter should be an examination of the records. But Randall denied having received any such letter. Randall also testified that "Mr. Le Moyne told him upon three different occasions that he owned the Allison

title; three different and separate occasions; that the last time was when the title passed." Again witness' statement is: "Witness said to Mr. Le Moyne: 'Mr. Le Moyne, I have gotten Mr. Wilson to buy this title, this Allison title; but before I deliver this money to you I want to know whether you own this Allison title,' and he told me as far as he knew he owned that Allison title." This statement is alleged to have been made just before Randall delivered the check for the purchase money to Le Moyne. One other witness, Randall's clerk, testified that he was with Randall when the deed was delivered, and that at that time "Mr. Randall asked Mr. Le Moyne, 'Is this the Allison title?' as other titles would be no good to him, and he said, 'Yes, this is the title.'"

There was no evidence that Le Moyne had any further dealings or communications with either Wilson or Randall after the delivery of the deed to Randall on March 26, 1906, or that he ever did or said anything to prevent an investigation of the truth of his alleged statements as to his ownership of the Allison title. There was evidence for the plaintiff to the effect that neither Wilson nor Randall learned of the defect in Le Moyne's title until 1911. So far as appears, no examination of title was made, and no effort of any sort was made to investigate the truth of Le Moyne's alleged statement, until some time in 1911. It also appears that Wilson never met Le Moyne, and that Randall made such slight acquaintance as he had with him only a few months before the purchase was made.

Samuel V. Hayden, of Washington, D. C., for plaintiff in error.
W. Irvine Cross, of Baltimore, Md., for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and McDOWELL, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above).
[1] The first assignment of error is to the effect that the court erred in granting defendant's second prayer, which is in the following language:

"The court instructs the jury that there is not in this case legally sufficient evidence that the plaintiff had been kept in ignorance of the alleged deceit until within three years from the beginning of this suit, and that verdict must be for the defendant."

The law of Maryland as respects this question is to be found in the Code of Public General Laws of Maryland (article 57, § 14):

"In all cases where a party has a cause of action of which he has been kept in ignorance by the fraud of the adverse party, the right to bring suit shall be deemed to have first accrued at the time at which such fraud shall or with usual or ordinary diligence might have been known or discovered."

Under the provisions of the Maryland statute of limitation, one who fails to bring his suit within three years from the time his cause of action accrues is precluded thereby, unless he can bring himself within the exception contained in the foregoing statute by showing that he has exercised ordinary diligence to discover the fraud of which he complains. Therefore the burden is upon him to show that he has exercised ordinary diligence before he can avail himself of the provisions of this statute.

It is insisted by counsel for plaintiff that the court below should have submitted to the jury the question whether the failure of plaintiff's decedent to discover his cause of action until within three years of the bringing of this suit was due to failure on his part to use due

diligence, or to the fact that the defendant so concealed the wrong that he was unable to discover it by the exercise of ordinary diligence. In order that we may reach a correct determination of this point, it becomes necessary to consider the facts surrounding the transaction at the time that Le Moyne parted with such title as he may have had to these lands.

At the beginning of the negotiations leading up to the conveyance of the lands in question to Wilson, Samuel J. Randall, a witness for the plaintiff, testified that:

"In 1904 he was employed by the Randall creditors of the Swan estate, and as attorney for these creditors he came in contact with Mr. Henry McCarthy, of Philadelphia, who was trustee of that estate. He called upon Mr. McCarthy one day, and he informed him that there were two tracts of land, situated in Grayson and Wythe counties, in the state of Virginia, consisting of 150,000 acres and 33,000 acres; that those two tracts of land in his estimation were valuable, if they could combine the various conflicting senior grants. He then saw him the second time, and he informed him [witness] that, as far as the Swans were concerned, he as trustee would go into any combination to bring these titles together. He also informed witness that he could probably get in contact with the owner of the Allison title by communicating with Mr. Hawes, of New York, a member of the New York bar. The witness went to New York and saw Mr. Hawes; saw him upon two occasions. He told witness that Mr. Le Moyne, of Baltimore, the defendant in this action, was the owner of the Allison title."

Thus it will be seen, as the statement of facts shows, that Wilson, through his counsel, was exceedingly anxious to secure any outstanding titles which might strengthen or perfect the title to which Randall referred, and it was with this object in view that he approached Le Moyne and entered into negotiations for the purchase of the title which he held. That there was doubt in the minds of the parties as to who had the legal title is evidenced by letter from Randall to Le Moyne of January 17th, about two months before the purchase by plaintiff's decedent, in which Randall was endeavoring to induce Le Moyne to agree to the consolidation of the Virginia lands, in order that there might be a sale thereof for the benefit of all parties concerned. This was the situation at the time Le Moyne executed the deed for the land in question.

It is insisted by counsel for plaintiff that, where one practices a fraud for the purpose of keeping the injured party in ignorance of his cause of action, such party is kept in ignorance "by fraud of the adverse party." Thus we are confronted with the question as to whether the fraud complained of in this instance was of such a character, or so concealed, as to keep plaintiff in ignorance of same, or, in other words, if fraud was practiced in this instance, was it of such a character that by ordinary diligence it might have been known or discovered.

In the case of *Stieff Company v. Ullrich*, 110 Md. 634, 73 Atl. 874, the facts are somewhat like those of the case at bar. A man named Lauritzen borrowed \$2,000 from a company of which he was employed to purchase a house. At the time he borrowed the money, he stated that he did not want to put a mortgage on his house, but would take it in his own name, so that it would be a security for the

debt. Instead of taking it in his own name, he took it in the name of himself and wife as tenants by the entireties. Lauritzen died, and shortly after him his wife died, and the property was sold by her administrator. When he was about to distribute the proceeds, a bill was filed by the company from which Lauritzen had borrowed the money to enjoin a distribution of the fund until the adjustment of the company's claim. More than three years had passed since Lauritzen had had the deed to himself and wife recorded. It was contended by the company that the taking of the deed by Lauritzen in the name of himself and wife as tenants by the entireties had been a fraud, and that the company did not discover it until within three years of the bringing of the suit, and that limitations should not begin to run until such discovery. The court said:

"But it is contended by the appellant that it did not discover the fact that the deeds had been given to Lauritzen and wife, as tenants by the entireties, until about the time of the death of the former, in June, 1908, and that limitations should not begin to run until such discovery at that time. In the case of *Wear v. Skinner*, 46 Md. 257 [24 Am. Rep. 517], a leading one on this subject, it is said that 'when a party has been injured by the fraud of another, and such fraud is concealed, or is of such character as to conceal itself, whereby the injured party remains in ignorance of it without any fault or want of diligence on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' The facts in this case show that the appellant, who, as president of a large business enterprise, must be regarded as a person of intelligence, did not exercise the diligence or prudence usually observed in a transaction of such importance. He gave a check for the money and took the note as security for the same, relying upon the promise of Lauritzen to have the deed made in his own name. There was a clear breach of confidence on the part of Lauritzen, but he took no pains to conceal it. He did not keep the deed from record. The money was loaned January 28, 1904; the deed was recorded about three weeks later, on February 19th, following. Ordinary diligence on the part of the appellant would have caused him to look at the records, or have the deed submitted to him before it was recorded, to see that his interests were properly protected in the manner he desired. It seems to us a case of inexcusable neglect on his part. 'The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove. Hence the tendency of courts in recent years has been to hold the plaintiff to rigid compliance with the law, which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts.' *Phelps' Judicial Equity*, § 265; *Foster v. Railroad*, 146 U. S. 88 [13 Sup. Ct. 28, 36 L. Ed. 899]; 16 Cyc. 171 et seq."

It is insisted by counsel for plaintiff that the case of *Wear v. Skinner*, *supra*, is controlling here. We do not think so. The facts in that case are different, and for the purpose of this case we are content to base our ruling upon the more recent decisions of that state, especially the one which we have just quoted.

Also in the case of *Reeder v. Lanahan*, 111 Md. 372, 74 Atl. 575, it appears that a bill was filed against Samuel J. Lanahan, who had been his surviving partner and his trustee. It had been 30 years since Samuel J. Lanahan had settled up his accounts as trustee. The executors and heirs had been familiar with the settlement of William

Lanahan's estate, including the trust in the hands of Samuel J. Lanahan. Samuel J. Lanahan pleaded want of equity, limitations, and laches. To avoid the limitations the plaintiff set up the statute which is invoked here, alleging that Samuel J. Lanahan had concealed all knowledge of his failure to fully account to the plaintiffs and other parties interested. In that case the court said:

"The defendants seek to avoid the defense of limitations upon the ground that Samuel J. Lanahan concealed all knowledge of his failure to fully account, not only from the complainants, but from all other parties interested. It is somewhat difficult to perceive how it can be said that he concealed anything from persons who were not then in existence, or how the mere allegation of concealment can affect the legal results which flow from the facts disclosed by the record upon which the suit rests. The law requires suits of this nature to be brought within three years from the time the cause of action accrues, and 'where a party has a cause of action of which he has been kept in ignorance by the fraud of the adverse party, the right to bring suit shall be deemed to have first accrued at the time at which such fraud shall, or with usual or ordinary diligence might, have been known, or discovered. Acts 1868, c. 357; Code 1904, art. 75, § 14.' If it be true that Samuel J. Lanahan were guilty of the fraudulent concealment alleged, and that the trustees knew, or by the exercise of ordinary diligence might have known, or discovered it, the bar of the statute is not removed, because it is well settled that such knowledge or want of ordinary diligence on the part of the trustee is imputed to the plaintiffs. *Crook v. Glenn*, 30 Md. 55."

In the case of *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, the Supreme Court, in construing the statute of Indiana, which provides that "an action for relief shall be commenced within six years after the cause of action accrued, and not afterwards," and that "* * * if any person liable to an action shall conceal the fact from the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the case of said cause of action," said:

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together. The provision in the statute of which the plaintiff seeks to avail himself was originally established in equity, and has since been made applicable in trials at law. There is no trace of it in the English statute of limitations of the 21st of James I, which was adopted in most of the American colonies before the Revolution, and has since been the foundation of nearly all of the like legislation in this country. Having been imported from equity, the adjudications of equitable and legal tribunals upon the subject are alike entitled to consideration. Upon looking carefully into the reply, we find it sets forth that the concealment touching the cause of action was effected by the defendant by means of the several frauds and falsehoods averred more at length in the complaint. The former is only a brief epitome of the latter. There is the same generality of statement and denunciation and the same absence of specific details in both. No point in the complaint is omitted in the reply, but no new light is thrown in which tends to show the relation of cause and effect, or, in other words, that the protracted concealment which is admitted necessarily followed from the facts and circumstances which are said to have produced it. It will be observed also that there is no averment

that, during the long period over which the transactions referred to extended, the plaintiff ever made or caused to be made the slightest inquiry in relation to either of them. The judgments confessed were of record, and he knew it. It could not have been difficult to ascertain, if the facts were so, that they were shams. The conveyances to Alvin and Keller were also on record in the proper offices. If they were in trust for the defendants, as alleged, proper diligence could not have failed to find a clew in every case that would have led to evidence not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort."

Also in the case of *Redd v. Brun*, 157 Fed. 190, 84 C. C. A. 638, in construing section 2911 of the Colorado statute, which requires "bills for relief on the ground of fraud to be filed within three years after discovery of the facts constituting the fund, bars such suits three years after the discovery of facts which would awaken a person of ordinary prudence to an inquiry, which, if pursued with reasonable diligence, would lead to a discovery of the fraud," the court said:

"In the face of this statute, reasonable diligence required that the complainant, who suspected conveyances of real estate would be made or procured by Tillett for the purpose of concealing his property and defrauding his creditors, should examine the public records in his name, which would be likely to disclose and which did disclose such conveyances, at least once in three years. He failed to make this search, and to inquire among Tillett's neighbors and friends, so as to ascertain his relationship to Mrs. Stortes, until the statutory time had passed. The burden was upon him in this suit to show some sound reason why he did not make this search and inquiry in less than four years after the means of discovering the fraud were within his reach, and why a court of equity should refuse to apply its doctrine of laches until more than two years after the statutory limitation upon a like action had expired. He did not successfully bear this burden. He failed to establish any reasonable excuse for his postponement of his inquiry and search for more than four years after these deeds had been recorded. If by a failure to make the search and inquiry after the public record disclosed the means of discovery he could toll the limitation of the statute two years beyond the statutory time, it is not perceived why by a continued failure he might not toll it indefinitely; and as no equitable reason has been shown why the doctrine of laches should not be applied after the expiration of the limitation, the complainant has no standing in equity."

In this case it should be borne in mind that the purchaser was not engaged in buying lands, but simply speculating in land titles; that is to say, he was endeavoring to purchase any and all outstanding titles in order to perfect that which was not otherwise a legal title to the lands in controversy. Under these circumstances it is fair to assume that he was aware of the fact that, as a prudent man, it was his duty to scrutinize the title that he was purchasing, and if possible to trace the title in question to its original source with the view of determining its validity. The alleged representation made by Le Moyne to plaintiff's decedent was such that he could have ascertained the truthfulness of the same, if he had exercised anything like ordinary diligence. The deeds upon which which Le Boyne relied as muniments of title were of record and could have been examined at any time, had the purchaser exercised the diligence of a prudent man under similar circumstances. There is not a scintilla of evidence tending to show that Le Moyne did or said anything after he made the conveyance that could

be construed as an attempt on his part to conceal anything connected with the transaction.

If the contention of counsel for plaintiff as to the proper construction of this statute be true, one could purchase a tract of land, and file the deeds away in his safe, and keep them there for 50 years, and if, at the end of that time, an investigation should show that a fraud had been practiced upon him by the party from whom he purchased, he could institute a suit of this character, and have as his only excuse therefor that the fraud practiced was such as to conceal itself. It was evidently the purpose of the Legislature in the enactment of this statute that, in cases where a fraud was of such character as to conceal itself, or where the offending party by his own acts kept it concealed, to afford relief provided it should appear that the injured party had in the meantime exercised ordinary diligence in endeavoring to ascertain the true facts. It must be that the Legislature in using the proviso, to wit, " * * * at the time at which such fraud shall or with the use of ordinary diligence might have been known or discovered," intended to impose upon one who seeks to avail himself of this statute the duty to make some effort, to say the least of it, to ascertain the facts upon which he relies to relieve him from the provisions of the statute of limitations. It certainly could not have been the intention of the Legislature to relieve one who comes into court and claims that the fraud has been concealed, and that he could not have discovered it sooner in the face of the fact that he has had in his possession all the time papers which afforded him ample means of examining the record and ascertaining the truth about the matter.

It is a matter of common knowledge that there are more or less defects in the land titles of this country, and under these circumstances a man of ordinary prudence usually requires an abstract of title of the land purposed to be purchased. While this may not be true in every instance, yet where one without investigation takes title to a tract of land, but makes no effort whatever to ascertain whether he has obtained a good title, and rests content and does not bring his suit within the statutory period, he cannot be heard to say that he has exercised ordinary diligence to discover any fraud which may have been practiced upon him.

[2] The employment of the words "ordinary diligence" in the statute implies that something must be done in order to enable one to avail himself of the provisions of the statute. In the case of *Stieff v. Ullrich*, supra, the court, among other things, said:

"Ordinary diligence on the part of the appellant would have caused him to look at the records or have the deed submitted to him before it was recorded, to see that his interests were properly protected in the manner he desired."

In this instance the purchaser had the same opportunity that was afforded the party in that case to discover the true facts; but he did not make a single inquiry, and so far as the record shows made no effort whatever to ascertain the true condition of the title which he had purchased. After due consideration of the facts surrounding

this transaction, we fail to find any evidence tending to show that plaintiff's decedent exercised ordinary diligence to discover the alleged fraud. In the case of *New England Insurance Company v. Swain*, 100 Md. 558, 60 Atl. 469, the court, in discussing the Maryland practice, among other things said:

"Under our practice, if there be a total absence of evidence to establish such facts in favor of the plaintiff, suing after the period fixed by the statute of limitations, the court can so determine, as will be seen by reference to *Cummings v. Baunon* and *Wear v. Skinner*, *supra*."

If there had been any evidence tending to show that the plaintiff *had used ordinary diligence*, or that the wrong was so concealed that he could not have discovered it, then there would have been a question to be passed upon by the jury, to wit, as to whether he had exercised ordinary diligence; but, as we have stated, there is a total absence of evidence tending to establish this fact, and we are therefore of the opinion that the action of the lower court in refusing to submit this question to the jury was proper.

Counsel for defendants relied upon the case of *New England Insurance Company v. Swain*, 100 Md. 558, 60 Atl. 469. We have carefully considered that case, and are of the opinion that it does not apply to the case at bar. There the court submitted to the jury the question whether or not the action of the agent could be charged to the company, and, if so, whether the failure of the company to return the premium had not been such as to prevent him from ascertaining at an earlier date that a fraud had been practiced upon him. The plaintiff in that case did not have the means by which he could ascertain the true facts, because the books and papers relating to the transaction were in the possession of the insurance company.

There was an element of subsequent concealment in that case; but, in view of the facts and circumstances surrounding this case, subsequent concealment cannot be considered as an issue in this controversy.

For the reasons stated, the judgment of the lower court is affirmed. Affirmed.

McDOWELL, District Judge, dissents.

BOARD OF LEVEE COM'RS OF TENSAS BASIN LEVEE DIST. v.
TENSAS DELTA LAND CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1913. On Application for Rehearing, April 12, 1913.)

No. 2,446.

1. EQUITY (§ 237*)—PLEADING—EFFECT OF FILING ANSWER AND DEMURRER—
WAIVER.

Although under the old equity rules the filing of an answer at the same time as a demurrer operates as a withdrawal of the demurrer, a plaintiff, by moving to strike out the answer and agreeing to have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the case set down for hearing on the demurrer, waives the right to insist that the demurrer was withdrawn.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 492; Dec. Dig. § 237.*]

Demurrer and plea or answer to same bill and effect thereof, see note to Sage Land & Improvement Co. v. Ripley, 114 C. C. A. 346.]

2. EQUITY (§ 232*)—PLEADING—DEMURRER.

A demurrer addressed to the whole bill for want of equity should not be sustained, where the grounds of demurrer apply to only a part of the bill, if it appears that an equitable claim is properly alleged in other parts.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 508; Dec. Dig. § 232.*]

3. CANCELLATION OF INSTRUMENTS (§ 37*)—SUIT FOR CANCELLATION—PLEADING—OFFER TO RETURN CONSIDERATION.

In a suit to cancel deeds to lands for fraud, where it is alleged that defendant has sold a part of the lands for a sum largely in excess of the entire purchase price paid to plaintiff, which sum it seeks to recover, less such purchase price, an offer in the bill to return the price is not necessary.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-80; Dec. Dig. § 37.*]

4. LEVEES (§ 28*)—SALE OF LAND—SUIT FOR CANCELLATION OF DEEDS—SUFFICIENCY OF BILL.

Allegations of a bill *held* sufficient to state a cause of action for the cancellation for fraud of deeds of land sold by a board of levee commissioners.

[Ed. Note.—For other cases, see Levees, Cent. Dig. §§ 26, 27; Dec. Dig. § 28.*]

5. LIMITATION OF ACTIONS (§ 100*)—WHEN STATUTE BEGINS TO RUN—SUITS BASED ON FRAUD.

In suits in equity, where relief is sought on the ground of fraud, and the party injured remained in ignorance of the fraud without fault or want of diligence on his part, limitation does not begin to run until the fraud is discovered, although there are no special circumstances, and no effort on the part of the party committing the fraud to conceal it.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

6. LIMITATION OF ACTIONS (§ 100*)—SUITS BASED ON FRAUD—DISCOVERY OF FRAUD—LACHES.

In a suit in equity by a public board of levee commissioners, created by the state, to cancel deeds to lands sold by such board for fraud, complainant is not chargeable with notice of the fraud by the fact that it consisted of bribery of persons who were then officers and members of the board and its agent, nor because it did not take active measures to discover it, where the transaction was fair on its face, and there was nothing to cause suspicion, until the facts were incidentally learned by a third person, who communicated them to plaintiff.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

7. EQUITY (§ 247*)—AMENDMENT—FEDERAL EQUITY PRACTICE.

The federal statute allowing amendments should be liberally construed to promote trial on the merits, and where a demurrer is sustained to a bill the usual order is that plaintiff have leave to amend, although there is a discretion in the court to refuse such leave.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 520; Dec. Dig. § 247.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
204 F.—47

Appeal from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Suit in equity by the Board of Levee Commissioners of the Tensas Basin Levee District against the Tensas Delta Land Company, Limited. Decree for defendant, and plaintiff appeals. Reversed.

Ruffin G. Pleasant, Atty. Gen. (Harry P. Gamble and Daniel Wendling, both of New Orleans, La., on the brief), for appellant.

Edgar H. Farrar, of New Orleans, La. (Henry Bernstein, of Monroe, La., on the brief), for appellee.

Before PARDEE and SHELBY, Circuit Judges, and SHEPPARD, District Judge.

SHELBY, Circuit Judge. The main purpose of the bill in this case is to annul for fraud a sale of more than 800,000 acres of land made in November, 1898, by the plaintiff (appellant here), a corporation organized under the laws of Louisiana, for the sum of \$130,000, to the defendant, an incorporated limited liability partnership organized under the laws of the state of Michigan, the members of which partnership are shown by the record to be citizens of other states than the state of Louisiana.

The averments show that there was gross fraud connected with the sale, which did not come to the knowledge of the plaintiff till the year 1909.

Before considering the controlling questions in the case, there are some matters relating to procedure, occurring before the new equity rules became effective, that require brief attention.

[1] After the present suit was brought, the defendant, on December 16, 1911, filed a demurrer to the entire bill and an answer to the entire bill. Under the federal equity rules then in force, the effect of this was that the answer was a withdrawal or abandonment of the demurrer. *Crescent City, etc., Co. v. Butchers', etc., Co.* (C. C.) 12 Fed. 225 (by Judges Pardee and Billings); *Bryant Bros. Co. v. Robinson*, 149 Fed. 321, 79 C. C. A. 259, and authorities there cited. If the case had been left in this position, the plaintiff could have filed a replication and the case would have stood for trial on its merits. But it did not choose to take that course; on the contrary, it moved to strike the answer from the files, and also agreed to have the case set down for hearing on the demurrer. This, as contended in this court by the defendant, was a waiver of the right to treat the answer as a withdrawal of the demurrer. The plaintiff, having elected and agreed to have the case set down for hearing and tried on the demurrer, cannot now be permitted to insist successfully that the demurrer was withdrawn by the filing of the answer. We must proceed, therefore, to consider the case presented by the bill and the demurrer to it.

This suit was brought October 7, 1911, by petition in a Louisiana state court, and was, by the defendant, duly removed to the District Court of the United States for the Western District of Louisiana. On motion of the defendant, an order was there made to reform the pleadings so that they would conform to the federal equity rules, and

the plaintiff asked leave that, in reforming the pleadings, it be permitted to file a supplemental amended bill, and leave to that effect was granted. The plaintiff thereupon reformed its pleading, repeating the allegations contained in the petition filed in the state court and elaborating and enlarging the same. The defendant demurred to the bill, alleging that it was without equity, and stating several specific grounds of demurrer, which will hereinafter be stated and considered.

Before the decision of the case upon the demurrer, the plaintiff, on May 6, 1912, offered to further amend its bill with the view of remedying the alleged defects pointed out by the demurrers. The court below, on May 20, 1912, made an order sustaining the demurrers and dismissing the bill with costs. The court, at the same time, ordered that the amendments tendered be "filed in the record to show what said tendered amendments are," but no formal order was made allowing the amendments; on the contrary, they were denied. In a memorandum of reasons for judgment, the judge of the District Court said:

"It is clear to me that there is no case made on the original or amended bill, and that to allow the proffered amendments would not better the case as made in this bill and amended bill. The bill must therefore be dismissed. The proffered amendments will be filed and made part of the decree, in order that, in case of appeal, the appellate court may see why this court has thus exercised the discretion given it by law to permit or to refuse a complainant the right to amend his bill."

Although there was no order allowing the amendment, the court below evidently considered the amendment, and held that, if it was allowed and the demurrers were interposed to the bill as amended, the proffered amendment making no better case, the demurrers would be sustained, and the bill, so amended, dismissed. The case has been presented in this court in the same way; that is, the question argued was whether or not the bill, if amended as offered, would have been subject to the demurrers. In the printed argument filed in this court for the defendant and appellee, it is said:

"We freely admit that, if the amendment tendered made a good bill, then the court ought to have permitted the amendments to be filed, and that this court, being informed as to what the proffered amendments were, can review the action of the court."

We are not concerned, therefore, with the case as stated by the petition in the state court, nor as stated under the order of the District Court to reform the pleading. We are concerned only with the question as to whether or not the bill, as offered to be amended May 6, 1912, before the decision of the demurrers, is subject to the demurrers which were sustained. In the following references to the bill, we refer to it as embodying the proffered amendments.

It is assigned that the court erred in sustaining each of the demurrers and in refusing to allow the amendments.

We shall proceed to consider each of the several grounds of demurrer, but not in their numerical order.

The eighth and ninth grounds are to the effect: (a) That the de-

mand of the plaintiff to annul the deeds for fraud is barred by the prescription of one year, because it appears that the knowledge of the alleged fraud came to the plaintiff more than one year prior to the time when the suit was brought; and (b) that the averments of the bill, whereby the plaintiff attempts to avoid the operation of the prescription of one year, are insufficient in law to prevent the operation of the limitation. These grounds are not well taken. They are abandoned, as shown by the brief for the appellee, from which we quote:

"Counsel for defendant conceded in the lower court, and now concedes here, that the prescription of one year applies only to actions to annul judgments obtained by fraud and not to actions to annul a sale for fraud."

[2] It should be noted here that the demurrer is addressed to the whole bill. There is no demurrer to any separate part of the bill. Keeping that in mind, we consider the fourth and fifth grounds of demurrer. They are to the effect: (a) That the bill is without equity, because the plaintiff sues to recover the gross amount of the sale price of certain lands, with interest, and at the same time refuses to confirm and ratify said sale; and (b) that the demand of the plaintiff to set aside said sale for lesion beyond moiety is barred, on the face of the bill, by the prescription of four years. Each of these grounds of demurrer, although they are embraced in a demurrer addressed to the whole bill, relates to only a portion of the bill. If it were true that the bill was without equity to recover the gross amount received by the defendant for the portion of the land which it has sold, it might still contain equity as a suit to annul the deeds for the lands which the defendant still retains. That ground of demurrer, therefore, should not be addressed to the whole bill, but only to that part of the bill to which it refers.

The demand of the plaintiff to avoid the sale for lesion beyond moiety is but one alternative claim and prayer of the bill, and if that remedy were barred, as claimed in the demurrer, by the prescription of four years, the bill might still be good as one to annul the deeds for fraud. That ground of demurrer, therefore, even if well taken to a part of the bill—if it had been so addressed—should not be sustained as a demurrer to the whole bill, if it appears that an equitable claim is properly asserted in other parts of the bill. The rule is that, if a demurrer is addressed to the whole bill when it is a good defense to a part of the bill only, it must be overruled. The objection could only be sustained when it is presented as a demurrer to part of the bill. *Stewart v. Masterson*, 131 U. S. 151, 158, 9 Sup. Ct. 682, 33 L. Ed. 114; *Story's Equity Pleadings*, § 443; 1 *Foster's Federal Practice* (3d Ed.) § 107; *Higinbotham v. Burnet*, 5 Johns. Ch. 184 (by Chancellor Kent). This rule is necessarily correct, because a chancellor would not dismiss a bill containing a just demand properly asserted because it contained another demand not well founded.

[3] The third ground of demurrer is to the effect that the bill is without equity because the plaintiff does not offer to do equity by offering to return the purchase price of the lands, with interest, and the taxes paid on the whole of the lands, and the necessary cost expended

in reserving the lands, with interest, and the necessary cost of making sales of the lands, with interest. We are of the opinion that it was not necessary to make such tender. The bill shows that the defendant has sold part of the land which was conveyed to it by the plaintiff, and the plaintiff is seeking by this suit, not only to annul the deeds to the part of the land still retained by the defendant, but also to recover more than \$480,000 (less \$130,000, the original purchase price), which was received by the defendant for the part of the lands which it had sold. Under the circumstances, a tender was not necessary, because the court could properly adjust the equities between the parties. *State of Texas v. Snyder*, 66 Tex. 687, 698, 18 S. W. 106, and cases there cited. The purpose of the rule requiring a tender in certain suits has its foundation in the purpose of courts of equity to protect all parties. Where the facts alleged show that, should the plaintiff obtain relief, the parties can be protected without the necessity of a tender, a tender need not be made. The bill contains the usual offer to do equity toward the defendant as the court may adjudge, and that is sufficient.

[4] The second ground of demurrer is that the averments of conspiracy and fraud "are so vague, general, incomplete, and indefinite that these defendants cannot be put upon their defense by any such vague and indefinite averments." Whether or not this ground of demurrer is well taken can, of course, only be answered by an examination of the bill. It would unduly lengthen this opinion to repeat in detail the averments relating to the conspiracy and fraud. We can only indicate here what is elaborately stated in the bill.

The bill first shows the creation by Act of the General Assembly of Louisiana on July 3, 1886 (Acts 1886, No. 59), of the plaintiff corporation, and of the Tensas Basin Levee District, composed of named parishes, and that the purpose of such legislation was for the raising of revenue to protect the lands therein from inundation, by the construction and maintenance of levees, and that the Governor of Louisiana was authorized to appoint from each of the parishes located in the district one competent person, and that such appointees should constitute a board of levee commissioners. The state of Louisiana was the owner of about 900,000 acres of land situated in the parishes of said levee district. It was provided that the title to these lands should pass to the board of levee commissioners of the levee district so organized under the act, with authority in the board to sell the lands for the best interest and advantage of the public, the proceeds to be used as provided by the act. The persons are named who became members of the board under the act. Joseph W. Simms was appointed by the board its land agent to find a purchaser for the lands, and in 1896 Simms made a contract with James W. Brown, engaging him to assist in finding a purchaser. It is alleged that in September, 1898, a fraudulent and collusive scheme was entered into between Brown and Simms and nine other persons, to wit, James D. Lacey, S. Wood Beal, Thomas Hume, Ransome C. Luce, T. Stewart White, Thomas Friant, John C. Rugee, Joseph J. Tucker, and Anton G. Hodenpyl, all of whom are nonresidents of the state of Louisiana,

with certain members of the board of commissioners of the Tensas levee district, and certain of its officers, agents, and employes, whose names are stated, whereby all the lands owned and situated in the district and under the control of the board of commissioners should be sold and delivered for a nominal consideration to a company or corporation to be organized for the purpose of carrying out the fraud; that, pursuant to this agreement, the defendant company was organized under the laws of the state of Michigan by named persons, who were parties to the conspiracy; that the defendant company obtained conveyances from the levee board, pursuant to this conspiracy, of lands worth at least \$500,000, for which they paid only \$130,000, \$30,000 thereof being paid in cash, and the remainder in three equal payments, due in one, two, and three years. To obtain these conveyances, the defendant company, or the persons who organized it, corruptly used \$20,000 in cash and \$18,750 of the capital stock of the defendant company. This sum and stock was given to members, officers, and agents of the levee board and to certain citizens, the purpose being to influence a sufficient number of the members of the board to vote for and to approve the sale. It is alleged that \$3,000 of the cash and \$3,750 of the stock in the defendant company was given to John P. Parker, the then president of the board of levee commissioners, and that \$500 was paid to each of two other members of the board of levee commissioners, J. A. Hemler and R. E. Yancey, and that \$7,500 in cash and stock amounting to \$3,750 was paid, for the purposes aforesaid, to R. B. Blanks, who afterwards became president of the board of levee commissioners, and that J. W. Simms, the land agent of the board, received \$2,500 in cash and \$3,750 in stock of the defendant company.

In brief, the bill shows with elaboration that the levee board received these lands in trust for the public, and that the persons who organized and composed the defendant company obtained the lands by bribery from the board for \$130,000, when they were worth \$500,000. It requires no argument or authority to show that this constituted a fraudulent betrayal of trust on the part of the members of the board who received the bribes and who caused the conveyances to be made, and also that the conspiracy to obtain the lands in this way, and to use the money and stock for the corrupt purpose, was a gross fraud on the part of those who participated in the bribery and in the organization of the defendant company, which subsequently received the conveyances of the land. It seems to us that the facts are sufficiently alleged. The plaintiff cannot be required, and in fact would not be permitted, to embody in the bill all of the evidence which it expects to offer. It is sufficient if the details of a transaction of this kind are so succinctly and clearly stated as to notify the defendant of the charges made and of the facts on which the suit is based. No more is required even in a criminal prosecution. Greater fullness of statement would tend to obscure rather than to make clear.

[5] We come now to the grounds of demurrer upon which the defendant chiefly relies. The sixth and seventh grounds are to the

effect: (a) That the demand of the plaintiff to set aside the sale for fraud is barred, on the face of the bill, by the prescription of 10 years; and (b) that the averments of the bill, whereby the plaintiff attempts to avoid the operation of the prescription of 10 years, accrued on the face of the bill, are insufficient to prevent the operation of the limitation. The bill shows that the plaintiff was first informed of the fraud on October 13, 1909. The fraud was consummated by the board of levee commissioners accepting the proposition of the agent of the defendant company to purchase the land on November 4, 1898. It therefore appears on the face of the bill that a period of 11 years, less 22 days, elapsed between the date of the consummation of the fraud and the date when the plaintiff obtained knowledge of it. The defendant's contention is that the limitation of 10 years provided by the Louisiana Civil Code—articles 2221 (2218) and 3544—is applicable to the case. It is contended by the plaintiff that the prescription of 10 years is inapplicable, because the defendant did not acquire title in good faith, and other articles of the Civil Code and cases construing them are cited and relied on. As it does not change the result of our conclusion, we shall assume, for the purpose of the decision, that the contention of the defendant is correct—that the prescription of 10 years is applicable.

One of the statutes relied on by the defendant—article 2221—provides that the limitation, in case of deception, begins to run only from the day on which the deception is discovered. The other statute on which reliance is had—article 3544—contains no provision as to when the limitation of 10 years would begin to run.

In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict that, where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute of limitations will not bar relief, provided suit is brought within proper time after the discovery of the fraud. This doctrine favoring parties who seek relief against fraud goes further, and is applicable in cases where there are no affirmative acts of the guilty party in concealing the facts. Where the party injured by the fraud remains in ignorance of it without fault or want of diligence on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the plaintiff. *Bailey v. Glover*, 21 Wall. 342, 347, 22 L. Ed. 636. In *Traer v. Clews*, 115 U. S. 528, 538, 6 Sup. Ct. 155, 159 (29 L. Ed. 467), it is held, citing Mr. Justice Miller's opinion in the foregoing case, that where fraud is the foundation of the suit, and the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered or becomes known to the party suing or to those in privity with him. And it is said that "the case of *Bailey v. Glover* has never been overruled, doubted, or modified by this court." This doctrine rests upon general and universal principles of justice, and it has been recognized and applied by the Louisiana courts from the earliest times to the present. See *Hennen's*,

Breaux's, and other digests of decisions of the Louisiana Supreme Court, title "Prescription."

[6] The seventh ground of demurrer, quoted above, means that the averments of the bill are insufficient to prevent the operation of the limitation, or, in other words, that the bill shows laches or fails to show that the plaintiff exercised due diligence in the matter of discovering the fraud. This, the defendant contends, is the crucial point in the case.

To prevent the running of the prescription, it is true that the bill should show, not only that the plaintiff was ignorant of the fraud, but that it has not been guilty of laches, and has not failed to use reasonable diligence to ascertain all of the facts. As to what it is necessary to allege in the bill and to prove on the trial in reference to diligence and want of negligence to avoid the operation of the statute of limitations, every case must "depend on its own peculiar circumstances, and there would be little profit in referring to the very numerous cases to be found in the books on this subject." *Stearns v. Page*, 7 How. 819, 829 (12 L. Ed. 928).

We can only indicate here what are the "peculiar circumstances"—which are stated at length in the bill—tending to negative the charge of want of diligence. The plaintiff had no actual notice of the conspiracy and fraud till October 13, 1909. George Wesley Smith, an attorney, obtained the information from testimony in cases to which the plaintiff was not a party. One of the cases in which testimony was given was pending in a court in Michigan; the others in Louisiana. The plaintiff had no knowledge of, or connection with, the cases, and only knew of the testimony disclosing the fraud by receiving the information from Smith. No fact appears in the bill that would naturally excite plaintiff's suspicion and so lead to an investigation. The fraud was committed with the active connivance of the president and two members of the plaintiff board, as it was then organized. The members of the board not participating in the fraud, being in ignorance of it, are presumed to have had confidence in their fellow members. Subsequent to the consummation of the fraud, a citizen, who also received a bribe to aid in the fraud, became a member and president of the board.

In brief, it is elaborately shown by the averments of the bill that the fraud and conspiracy were of the kind that concealed themselves under cover of negotiations and acts of sale and the apparently fair and open dealings of officers apparently discharging a public trust, while in fact they were secretly perpetrating a fraud.

The members of the levee board who participated in the fraud and received the bribes, and the sales agent of the board, Simms, who also received a bribe, of course knew of the existence of the fraud, for they were participating in it. Notice to the plaintiff, or to other members of the board, is not to be presumed from the knowledge of those who participated in the fraud. Ordinarily, notice to an agent is treated as notice to the principal, because of the presumption that he will communicate the facts known to him to his principal. But, in a case like this, notice is not presumed to have been communicated;

on the contrary, the facts alleged here create the presumption that the agent and the members of the board who received the bribes did not inform the plaintiff or the other members of the board. *McCaskill Co. v. United States*, 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590; *First National Bank v. Tompkins*, 57 Fed. 20, 6 C. C. A. 237; *Barnes v. Gaslight Co.*, 27 N. J. Eq. 33, 37; *Innerarity v. Merchants' National Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710. Members of the board not participating in the fraud are presumed to have been kept in ignorance of it. It is common knowledge that transactions involving "graft" by public officials are strictly guarded in the guilty circle, and are only speedily discovered by the use of detectives and the dictograph.

When it is said that a plaintiff must use reasonable diligence to discover fraud, it does not mean that he must necessarily have used some affirmative means, or taken some active steps, or begun an investigation; for he might not have the slightest suspicion of the existence of the fraud. The rule of diligence only means that the defrauded party's ignorance must not be negligent and that he remains ignorant without fault of his own. This necessarily follows from the undoubted rule that a party defrauded is not affected by the lapse of time, or by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed. 2 *Pomeroy's Eq. Jur.* (3d Ed.) § 917, and authorities cited in note 2.

In this case, the principal persons receiving the bribes were the president and two members of the levee board. They and the sales agent, who also received a bribe, were in positions of trust, and there is nothing in the record to show that the plaintiff, or members of the board not participating in the fraud, had any cause to suspect that they were engaged in the alleged conspiracy until the board was notified of the fraud in 1909. It is alleged that the conspiracy and the receipt of the bribes were kept secret and "locked in the minds" of the guilty parties, and that the plaintiff was kept in ignorance of it.

The fiduciary relation that existed between the plaintiff levee board and its members and its land agent, Simms, was such that the plaintiff would naturally place confidence in them, and, in view of the relationship that existed between them, we are of the opinion that the plaintiff was not charged with the duty of making an investigation or inquiry to ascertain whether, in fact, a fraud had been committed, unless it had notice, or was chargeable with notice, of the existence of some fact that would naturally excite suspicion.

This suit does not stand altogether like a suit between private parties. The plaintiff is a public corporation, charged with the management and sale of a vast area of real estate. It is not presumed that it could exercise, under the circumstances, the same degree of diligence in guarding against fraud as a private owner of real estate. *United States v. Minor*, 114 U. S. 233, 240, 5 Sup. Ct. 836, 29 L. Ed. 110. Unless the plaintiff's want of diligence is such as to clearly bar its right of action, the court should be reluctant to deprive it of relief on that ground, in view of the fact that the suit is by a plaintiff acting in a fiduciary capacity and suing for the benefit of the public be-

fore the rights of any third party has attached which it is necessary to imperil by the suit. A defendant, who has committed a fraud involving the corruption of persons occupying a place of trust, should not be permitted to profit by it on account of the negligence of the plaintiff, unless the facts of the case and the rules of equity inexorably require it.

We think the bill is sufficient to avoid the imputation of a want of diligence in discovering the fraud. It clearly appears that the plaintiff acted promptly after the fraud was discovered. It is averred that a suit was speedily brought in the name of the state to annul the deeds, the plaintiff being advised that it should be brought in that way; that this case was finally decided by the Supreme Court of Louisiana against the plaintiff, a majority of the judges holding that the state could not maintain such suit, but that the proper party plaintiff was the board of levee commissioners. Conforming to that opinion, the present action was instituted shortly after the final termination of the suit in the name of the state. The bill shows diligence in the prosecution of the suits to annul the deeds since the date of the discovery of the fraud.

[7] It is assigned that the court erred in refusing the plaintiff leave to amend. No question was made in the lower court, nor in this court, as to the amendment being a departure from the original bill. It was not denied that the amendment was proper; the contention and decision was that it was insufficient to confer equity. The court refused to allow it on the sole ground that, if it had been allowed, the bill would still have been without equity, and that it would have been proper to have sustained a demurrer to it as amended. The federal statute allowing amendments is liberal, and should be construed liberally to promote trials on the merits. When a demurrer is sustained to a bill, the usual order is that the plaintiff have leave to amend. It is a general rule in the federal courts that it is in the discretion of the court to allow or to refuse to allow an amendment. It is often held that this discretion will not be interfered with, except in cases of a plain abuse of it. Where it is possible to avoid it, the court should never allow justice to be defeated and wrong to triumph by a mere mistake or unskillfulness in pleading. Notwithstanding the general rule that, in the absence of abuse, the discretion of the court as to allowing amendments will not be interfered with by an appellate court, such courts have, in some instances, interfered and reversed decrees and remanded cases, with direction that the rejected amendments be allowed. *Backus v. Brooks*, 195 Fed. 452, 115 C. C. A. 354; *Lant v. Manley*, 75 Fed. 627, 635, 21 C. C. A. 457. It is not necessary to consider this question further. The refusal of the learned judge in the court below to allow the amendment was based entirely upon his view that the amendment, if made, would still leave the bill without equity, and, in effect, he sustained the demurrers to the bill as amended, and framed the decree so as to submit the amendments to the appellate court. We are of the opinion, for reasons given in the foregoing discussion, that the bill, as offered to be amended, contained equity, and was not sub-

ject to the demurrers interposed, and therefore that the amendments offered should have been allowed.

In deciding the questions raised by the demurrers, we have assumed, as required by the rule, that the averments of fact in the bill are true. If the cause comes to trial on the merits, the defendant will not be prejudiced by what we have said, should the evidence show a different state of facts from that alleged.

The decree of the District Court is reversed, and the cause remanded, with directions to allow the amendments offered, to overrule the demurrers, and to allow the defendant 20 days in which to answer, and to proceed with the case according to law and the rules in equity.

And it is so ordered.

On Application for Rehearing.

One of the grounds upon which application for a rehearing is made is that the court erred in allowing the defendant only twenty days in which to answer. It is stated that it is impossible within that time to prepare the necessary answer. Twenty days is the time now fixed for filing an answer by the new federal equity rule 12 (198 Fed. xxii, 115 C. C. A. xxii), which time runs from the day of the service of the subpoena. The 20 days allowed by the order in this case will run from the filing of the mandate of this court in the District Court. Under rule 22 of this court, 21 days must elapse before the mandate issues. The defendant, therefore, has more than 40 days from the date of the decree of reversal by this court in which to answer the bill. Besides, the matter is under the control of the District Court, for new federal equity rule 17 (198 Fed. xxiii, 115 C. C. A. xxiii) provides that that court may enlarge the time for filing the answer, upon cause shown, on motion and affidavit. There is no reason, therefore, for changing the order of this court fixing 20 days for the filing of the answer.

The demurrer relating to the statute of limitation of four years, applicable to lesion beyond moiety, was necessarily overruled, for reasons stated in the opinion. The claim asserted in that regard was abandoned by counsel for appellant on the argument in this court. If it should hereafter be urged, any proper defense could be presented to it, under new federal equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi).

The other grounds for an application for a rehearing were all considered before rendering judgment.

The application for a rehearing is therefore denied.

NOTE.—The new federal equity rules referred to became effective February 1, 1913.

RECTOR et al. v. ALCORN et al.

(Circuit Court of Appeals, Fifth Circuit. April 1, 1913.)

No. 2,449.

1. APPEAL AND ERROR (§ 365*)—ALLOWANCE OF APPEAL—INFORMAL ORDER—WRIT OF ERROR.

Where a petition and bond for an appeal and citation were presented to the trial judge, and he entered an order allowing a "writ of error" and fixed the amount of a bond for supersedeas and accepted a bond specifically providing for an appeal, a misuse of the term "writ of error" instead of "appeal" in the order would be treated as an inadvertence or informality, and was insufficient to deprive the Court of Appeals of jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1784, 1977-1988; Dec. Dig. § 365.*]

2. APPEAL AND ERROR (§ 405*)—PROCEEDINGS—CITATION—SIGNING.

Where an appeal has been taken, it is not necessary that the citation should be issued at the same time, but it may be issued thereafter by proper authority, even after expiration of the time for taking an appeal, if the allowance of the appeal was within the time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2120-2122; Dec. Dig. § 405.*]

3. APPEAL AND ERROR (§ 807*)—DISMISSAL—VACATING ORDER AND LEAVE TO DOCKET.

Final decree having been entered December 4, 1911, a petition for appeal was filed May 27, 1912, accompanied by bond and citation for the approval of the judge. An order granting the appeal was allowed and amount of the supersedeas bond fixed. No order fixing a return day, however, was made and on June 2d an assignment of error was filed in the trial court. On October 7th the time to file a transcript was orally extended, and on December 5th, no transcript having been filed, the case was docketed and dismissed, under Court of Appeals rule 16 (150 Fed. lxxix, 79 C. C. A. lxxix). On January 30, 1913, a citation directing appellees to answer the appeal sued out within 30 days was issued and signed by the trial judge and served February 4, 1913, and on February 10th the transcript was tendered to the clerk, who refused to file it, whereupon appellants moved to set aside the dismissal and for leave to redocket, showing that their attorney, on February 28, 1912, was shot and so severely injured, that he was unable to attend to the matter, and that what was done was by a brother attorney, whose services were requested; that when appellant's attorney partially recovered from his wounds he was compelled to take treatment in a sanatorium, and when he returned in September, 1912, he took up the matter of the appeal, procured the order extending the time for filing a transcript, and afterwards obtained a written certificate from the judge showing that such order was made. *Held*, that such facts were sufficient to move the court, in the exercise of discretion, to vacate the order of dismissal and to permit the redocketing of the appeal on terms.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3177-3188; Dec. Dig. § 807.*]

Action between E. W. Rector and another, as surviving executors, and May Yates Alcorn and another. On motion to set aside an order dismissing the appeal and for leave to docket the cause. Granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Wm. Grant and W. B. Grant, both of New Orleans, La., for the motion.

James H. Watson and Calvin Perkins, both of Memphis, Tenn., opposed.

Before PARDEE and SHELBY, Circuit Judges, and SHEPPARD, District Judge.

PARDEE, Circuit Judge. On December 4, 1911, a final decree was entered in this case, then pending in the United States Circuit Court for the Northern District of Mississippi. On May 27, 1912, a petition asking an appeal to this court was filed with the judge who tried and decided the case. The petition was accompanied by a bond and a citation for the judge's signature and approval. The judge, acting upon the petition, entered an order allowing a writ of error in the said case, and therein fixed the bond for a supersedeas on said writ of error at the sum of \$3,000. At the same time he approved the bond for an appeal, conditioned to pay all damages and costs in case the appeal should not be prosecuted to effect.

Neither in the order allowing a writ of error nor in the bond for appeal approved by the judge was any return day fixed. See our rule 14 (150 Fed. lxxix, 79 C. C. A. lxxix).

On June 2, 1912, an assignment of errors was filed in the court below. On October 7th the trial judge orally extended the time within which to file transcript in the Circuit Court of Appeals. Rule 16 (150 Fed. lxxix, 79 C. C. A. lxxix). On December 5th, no transcript having been filed in this court, the case was docketed and dismissed under our sixteenth rule. January 30, 1913, a citation directing the appellees to answer the appeal sued out within 30 days was issued and signed by the trial judge, and the same was served February 4, 1913. February 10, 1913, the transcript was tendered the clerk of this court, who declined to file the same because the case had previously been docketed and dismissed.

As the case is presented in this court on this motion, it appears that J. W. Cutrer, Esq., was the appellants' attorney, charged to sue out, perfect, and prosecute the appeal. On February 28, 1912, Mr. Cutrer was shot in his office by an insane person and so severely injured that he was unable to attend to the matter. What was done was done by a brother attorney, whose services were requested in the matter. After Mr. Cutrer partially recovered from his wounds, he suffered an attack of appendicitis and fevers from his low state of vitality, etc., and was compelled to go to Hot Springs for treatment and subsequently to a sanatorium. He returned home the latter part of September, took up the matter of this appeal, procured the oral order from Judge Niles extending time for filing transcript, and afterwards a written certificate from the judge showing that such order was made.

On this state of the record, and for the excuses fully set forth in affidavits, we are now asked to allow the case to be reinstated on the docket of this court and the transcript filed.

[1] The first question is whether an appeal in this case was taken from the court below so as to vest this court with jurisdiction.

In *Brandies v. Cochrane*, 105 U. S. 262, 26 L. Ed. 989, it was held that no formal order of allowance of appeal was necessary, and that the Circuit Judge in that case, by taking the security and signing the citation, allowed the appeal. The court said, quoting from *Credit Co. v. Arkansas Central Railway Co.*, 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448:

"An appeal cannot be said to be 'taken,' any more than a writ of error can be said to be 'brought,' until it is in some way presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause and making it its duty to send it to the appellate court. This is done by filing the papers, viz., the petition and allowance of appeal (where there is such petition and allowance), the appeal bond, and the citation. In *Brandies v. Cochrane*, 105 U. S. 262 [26 L. Ed. 989], it was held that, in the absence of a petition and allowance, the filing of the appeal bond, duly approved by a justice of this court, was sufficient evidence of the allowance of an appeal, and was a compliance with the law requiring the appeal to be filed in the clerk's office."

In this case the judge was presented with a petition for an appeal and bond for the same and a citation. Acting thereon, he entered an order allowing a writ of error and fixed the amount of a bond for supersedeas and accepted a bond specifically providing for an appeal.

The only trouble in this connection arises from the fact that the judge mentioned in the order of allowance a writ of error instead of an appeal as allowed, but we think that under the circumstances this can and should be treated as an inadvertence for which the appellant was not responsible, and that we may treat the order as one allowing an appeal, and at worst as an informal order to that purport.

[2] The record does not show that the judge issued or signed a citation, but if the appeal was taken citation was not necessary at that particular time. In *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127, it was held that a citation was not necessary to be issued at the time, but could be issued thereafter by proper authority, even after the expiration of the time of taking an appeal, if the allowance of the appeal were before such expiration. See, also, *Lockman v. Lang*, 132 Fed. 2, 65 C. C. A. 621.

In *Florida v. Charlotte Harbor Phosphate Co.*, 70 Fed. 833, 17 C. C. A. 472, this court allowed the reinstatement of an appeal which had been dismissed under rule 16, although it appeared that no return day had been fixed, and no valid extension of time for filing the record had been made. See, also, *Love v. Busch*, 142 Fed. 429, 73 C. C. A. 545.

[3] It thus appears that the granting of the motion in this case is one within the discretion of the court, and we think the admitted facts in regard to the causes of the delay are such as to appeal strongly to the favorable exercise of such discretion; and we notice that the decree appealed from was not a money decree, the nonenforcement of which could seriously affect the rights of the appellee, who, it would seem, had only been prejudiced, if at all, by the ex

penses and trouble of docketing and dismissing the cause, and of contending against the present motion to redocket the same.

As the case in the two respects in which our rules were not observed is almost identical with the case of *State of Florida v. Charlotte Harbor Phosphate Co.*, supra, we think it well to repeat from our opinion in that case, as the trouble here arises fully as much from disregard of our rules as from Mr. Cutrer's physical disability.

"The rules of this court in regard to the return day of appeals and to the filing the transcript are directory, and it is within the sound discretion of the court to relieve parties who have not complied therewith. While we say this, we also say that the rules of the court, although directory, were made to be observed, and that our patience is tried with applications for relief where counsel have utterly ignored and disregarded their plain requirements. An observance of the rules preserves the rights of parties and facilitates the business of the court. Disregard of them not only injuriously affects the rights of parties, but delays and embarrasses the court, to the hindrance of other causes."

Considering all these matters, we are of opinion that the exercise of sound discretion requires that the motion to docket be granted, on condition that the appellant shall pay all costs incurred in this court up to this time, including the costs heretofore made in docketing and dismissing under rule 16, and shall cause the record and transcript to be printed within 60 days from this date; and it is so ordered.

BALTIMORE & O. R. CO. v. DARR.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1913.)

No. 1,121.

COMMERCE (§ 27*)—EMPLOYER'S LIABILITY ACT—EMPLOYÉ EMPLOYED IN INTERSTATE COMMERCE.

When an engine and tender used by defendant railroad company in hauling interstate trains between two points reached the end of their run and had been placed on a fire track, as usual, to await the time for the return trip, which was but a few hours later, plaintiff, who was employed in making repairs, was sent to replace a bolt which had been lost from a brake shoe of the tender, rendering its use dangerous, and while so employed, without negligence on his part, was injured through the negligence of a fellow servant. *Held*, that such facts sustained a finding that defendant was engaged in interstate commerce, and that plaintiff was employed therein at the time of the injury, and that he was entitled to recover therefor under Employer's Liability Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

In Error to the District Court of the United States for the District of Maryland, at Cumberland; John C. Rose, Judge.

Action at law by George H. Darr against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 197 Fed. 665.

This was an action at law, instituted in the District Court of the United States for the District of Maryland, by George H. Darr, as plaintiff, against

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Baltimore & Ohio Railroad Company, a corporation, incorporated under the laws of the state of Maryland. For convenience the plaintiff in error will be referred to as the defendant, and the defendant in error, as the plaintiff. The declaration was filed on the 22d day of March, 1912. The defendant pleaded on April 8, 1912, and on May 15, 1912, it demurred to the declaration, which demurrer the court overruled. On May 15, 1912, the case was tried before a judge and jury, and the jury rendered a verdict in favor of the plaintiff in the sum of \$1,000, together with the costs of the action. The defendant made the usual motions, which were overruled, and the case was brought here on writ of error.

There was evidence tending to show that George H. Darr was, at the time of his injury, engaged as an employé and servant of the defendant company in the city of Cumberland, Md., as a running repairman and emergency man, whose duty it was to repair the engines and tenders of said company; that on the date of his injury, to wit, the 12th day of December, 1911, engine No. 4.119, of the defendant company, and its tender, brought in a loaded freight train from Brunswick, Md., to Cumberland, Md., crossed into the state of West Virginia, and again into the state of Maryland, before arriving at Cumberland; that said engine and cars arrived in Cumberland about 9 o'clock on the morning of December 12, 1911, and it was found, upon examination, that its tender was in need of immediate repair to the left front brake. A hanger bolt had fallen out of the brake beam on the tender. As a result the brake beam hung down in dangerous proximity to the rail and was likely to cause an accident. The plaintiff and one Stephen M. Thomas were directed to repair the same. The engine was removed to a track, called the "fire track," on which temporary repairs were made, and the plaintiff went to work to repair the brake shoe and hanger bolt. It further appears that while engaged in repairing it, and without any negligence whatever on his part, his fellow servant in charge of the engine, turned on the air and plaintiff was seriously injured.

The plaintiff testified that engine No. 4.119 was a second division engine, belonging to the Baltimore & Ohio Railroad Company, running out of Maryland, into West Virginia, to Brunswick, Md.; that it hauled freight over the second division, and that he first saw the engine about 9 o'clock on the morning he was injured; that it was then standing on the fire track; that he was running repairman and emergency man, employed by the defendant company at its roundhouse, in South Cumberland, Md.

A witness by the name of A. W. Dean, foreman in the employ of the defendant company, at the time the plaintiff was injured, testified that he knew engine No. 4.119, and that it was a through engine engaged in hauling freight; that it came from Brunswick, Md., on the morning the plaintiff was injured; that it brought a freight train in that morning; and that when it went out again it went either to Brunswick or Martinsburg, W. Va. Dean further testified that the defendant company was at all times on the day of the injury to the plaintiff, and ever since, engaged in the business of interstate and intrastate carrier of passengers and freight for hire; its freight and passenger trains traveling several times a day to and from Cumberland to Brunswick, Md., through the state of West Virginia.

A witness by the name of Stephen M. Thomas testified that he assisted the plaintiff in repairing said engine at the time of his injury; that the engine came into the yard at 9:15 on the morning the plaintiff was injured, and went out on its run at 2 o'clock on the same afternoon.

William Moreland, boss caller for the defendant company, at Cumberland, was also examined as a witness. He testified that he was in the employ of the Baltimore & Ohio Railroad Company in its shops in South Cumberland, and was thus engaged on the morning the plaintiff was injured, and further testified that he knew engine No. 4.119, and that it was engaged at that time in handling freight between Cumberland and Brunswick, Md., Martinsburg and Keyser, W. Va.; that it comes into Cumberland and goes out regularly with freight.

George A. Pearre, of Cumberland, Md., for plaintiff in error.

Walter C. Capper, of Cumberland, Md. (Finley C. Hendrickson, of Cumberland, Md., on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and McDOWELL, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). This action was instituted in pursuance of Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), which, among other things, provides:

"Every common carrier by railroad, *while engaging* in commerce between any of the several states, * * * shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce* * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

It is clear that it was the purpose of this act that every common carrier by railroad engaged in commerce between any of the several states should be liable in damages to any person suffering injury while employed in interstate commerce by such carrier for injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such company, as well as employes injured by reason of any defect or insufficiency in its engines, cars, bolts, etc.

Therefore the only questions that it becomes necessary for us to determine are as to whether, first, the defendant company as a carrier was engaged in interstate commerce and if the plaintiff below was at the time of the injury employed in such commerce; second, as to whether the injury the plaintiff sustained was due to the negligence of any of the officers, agents, or employes of such carrier, but there seems to be no controversy as to the second proposition. Therefore this leaves for our consideration the sole question as to whether, at the time of the injury, the engine in question was employed or engaged in interstate commerce.

The evidence offered in the court below was to the effect that this particular engine was used by a common carrier while engaged in interstate commerce. Manifestly it was the intention of Congress that this act should apply to a particular class of employes and to a particular class of carriers, to wit, those carriers that were engaged in interstate commerce and those employed by such carriers for the purpose of aiding them in carrying on the business. The plaintiff belonged to this class of employes.

If this engine had been stopped en route, while attached to a loaded train, either in the state of Maryland or in the state of West Virginia, for making needed repairs, it could hardly have been insisted that during the time consumed in making such repairs the defendant company was not engaged as an interstate carrier. The engine was making its daily trips through Maryland and West Virginia, and while

temporarily in the yards at Cumberland, Md., it became necessary to make certain repairs that were essential to the successful operation of the defendant company's trains. Therefore it necessarily follows that any work that was performed by the plaintiff was as much an incident of the business as if the accident had occurred while the train was on its regular trip either in Maryland or West Virginia. The learned judge who heard this case in the court below, among other things, made the following statement of facts:

"The engine was at the time of the accident habitually used in interstate commerce, and apparently, from the testimony, in no other kind of commerce. It was not withdrawn from service. * * * The engine came in from its interstate commerce run as usual, and apparently went out as usual. The repairs which the plaintiff was making to it were of the ordinary trivial kind, which must be, and habitually are, made from day to day, without in any wise interfering with the ordinary and profitable use of the equipment. At the time of the accident, I am persuaded, the locomotive and tender were instruments of interstate commerce, as those words are used by the Supreme Court."

The case of *Johnson v. Southern Pacific Railroad Company*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, is very much in point. It appears that a dining car regularly used to furnish meals to passengers between San Francisco and Ogden was detached from the east-bound train at Promontory and left at that point to be picked up by the next west-bound train. Johnson sustained injuries while coupling it to an engine. In that case, as in this, it was insisted that for the time being the car was not engaged in interstate commerce. The court in that case said:

"Another ground on which the decision of the Circuit Court of Appeals rested remains to be noticed. That court held by a majority that, as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the east-bound train was so late that it was found that the car could not reach Ogden in time to return on the next west-bound train according to intention, and it was therefore dropped off at Promontory to be picked up by that train as it came along that evening. The presumption is that it was stocked for the return, and as it was not a new car, or a car just from the repair shop, on its way to its field of labor, it was not 'an empty,' as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employes is practically the same, and we agree with the observation of Judge Shiras in *Voelker v. Railway Co.* (C. C.) 116 Fed. 867, that 'it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars were empty.'

"Counsel urges that the character of the dining car at the time and place of the injury was local only, and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use, and *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, is cited as supporting that contention. In *Coe v. Errol* it was held that certain logs cut in New Hampshire, and hauled to a river, in order that they might be transported to Maine, were subject to taxation in the former state before transportation had begun. The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily

in making its trip between two points in different states, renders this and like cases inapplicable. Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law."

In the case of *St. Louis & S. F. R. Co. v. Delk*, 158 Fed. 931, 86 C. C. A. 95, 14 Ann. Cas. 233, the Circuit Court of Appeals for the Sixth Circuit held as a matter of law that the car in question was engaged in commerce, notwithstanding the fact that it was kept out of service at least a day before the repairs were even begun. From the facts of that case, it appears that there was no necessity for making immediate repair; but in the case at bar the engine was to be used immediately, and the work of repairing the brake beam began shortly after the engine and tender had been placed on the fire track. While it appears that the plaintiff on account of his injury was prevented from making the repair, another employé was called upon to finish the work, thus enabling the engine to leave at 2 o'clock in the afternoon of that day on its regular run. Why was it necessary that this engine be repaired promptly? Can any inference be drawn from the facts, other than that it was essential to the prosecution of the work in which the company was engaged? Of course, the cars drawn by this engine had to be carried on schedule time, and, the repairs being of such a character as could be made during the interval between the incoming and the outgoing of the train, the repairs were promptly made notwithstanding the accident, and the company was thus enabled to carry on its business as an interstate carrier without interruption.

The case of *Lamphere v. Oregon Railroad & Navigation Co. et al.* (C. C.) 193 Fed. 248, was cited by counsel for the defendant to sustain this phase of the case. On the 1st day of December, 1910, C. Roy Lamphere, a resident of Tekoah, Wash., was employed on the Oregon Railroad Company as a locomotive fireman. On the evening of that day he received orders from his superior officers to board the west-bound train at Tekoah as a part of the deadhead crew, to proceed thence westerly to a certain town, there to relieve an engine crew which had been constantly employed for more than 16 hours on an engine engaged in interstate commerce, and on the way from his home to the depot at Tekoah, for the purpose of taking the train as directed, he was crushed between two cars and received injuries from which he thereafter died. A demurrer was filed in that case, which was sustained upon the ground that the plaintiff was not, at the time he was injured, employed in interstate commerce within the meaning of the Employer's Liability Act. Later this case was carried to the Circuit Court of Appeals for the Ninth Circuit, where the lower court was reversed. That case is reported in 196 Fed. 336, 116 C. C. A. 156. The court, in referring to this case, among other things, said:

"The deceased when he was killed was not only on his way to work for his employer, but he was proceeding under the direct and peremptory command of the railroad company to do a designated specific act in the service of the company, to wit, to move a train then engaged in interstate commerce. He was on the premises of the railroad company and in the discharge of his duty when he met his death, and the train which struck him and caused his

death was engaged in interstate commerce, and belonged to the same railroad company. Must a fireman be actually in his place of duty on the locomotive of a train which is engaged in commerce between the states, in order that he may be said to be employed in interstate commerce? If he is commanded to step down from his train, and proceed across the track, and take his place on another train engaged in interstate commerce, and he is injured while on the way, will it be said that he was not employed in interstate commerce when he received the injury? The case supposed is substantially the case now before the court. * * *

"Counsel for the defendant in error contend that the act applies only to employes of railroad companies who are at the time actually engaged in the movement of interstate commerce, and they deny that others, such as those who are employed in the shops of a railroad company, where its engines are repaired, or are repairing its tracks or roadbed, are employed in interstate commerce, and they cite the case of *Pedersen v. Delaware, L. & W. R. R.* (C. C.) 184 Fed. 737, in which it was held that, although the railroad company was engaged in both interstate and intrastate business at the time of the plaintiff's injury, he, being an employe engaged at that time in bridge construction on the track of the company, which was to be used for such commerce, was not engaged in interstate commerce. The decision in that case runs counter to the cases above cited, and we think it is also opposed to the doctrine of the recent decision of the Supreme Court in *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. The judgment in that case disposes of three cases involving the application of the Employer's Liability Act. In one of the cases, the judgment in which was affirmed, the action was brought and damages were recovered by a personal representative of a deceased employe of a railroad company. The complaint alleged that the injury occurred while the defendant as a common carrier was engaged in commerce between some of the states, and while the deceased, in the course of his employment by the defendant in such commerce, was engaged in replacing a drawbar on one of the defendant's cars then in use in such commerce. The statement of the facts is meager, but it would appear therefrom that the employe who was injured was not one of a train crew, but was a machinist or repairer, whose duty it was to replace drawbars, and that the work was done either in a yard or on a switch, for the injury resulted from the negligence of fellow servants in pushing other cars against the one on which the deceased was working. In the opinion in that case the court made certain observations concerning the act which we think pertinent to the case at bar. * * *

"As indicated in the opinion, the test question in determining whether a personal injury to an employe of a railroad company is in the purview of the act is: What is its effect upon interstate commerce? Does it have the effect to hinder, delay, or interfere with such commerce? As applied to the present case, it is this: Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce? To that question we think there can be but one answer. Under the imperative command of his employer, the deceased was on his way to relieve, in the capacity of a fireman, the crew of a train which was carrying interstate commerce, and the effect of his death was to hinder and delay the movement of the train. In our opinion, the complaint states a cause of action under the Employer's Liability Act."

The learned judge who heard this case in the court below submitted issues to the jury, one of which raised the question as to whether the defendant was engaged as a common carrier in interstate commerce, and also as to whether the plaintiff was injured while employed in interstate commerce, and the issues thus raised were found in favor of the plaintiff. In view of the evidence to which we have referred, we are of the opinion that the circumstances surrounding this case are

such as to bring it within the purview of the statute, and, therefore, that the plaintiff is entitled to recover for the injuries sustained. We have examined the cases relied upon by counsel for the defendant, but are of the opinion that they do not apply to the case at bar. A careful consideration of the rulings of the lower court, as respects the questions raised by the assignments of error, impels us to the conclusion that the same are without merit. For the reasons stated, the judgment of the lower court is affirmed.

Affirmed.

MISSOURI PAC. RY. CO. v. UNION STOCKYARDS CO.

UNION STOCKYARDS CO. v. MISSOURI PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. April 21, 1913.)

Nos. 3,834, 3,835.

CARRIERS (§ 100*)—TERMINAL CARRIER—DEMURRAGE.

Plaintiff's demurrage rules provided that cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose are subject to the rules, and that when cars are interchanged with minor railroads or industrial plants performing their own switching services, handling cars for themselves or for others, an allowance of 24 hours will be made for switching, in addition to the regular time for loading and unloading, and if returned loaded an additional 48 hours will be allowed. *Held* that, where a stockyards company operated a terminal railroad, switching cars from plaintiff and other connecting carriers consigned to itself for its own use, and to other industrial plants reached by switches from its terminal road, it was liable for demurrage on cars consigned to it, but not on cars delivered to it as a connecting carrier for transportation to consignees.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 427-433; Dec. Dig. § 100.*]

Quick dispatch, demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 342.]

In Error to the District Court of the United States for the District of Nebraska; William H. Munger, Judge.

Action by the Missouri Pacific Railway Company against the Union Stockyards Company. From a judgment for plaintiff for part of the relief demanded, it brings error, and defendant prosecutes a cross-error. Affirmed.

Edgar M. Morsman, Jr., of Omaha, Neb., for plaintiff in error.

Frank T. Ransom, of Omaha, Neb., for defendant in error.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge. This was an action by the Missouri Pacific Railway Company to recover of the Union Stockyards Company of Omaha demurrage charges claimed under rules and regulations in tariffs filed with the Interstate Commerce Commission. The trial court directed a verdict for the plaintiff as to part of the items, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

denied a recovery as to the balance. Each party prosecuted a writ of error.

The defendant owns and operates the stockyards at South Omaha, Neb., and in connection therewith about 35 miles of railroad track constituting a terminal railroad. Its stockyards were located upon its tracks, and also various packing houses and other industrial plants belonging to other parties. These tracks were the means of connecting the large railroad systems entering South Omaha, including that of the plaintiff, with the industrial concerns. Defendant did not engage in the ordinary carrying business of a railroad company, but merely performed a switching service with a number of switch engines which it owned. On the inbound shipments with which we are concerned it took the cars at the transfer or interchange tracks, where the railroad companies delivered them, and hauled them over its own rails to the unloading docks of the consignees. The plaintiff's claims for demurrage were of two classes: (1) On cars consigned to defendant; (2) on cars consigned to the other industrial concerns located on its tracks. The defendant complains of the allowance of the former, and the plaintiff of the denial of the latter.

No substantial reason is offered why the defendant is not responsible for demurrage on the cars consigned to it and held beyond the free time allowed. It was an ordinary consignee of cars containing for the most part feed and materials for the upkeep of its stockyards. It was not a railroad company within the meaning of the exceptions in the rules and regulations imposing the charges. It is urged that a discrimination would result, because other consignees were not charged; but no purpose to discriminate appears in the tariff, which on its face applies to all affected by like circumstances and conditions. The real controversy is as to the liability of defendant for demurrage on the cars consigned to the other industries on its tracks. The demurrage rules and regulations in the tariff, so far as they need be quoted, were as follows:

"Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose are subject to these demurrage rules," with some exceptions not material here. "When cars are interchanged with minor railroads or industrial plants performing their own switching services, handling cars for themselves or other parties, an allowance of 24 hours will be made for switching in addition to the regular time allowed for loading or unloading. If returned loaded, an additional 48 hours' free time will be allowed."

These and the other rules and regulations define the free time allowed, when demurrage shall begin, and to what cars it shall attach; but they do not say in definite terms that any person other than a consignor or consignee shall be personally liable. If a railroad company desires to impose upon the owner of an instrumentality which it employs for the delivery of traffic to its consignees a schedule of fixed charges or penalties for delay, it should express itself definitely and clearly beforehand, so that the person to be affected may shape his course accordingly. There is nothing in the rules and regulations before us which fairly indicate a purpose to charge the switching company, instead of the consignees, and the circumstances of the case make an implication to that effect quite inadmissible. The

defendant was neither consignor nor consignee of the cars in question, nor was it interested in their contents. It did not load or unload them, or make any use of them for its own purposes. It was not its duty to notify the consignees of the arrival of the cars on the transfer tracks; that was done by the plaintiff. Defendant had no contractual relation with, and did not receive its compensation from, the consignees. It acted as the agent of the plaintiff, not of the consignees, and performed its services for a switching charge, which plaintiff paid. The unloading docks of the industrial plants were the destinations of the cars, and the cost of switching to those points was embraced in the freight charges, which were collected by the plaintiff or its connecting carriers. When the cars were placed by plaintiff on the transfer tracks for switching to the docks of the consignees, they were necessarily held until the consignees were ready and willing to receive them; nor could they be taken for return until the consignees had unloaded them. No other course was practicable. There was no proof that the delay beyond the free time in delivering the cars to the consignees and in returning them to the plaintiff at the place of interchange was the fault of the defendant. On the contrary, the testimony on that subject was that the defendant acted promptly and diligently. The imposition of demurrage implies delay through negligence or inattention, or a retention for personal uses, whereby the proper office of the cars in transportation is impaired.

The judgment is affirmed.

UNITED STATES v. PRESIDENT, ETC., OF JAMAICA & R. TURNPIKE
CO. et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 5.

1. DEDICATION (§ 44*)—CANALS—PUBLIC THOROUGHFARE.

Evidence *held* insufficient to sustain a finding that a canal cut through private land to shorten a navigable river route, and maintained at private cost, was dedicated to the public as a water thoroughfare.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. § 44.*]

2. NAVIGABLE WATERS (§ 20*)—OBSTRUCTIONS—BRIDGES.

A corporation organized in 1859 dug a canal over private property to shorten a navigable river route. The canal company failed in 1869, and its property and franchises were purchased by H. In 1888 or 1889 he decided to close the canal, which he did by making a solid embankment across it at a point where a turnpike had previously crossed on a bridge. Thereafter the canal could only be used for about 500 feet to the embankment, which continued for 10 years, until part of the embankment was washed away and a new bridge constructed, after which small boats passed through; but the presence of piles obstructed the passage of larger ones. *Held* that, the canal never having been dedicated to the public, the owner was entitled to close it at his election, and the government was therefore not entitled to the removal of the bridge as an obstruction to navigation, under Act Sept. 19, 1890, c. 907, 26 Stat. 453, as amended by Act July 13, 1892, c. 158, 27 Stat. 88, Act March

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3, 1899, c. 425, § 9, 30 Stat. 1151 (U. S. Comp. St. 1901, p. 3540), and Act Feb. 20, 1900, c. 23, § 31 (U. S. Comp. St. 1901, p. 3542).

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 73-99; Dec. Dig. § 20.*]

This cause comes here upon appeal from a decree of the District Court, Eastern District of New York, which found that a bridge along the property of the Turnpike Company was an obstruction to the navigable capacity of the water flowing through the cut over which it was built and ordered its removal. The opinion of the District Judge will be found in 183 Fed. 598.

Wm. E. Stewart, of Long Island City, N. Y., and James L. Quackenbush, of New York City (A. C. Peacock, of New York City, of counsel), for appellants.

Wm. J. Youngs, U. S. Atty., of Brooklyn (L. R. Bick, Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. Hook creek is a tidal stream emptying into an arm of Jamaica Bay, shallow at low water, having sometimes as little as 2 feet or so, with a rise and fall of tide of from 4 to 5 feet. From its outlet it bears off to the south and west in a winding course, turning after a bit to the eastward until it reaches a point about north of its outlet and some 500 or 600 feet therefrom. From this point it turns north for about 2 miles to a place which used to be called Foster's Meadow and is now a settlement known as Rosedale. At this place there was and is a dock known as Hirst's Dock, or the Canal Dock. The length of this irregular bow, formed by the course to the south and west and return, is about a mile and a half. This was the natural condition of the stream so far back as the testimony discloses it. The turnpike from Jamaica to Far Rockaway ran close to the creek, where it turns to the north, and further on crossed it in the southerly part of the bow.

[1] By special act of the Legislature the Foster's Meadow Canal & Dock Company was incorporated in 1859. It dug a canal, over private property from the outlet to the place where the creek turned north, having obtained the consent of the Turnpike Company to cut through its road, upon condition that it would build a bridge. This it did, the bridge having some sort of draw which could be unlocked, opened, and relocked by a person passing in a boat, who had been furnished with a key. This artificial waterway reduced the distance from the dock to the outlet nearly a mile and a half, and boats, which before had gone through the bow of the creek, went through the canal. The Canal Company failed in 1867, and all its property and franchises were purchased by one John Hirst. From the time the canal was opened, until 1888 or 1889, pleasure craft, rowboats, and sailboats, and small scows carrying fertilizer, bricks, coal, and hay, and fishing craft of various sizes, passed to and from the upper waters of the creek through the canal to its outlet. During all this period the Canal Company and its successor appear to have demanded and received toll

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from boats using their improvements. There were many occasions, no doubt, when toll was not collected. The situation was such, and the extent of navigation so trivial, that it would not pay to maintain a toll gatherer permanently at the entrance to the canal. The owner had to depend for his collections upon his own actual presence when his canal was used. The testimony in our opinion wholly fails to support the conclusion contended for that this canal, cut through private land and maintained at private cost, was ever dedicated to the public as a water thoroughfare.

[2] About 1888 or 1889, for some reason not explained, Hirst, then the owner, decided to close the canal. His predecessor's contract with the Turnpike Company obligated him to erect, and presumably maintain, any bridge that might be necessary to permit the crossing of the turnpike by the canal. Such maintenance might involve expense. He therefore undertook to restore the turnpike to its original condition, filling the canal in at the crossing, and making a solid embankment to carry the roadway. Thereafter the only waterway from the outlet to the dock or landing places at Foster's Meadow or Rosedale was through the natural channel of the stream, around the westerly bend or bow, and then north. The canal could still be entered from the outlet; but, as it only ran about 500 feet to the turnpike embankment, it was little used and only by pleasure craft. This condition of things continued about 10 years. In the meantime the Long Island Electric Railway, with consent of the Turnpike Company, had laid and operated a trolley line from Jamaica to Far Rockaway. It was found that during the spring and autumn there was a difference in tide level between the bay side and the creek side of the turnpike, so that, on occasions when a strong wind combined with an exceptionally high tide, water flowed over the roadway, washing it away, and making the track unsafe. To remedy this the filling at the place of intersection, except some piles driven in the bed of the old canal, was removed, and the bridge now complained of was built. Since then small rowboats and sailboats with removable masts have gone through; but the piles prevent the passage of the loaded scows or lighters, such as used to pass. It is difficult and risky for a motor boat to go through, although some have done so.

The present application is for the removal of the bridge under the provisions of Act Sept. 19, 1890, c. 907, 26 Stat. 453, as amended by Act July 13, 1892, c. 158, 27 Stat. 88, Act March 3, 1899, c. 425, § 9, 30 Stat. 1151 (U. S. Comp. St. 1901, p. 3540), and Act Feb. 20, 1900, c. 23, 31 Stat. 31 (U. S. Comp. St. 1901, p. 3542). It is contended that its construction obstructs or impairs navigation or commercial use of navigable waters of the United States. That statute has been fully construed in *Leovy v. U. S.*, 177 U. S. 621, 20 Sup. Ct. 797, 44 L. Ed. 914, and cases therein cited. Certainly the condition of affairs existing for 10 years before the present bridge was built does not present a case of any commercial use of this canal, which then ran only from the outlet to the embankment. Prior to that we have a private cut through private land, which in no way interfered with the natural course of any navigable stream, and through which such as chose to pay the owner for the privilege might pass, and thereby shorten their

journey, from one part of the stream to another. Never having dedicated his canal to the public, the owner could have filled it in and planted crops or built upon it whenever he found it unremunerative, because neither its opening nor closing interfered with the natural channel of the creek, which was at all times open, as it always had been.

The decree is reversed, with costs.

WRIGHT & COBB LIGHTERAGE CO. v. NEW ENGLAND NAVIGATION CO. et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 136.

1. COLLISION (§ 70*)—NEGLIGENCE—MOORING AT END OF PIER IN FOG—SIGNALS.

Three companion tugs, with car floats on their sides, caught in a dense fog in East River in the night, tied up alongside each other at the end of a pier extending into the river some 300 feet. *Held* that, under the circumstances shown, such action was not negligent, but that it was their duty, so long as the fog continued, to sound some signals giving notice of their presence, other than signals which would indicate them to be in motion, and that the continuous ringing of a bell was such proper signal.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 91-100; Dec. Dig. § 70.*]

2. COLLISION (§ 100*)—FERRYBOAT—NAVIGATION IN FOG.

A ferryboat must navigate, even in a dense fog, and the only additional duty resting upon her is to exercise care commensurate with the additional risk.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 213-215; Dec. Dig. § 100.*]

3. COLLISION (§ 22*)—FOG—INEVITABLE ACCIDENT.

A finding by the trial court that collisions occurring in East River in the early morning in a dense fog were the result of inevitable accident, within the meaning of the admiralty law, affirmed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 19; Dec. Dig. § 22.*]

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing a libel to recover damages for a collision between libellant's barge and a car float in tow of a New Haven transfer tug, which latter two boats were broken away from a pier to which they were moored by a collision with the ferryboat Pierrepont. The facts are set forth with great fullness in the opinion of the District Judge, which will be found in 189 Fed. 809.

Foley & Martin, of New York City (F. A. Spencer, Jr., and William J. Martin, both of New York City, of counsel), for appellant.

J. J. Macklin, J. T. Kilbreth, and De Lagnel Berier, all of New York City, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. It is necessary to add but little to the careful discussion of the various propositions presented in this complicated case, which will be found in Judge Holt's opinion.

The charge of fault against the New England Navigation Company, charterer of the barge, for tying her up at the end of Pier 15 is disposed of by our recent opinion in *The Rhein* (March 10, 1913) 204 Fed. 252.

[1] As to the transfer tugs and car floats of the New Haven Railroad, which were tied up side by side at the end of Pier 15, we fully concur with Judge Holt that in the condition of fog then prevailing there was no negligence in placing them there. As thus tied up, projecting over 300 feet beyond the end of the pier, they were to some extent an obstruction in a much-navigated channel. Under the rule laid down in *The Kennebec*, 108 Fed. 303, 47 C. C. A. 339, and *N. Y., O. & W. R. Co. v. Cornell S. B. Co.*, 193 Fed. 380, 113 C. C. A. 306, they were under an obligation, while lying thus in dense fog, to give some sound signal indicating their presence. Our opinion in *Taylor Dredging Co. v. P. R. R.* No. 5, 181 Fed. 833, 104 C. C. A. 343, is not inconsistent with the two cases last above cited. In that case a single boat was tied up where it was to be expected that a boat might be found lying at any time.

These boats tied up at Pier 5 should not have undertaken to give warning of their presence by giving whistle signals, because that would have indicated that they were navigating, and so would have added to the confusion. The testimony is conflicting as to what indications they did give of their presence—conflicting, that is, to the extent that the witnesses from them say that a bell was rung, while other witnesses say that they did not hear it. The District Judge thought it was doubtful whether a bell was rung, but did not decide that question, because he placed his decision on another ground, viz., that the collision at Pier 5 was not the proximate cause of the subsequent collision at Pier 15. From our examination of the testimony, however, we have reached the conclusion that after the relief captains arrived in the morning prior to the accident the bell was rung almost continuously. The positive testimony is harmonious and plausible, and we do not think it is overborne by the testimony of those who did not hear the bell. Some of them were not accustomed to listening for signals; others were not placed where they would be likely to hear. *The Fin MacCool*, 147 Fed. 123, 77 C. C. A. 349. We do not think the transfers and car floats were negligent in failing to give sound signals of their presence.

[2] Finally, we do not think the ferryboat was negligent. Such craft must navigate even in dense fog. She seems to have been carefully navigated, and, indeed, on the oral argument, the counsel for the transfer flotilla substantially withdrew his charge of fault on her part.

[3] Since no improper navigation is proved against anybody, we concur in Judge Holt's conclusion that it is a case of inevitable accident, in the admiralty meaning of that word. *The Jumna*, 149 Fed. 171, 79 C. C. A. 119.

Decree affirmed, with costs.

THE NEW YORK.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

1. SEAMEN (§ 29*)—INJURIES—SHIP'S LIABILITY.

Vessel owners are liable to injured seamen for wages, maintenance, and expenses of cure, except where the injury resulted from the seamen's own willful misconduct, and also for indemnity for injuries resulting from unseaworthiness of the vessel or her equipment.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

2. SEAMEN (§ 29*)—INJURIES—UNSEAWORTHINESS OF VESSEL OR EQUIPMENT.

Libelant was employed as an engine room cadet to keep the oil cups on certain pumps in the engine room filled with oil during his watch. He was shown the cups, but was not told where to stand. At first he undertook to fill the cups, standing in the passageway between the guards of two pumps, but could not see into the cup from this position. He saw another cadet standing on the bearing of the pump shaft, with one foot over a revolving shaft, while filling the cup, and afterwards followed his example until the time of the accident, three or four days after, when, while filling the cup, his overalls were caught by the set pins in a revolving shaft, and his leg was broken. The vessel was built by first-class builders in the usual way, and the safe place where libelant could have stood was not hidden or concealed, but was open and obvious, though less convenient. *Held*, that the vessel was not unseaworthy in structure or equipment, in not providing a more convenient place to stand, or for failure to box the shaft and wheel, and that she was therefore not liable to libelant for damages for his injury.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

3. SEAMEN (§ 29*)—INJURIES—NEGLIGENCE OF FELLOW SERVANTS.

Omission of libelant's superiors to tell him where to stand while filling the cup, or to warn him not to straddle the shaft, if negligence, was the negligence of libelant's fellow servants, for which the owners of the vessel were not liable.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, in favor of libelant for \$350 maintenance and cure and \$5,000 damages, with costs.

Burlingham, Montgomery & Beecher, of New York City (M. P. Feary, and P. J. Bickel, of New York City, of counsel), for appellant.

Hays, Hershfield & Wolf, of New York City (D. P. Hays and S. P. Friedman, both of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The libelant was an engine room cadet on the steamship New York, and was on his first voyage in that capacity. His duties were to keep the oil cups on certain pumps in the engine rooms filled with oil during his watch. He was on duty during two watches, of four hours each, on each day. On the seventh or eighth day out, while he was filling an oil cup on the forward circulating pump, his overalls were caught by set pins in the revolving shaft of the pump and his leg was broken.

The first time he went on board he was taken around by one of the engineers and shown the oil cups he was to fill, including the one in question. No one told him where to stand, or where not to stand, when filling this cup; but when he first undertook to fill it he saw a passageway between the guards of two pumps and stood there to oil the cup. He could not see into it from where he stood, but could have told by inserting his finger how much oil there was in the cup. He oiled from that position for several watches. On the third or fourth night out an engineer criticised him for not having enough oil in the cup at the end of his watch, and that same night he saw another cadet, whose watch followed his, standing on the bearing of the pump shaft with his feet straddling the revolving shaft. He had never noticed this place before, but from that time on stood there when filling this cup, until the accident, which happened three or four days afterwards. This place was more convenient, as by standing on the bearing one could look into the cup, and it appears to have been frequently used by others when filling this cup.

[1] It is the law of the sea that vessel owners are liable for wages, maintenance, and expenses of cure of a seaman injured in the service of the ship, except as a result of his own willful misconduct. There has been gradually added to this well-defined relation, either by statute or by judicial decisions, an obligation of the owners to give the seaman indemnity for injuries resulting from unseaworthiness of the vessel or her equipment. The final utterance of the Supreme Court on the relation of seamen and owners is the case of *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760 (1902). It is inconsistent with many prior and some subsequent decisions.

[2] In the opinion of a majority of the court, this vessel was not unseaworthy in structure or equipment. A shipowner is not bound to furnish the crew with the very best and very safest appliances. The evidence is that the vessel was built by first-class builders and in the usual way. We do not think a steamer can be held unseaworthy because every shaft and wheel revolving in plain sight is not boxed in. The libelant was not hurt by any defect in the machinery, or by anything giving way, as in *The Frank and Willie* (D. C.) 45 Fed. 494, and *The Edith Godden* (D. C.) 23 Fed. 43. There were two places from which the cup could be filled. One was unsafe; the other was safe, although less convenient. This safe place was not a hidden one, which would not have been discovered by a novice, unless some one told him of it. It was in plain sight, and was apparently the natural place for a person to stand, because libelant without any directions went there at once, and used it for three or four days, until he saw some one else using another place, which may have been more convenient, but which was manifestly unsafe. Under *The Osceola* decision we do not see how the ship can be held unseaworthy, or not kept in proper order.

[3] The omission of the libelant's superiors to tell him where to stand when filling the cup, or to warn him not to straddle the shaft, if negligence, was negligence of fellow servants, for which the owners are not responsible.

The decree is reversed, with costs of this appeal, and cause remanded, with instructions to decree in favor of libellant only for \$350, with interest and costs of the District Court.

HENN v. CHILDREN'S AGENCY et al.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1913.)

No. 2,188.

INFANTS (§ 18*)—JUVENILE DEPENDENT—RESIDENCE—JURISDICTION.

Where a mother living in Montana permitted her minor daughter to go to California for her health, to be returned in six months, but permitted her to remain there for nearly two years, without knowing of her whereabouts, and to become dependent, the juvenile court of the city in which the child was found dependent had jurisdiction to place her in the custody of a children's agency, without reference to her actual residence or that of her mother.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 18; Dec. Dig. § 18.*]

Appeal from the District Court of the United States for the First Division of the Northern District of California; John J. De Haven, Judge.

Petition for habeas corpus by Mary Henn, on behalf of Mabel Henn, a minor, to obtain a discharge of the minor from custody of the Children's Agency in San Francisco, pursuant to a commitment of the juvenile division of the superior court of the city and county of San Francisco. From an order sustaining a demurrer to the petition, *re*lator appeals. Affirmed.

Henry B. Lister, of San Francisco, for appellant.

W. T. Kearney, of San Francisco, for appellees.

Before GILBERT, Circuit Judge, and WOLVERTON and DIETRICH, District Judges.

GILBERT, Circuit Judge. The appeal in this case is from an order of the District Court, sustaining a demurrer to a petition for a writ of habeas corpus and denying the writ. The amended petition alleges in substance that Mabel Henn, a child of 10 years of age, a resident of the state of Montana, was, on or about the 27th day of May, 1910, while temporarily within the state of California, seized under a process of the superior court of that state for the city and county of San Francisco, sitting as a juvenile court, and was charged with being a dependent child under subdivision 13, § 1, p. 213, St. Cal. 1909, as amended in 1911 (St. Cal. 1911, pp. 63, 658); that the petitioner is the mother of said child, and a resident of Montana; that no process was served upon petitioner, and that said minor child was not charged with the commission of any crime; that she was charged with being within the county and being dependent, on account of her father's death and having no proper home; that thereupon she was committed to the appellee until she shall

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

have reached the age of 21 years; and the petitioner alleges that the conviction and the commitment are void, and that the act aforesaid confers jurisdiction on a state to enslave foreign minors without conviction of crime, in violation of the fourteenth amendment. The original petition, which is found in the record, alleges further facts which may properly be considered on the assignment that the court below erred in denying the writ, as they are in the nature of admissions against the petitioner. These are that on or about May 27, 1910, the said Mabel Henn was taken on a visit to California by Marie Maginnis for her health, as she had been sick with typhoid fever, and such change was necessary; that she was taken to California only for the purpose of said visit; and that she was to be returned to Montana within six months.

The present is not the first attack that has been made upon the judgment of the juvenile court on behalf of said minor. In *Ex parte Maginnis*, 162 Cal. 200, 121 Pac. 723, the counsel who represents the petitioner here represented, on a petition for habeas corpus, one Marie Maginnis, who alleged that the child's name was Mabel Maginnis. The same contention was made there that is made here—that the juvenile court had no jurisdiction over the child, because she was a resident of the state of Montana. But the court said:

"The statute does not limit the power of the court to children who have a technical residence in this state."

And the court upon that consideration, and upon the consideration of the record of the juvenile court showing that the petition initiating the proceedings therein alleged that the minor "is residing in the city and county of San Francisco," and that the order committing the child to the custody of the Children's Agency found that allegation to be true, held that the order could not be reviewed on habeas corpus, and that the writ had been properly denied. The court referred to *De la Montanya v. De la Montanya*, 112 Cal. 131, 44 Pac. 354, in which Temple, J., speaking for the court, said:

"I do not doubt that the mere presence of infants within a jurisdiction is sufficient to confer jurisdiction, although they may be residents of another state. But, as such jurisdiction is always exercised for the good of the child, the courts would never allow the power to be used for purposes of oppression, or to prevent an infant temporarily within its jurisdiction from being taken away, when its best interests required it, to its more permanent residence. The jurisdiction is never used, except when necessary for the good of the child."

The language so quoted from that opinion aptly expresses the principles which should apply to the decision of the case at bar. Here was a child sent by her mother from Montana, the place of her mother's residence, in charge of another woman, to California, to reside there for six months. While there she became delinquent or dependent. She was within the county over which the juvenile court had jurisdiction. That court not only had the authority, but its duty was, to protect the child. It did so by committing her to the custody of the Children's Agency, the appellee herein, and for nearly two years thereafter the petitioner knew nothing of the whereabouts of the child.

The record herein does not justify the contention of the appellant's counsel that the law of California is harsh or arbitrary, and that it may so operate as unjustly or unconstitutionally to deprive parents of the custody of children who may be temporarily sojourning in or passing through a state other than that of their residence. The court below was dealing with the facts as they were presented on the petition, and not as they might have been presented by the petitioner if she had applied to the juvenile court to obtain a revocation of its order committing the child to the appellee, upon a showing that the order was unjust, that the child was not in fact delinquent or dependent, that the mother had not been remiss in the discharge of her parental duty, and that she was a fit and proper person to have the custody of her child.

We think the District Court committed no error in denying the writ upon the facts presented. Its judgment is affirmed.

CHICAGO, R. I. & P. RY. CO. v. BALDWIN.

(Circuit Court of Appeals, Eighth Circuit. April 25, 1913.)

No. 3,853.

(*Syllabus by the Court.*)

TRIAL (§ 260*)—CHARGE—REQUESTS—FAILURE TO REPEAT IN WORDS OF COUNSEL.

When the court fairly states a rule of law in its general charge to the jury for their guidance, it is not error for it to refuse to repeat it in the words of counsel.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

In Error to the District Court of the United States for the District of Nebraska; William H. Munger, Judge.

Action by Jane Baldwin, administratrix of Henry D. Baldwin, against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William D. McHugh and W. H. Herdman, both of Omaha, Neb., for plaintiff in error.

William J. Connell, of Omaha, Neb., for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

SANBORN, Circuit Judge. Henry D. Baldwin was an employé of the Union Pacific Railroad Company, engaged in the repair of its bridge over the Missouri river at Omaha, and the Chicago, Rock Island & Pacific Railway Company, the defendant, was operating its trains between Chicago and Denver over the rails of the Union Pacific Company upon this bridge on June 4, 1906. Baldwin was walking west on the bridge on or between the railroad tracks when one of the defendant's trains going west knocked him from the bridge and killed him. Jane Baldwin, the administratrix of his estate, brought this action against the defendant, and alleged that Mr. Baldwin's death

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was caused by the negligence of the defendant, in that, among other things, it ran the train which killed him over the bridge at an excessive, unreasonable, and dangerous rate of speed. At the time of the accident the contributory negligence of Mr. Baldwin was a complete defense to the action, and the defendant pleaded that it was free from all negligence, and that the accident was caused by the contributory negligence of Mr. Baldwin. There was a trial, and a verdict for the plaintiff.

The railroad company now complains because the court did not instruct the jury, as it requested, that no reliance on the exercise of care by the persons in control of the movement of the trains or engines across the bridge would excuse any lack of the exercise of reasonable care on his part to perceive approaching engines and trains, and to protect himself from injury from them by removing himself from the rails and placing himself beyond the reach of the trains. But the court in its general charge instructed the jury that in its opinion the negligence of the railroad company was established by the evidence, but that if Mr. Baldwin was guilty of negligence which contributed to his injury the plaintiff could not recover; that—

"It was his duty to use ordinary care to protect himself from these trains, and in the exercise of that care—that is, in the exercise of ordinary care—to be so alert and watchful that trains in plain view for say a mile, or half a mile, which he could escape by looking behind him in the exercise of ordinary care and then by moving with reasonable quickness from the track, should not strike him. * * * If Mr. Baldwin did not look to the east to see if there was a train approaching, and he could have seen the train approaching if he had looked, in time to have stepped out, in the exercise of ordinary care, onto these floor beams, that would be contributory negligence."

This was an instruction in concrete terms applicable to the facts of the case on trial, in terms more effective than the mere abstract statement of the rule, that no reliance by Mr. Baldwin on the care of the operators of the train could excuse his lack of reasonable care to watch for the coming trains and to protect himself from them. If Mr. Baldwin's reliance upon the care of such operators would have excused his lack of care, then his lack of reasonable care would not have been fatal to the plaintiff's right of action. But the court charged that it was. The case falls under the rule that, where the court fairly states a rule of law in its general charge to the jury for their guidance, it is not error for it to refuse to repeat it in the words of counsel. *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.*, 114 Fed. 133, 144, 52 C. C. A. 95, 106; *Southern Pacific Co. v. Schoer*, 114 Fed. 466, 473, 52 C. C. A. 268, 275; *Telegraph Co. v. Morris*, 105 Fed. 49, 53, 44 C. C. A. 350, 354; *Union Pac. R. R. Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433.

No other complaint of the trial of this case is made, and the judgment below is affirmed.

In re MORRIS.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 190.

BANKRUPTCY (§ 404*)—DISCHARGE—POSTPONEMENT TO PERMIT SUIT BY CREDITOR.

The amendment of Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), providing that as to all property not in the possession of the bankruptcy court a trustee shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied, qualifies a trustee to maintain a suit under the New York law to reach surplus revenue to which the bankrupt will be entitled under a testamentary trust for the benefit of all the creditors; and since such right will be unaffected by the bankrupt's discharge, a judgment creditor is not entitled to an order postponing such discharge to enable him to prosecute such a suit for the benefit of judgment creditors only.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 679, 681–691; Dec. Dig. § 404.*]

This cause comes here upon a petition to revise an order of the District Court, Southern District of New York, which denied the motion of petitioners, partners, who are judgment creditors of the bankrupt, for stay of proceedings on his application for discharge. No specifications of objections to the discharge have been filed. After adjudication of bankruptcy petitioners recovered judgment against the bankrupt in the City Court, and execution was issued and returned unsatisfied. Thereafter they began an action in the state Supreme Court, on behalf of themselves and all other judgment creditors who should come in and contribute for the purpose of reaching alleged surplus income to which the bankrupt is and will be entitled under a trust created by his father's will. Petitioners ask that the bankrupt's application for discharge be stayed to enable them to carry their suit in the state court to a conclusion.

Kurzman & Frankenhimer, of New York City (A. L. Gutman, of New York City, of counsel), for petitioners.

M. S. Hyman, of New York City, for respondent.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The petitioners rely upon the decision in *Butler v. Baudouine*, 84 App. Div. 215, 82 N. Y. Supp. 773; *Id.*, 177 N. Y. 530, 69 N. E. 1121. In that case it was held that a trustee in bankruptcy was not entitled to maintain an action to reach surplus income to which a debtor was entitled under a will, as a judgment creditor would be under *Williams v. Thorn*, 70 N. Y. 270, *Tolles v. Wood*, 99 N. Y. 616, 1 N. E. 251, and *Wetmore v. Wetmore*, 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. Rep. 752. If this were still the law it would be a hardship to judgment creditors to discharge the obligation of their judgment debtor and thus prevent the only persons who could reach the surplus income from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

securing its application to indebtedness of the bankrupt. The decision in the Baudouine Case was reached in view of the provisions of section 70a (5) of the Bankrupt Act, which vests the trustee with title to "property which prior to the filing of the petition [the bankrupt] could by any means have transferred or which might have been levied upon or sold under judicial process against him." The Court of Appeals points out that the bankrupt could not by any means have transferred this surplus and that it could not have been levied on and sold. The court says:

"We find, as the barrier to the plaintiff's successful assertion of a claim to that surplus, the requirement that none but a judgment creditor with his remedy at law exhausted is entitled to reach it. Our decision is placed on that ground alone."

One result of that decision was to create preferences among general creditors of the bankrupt. One object of the Bankruptcy Act was to insure equality of distribution of the assets among all the creditors, except for such advantage as might be secured to some creditor through a specific lien of some sort. This equality of distribution would not result, if some of the creditors, who had no specific lien on anything, but who had put their claims in judgment, even after the filing of the petition in bankruptcy, could secure for themselves exclusively a particular fund which under the state law a debtor might be required to give up.

It is not surprising, therefore, to find that subsequent to the Baudouine decision Congress in 1910 amended the Bankruptcy Act—section 47a (2)—by providing that trustees of bankrupts:

"As to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

This amendment is incorporated, not in section 70, but in section 47. That circumstance, however, is immaterial. The act must be interpreted as a whole, and all its parts harmonized. It cannot be assumed that Congress would have added this amendment to section 47, if the unamended language of section 70 were to operate to neutralize the amendment. See *Williamsburg Knitting Mill* (D. C.) 190 Fed. 871, affirmed as *Holt v. Henley*, 193 Fed. 1020, 113 C. C. A. 87.

Since the right to take proceedings to recover surplus income such as there is alleged to be here, in the interests of all creditors, is now vested in the trustee, and that right will be unaffected by a discharge, there is no longer any reason for postponing hearing and determination of application for discharge. The reasons which induced the court to order such a postponement in *Matter of Tiffany* (D. C.) 147 Fed. 314 (decided in 1906), no longer exist.

It is suggested that the trustee may not begin a proceeding to reach the surplus income. But if he fail to take proper action of his own motion, application to the court can be made by any creditor for instructions to proceed, and some way to secure funds to prosecute such proceeding will no doubt be found. See our opinion in *Cornell v. Nicholls & Langworthy Machine Co.* (C. C. A.) 201 Fed. 320 (December 9, 1912). The circumstance that the trustee may be occupied a long

time in such proceeding seems to the majority of the court not to be a sufficient ground for indefinitely postponing the bankrupt's application for discharge. The District Court, however, may properly adjourn application for 60 days, so that the trustee can begin his action before discharge.

The order is affirmed.

ROBINSON v. STEARNS et al.

(Circuit Court of Appeals, Third Circuit. May 6, 1913.)

No. 1,696.

APPEAL AND ERROR (§§ 690, 701*)—REVIEW—RECORD—BILL OF EXCEPTIONS—OMISSIONS.

Where, in an action on a note payable to bearer, defendant pleaded that plaintiff was not a bona fide holder for value before maturity, and was therefore bound to meet certain defenses against the original owner that would otherwise be barred, and plaintiff's case consisted only of the note in suit and his own testimony, but the bill of exceptions contained only a few meager extracts of plaintiff's testimony, the court could not review assignments of error relating to rulings on evidence and instructions of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908, 2933, 2935; Dec. Dig. §§ 690, 701.*]

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action by Samuel Robinson against George L. Stearns and others. Judgment for defendants, and plaintiff brings error. Affirmed.

A. R. Jackson and Mortimer C. Rhone, both of Williamsport, Pa., and Stuart MacKibbin, of South Bend, Ind., for plaintiff in error.

Max L. Mitchell, of Williamsport, Pa., for defendants in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. What is called the bill of exceptions in this case is so defective that we cannot safely undertake to decide the questions raised on the writ of error. At the trial the plaintiff was the apparent holder of a promissory note, although he had not been the original owner. The note was drawn to the order of the makers, and, as they had also indorsed it before it was handed to the original owner, it had become in effect a note payable to bearer and was transferable by mere delivery. The defense was that the plaintiff was not a bona fide holder for value before maturity, and therefore that he was bound to meet certain defenses against the original owner that would otherwise be clearly inadmissible. Thus it became vital to ascertain the truth about the plaintiff's title, and, as he testified in his own behalf, it is manifest that his examination and cross-examination were probably of great importance. Even from the imperfect record we have, it is clear to us that we cannot satisfactorily understand and dispose of the questions now presented without

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

knowing what he swore to; and yet the bill of exceptions offers us nothing except a few meager extracts from the stenographer's notes, hardly a half dozen sentences in all. As the whole of the plaintiff's case consisted of the note in suit and his own testimony, it is apparent we think that it would be hazardous to pass upon the assignments of error—all of them objecting to certain testimony offered by the defendants, and to certain portions of the judge's charge—because we cannot know how far this testimony and the charge may have been justified by the plaintiff's examination and cross-examination. A trial judge's rulings and instructions are presumed to be correct, and especially is this true when evidence was heard by him that is not presented for consideration on appeal. It would be useless to take up the assignments of error seriatim; they have all been examined with care, but we do not see our way to decide any one of them.

We can do nothing but affirm the judgment, and accordingly it is so ordered.

HOUSTON v. ARTHUR McMULLEN CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 181.

MASTER AND SERVANT (§ 287*)—DEATH OF SERVANT—INCOMPETENCY OF FELLOW SERVANT—QUESTION FOR JURY.

In an action for death of plaintiff's decedent by being drowned while working in a caisson in the bed of a river, by the failure of defendant's lock tender to promptly close the upper lock of the caisson on the falling of the bucket against the lower lock, forcing the same open and the exhaust of the air by which the water was kept out of the caisson, evidence held to authorize submission to the jury of the question whether the lock tender was competent and whether defendant by the exercise of reasonable care could have discovered his incompetency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1034, 1045, 1051, 1052, 1054-1067; Dec. Dig. § 287.*]

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, entered upon the verdict of a jury in favor of defendant in error, who was defendant below.

James A. Beha, of New York City (R. J. Donovan and H. D. Cohen, both of New York City, of counsel), for plaintiff in error.

Amos H. Stephens, of New York City (E. C. Sherwood, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Deceased was at work in defendant's caisson, in the bed of the Passaic river at Newark. Compressed air was used for the purpose of keeping the water out of the caisson. Material removed from the river bed was hauled up in a bucket through a shaft which had two air locks, an upper and a lower, which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

could be alternately opened by a man stationed conveniently for the purpose, so as to allow the bucket to be raised and lowered without such an escape of compressed air as would reduce the pressure in the caisson. On the day of the accident a bucket had been raised through the lower lock, which had then been closed. The upper lock was then opened for the passage of the bucket, but before it reached that outlet the appliance which attached the bucket to the cable gave way, and the loaded bucket fell, breaking open the lower lock, while the upper lock was still open. The compressed air escaped, permitting the water to enter, and deceased was drowned.

Plaintiff contended that the fall of the bucket was due to the fact that the pin which secured it was defective. It also contended that one Green, who was tending the lock at the time, was an incompetent man, and, therefore, failed to close the upper lock promptly when the bucket forced open the lower one. The plaintiff at the close of the trial by various requests asked to go to the jury on the question whether the lock tender was a competent man and whether defendant could by the exercise of reasonable care have discovered that he was incompetent. The court refused these requests, "because all question as to an incompetent lock tender had been withdrawn from the jury." We think there was enough shown to entitle plaintiff to submit this part of the case to the jury. We have not overlooked defendant's contention that the evidence showed that the bucket locks were so constructed that no carelessness, on the part of the lock keeper, could possibly result in the opening of either lock, when the other lock was open.

There was some testimony in the case that blowouts sometimes occurred when the air pressure increased and the caisson was not sufficiently weighted. It is argued that it might be anticipated that, as a result of one of those blowouts, the pressure might be so reduced that the lower lock would fall open, or could be opened by the lock tender, even when the upper lock was still open, and that therefore the locks should be tended by a man capable of dealing with that emergency. As to the weight of this testimony we express no opinion, but we think plaintiff was entitled to go to the jury on the question whether upon the whole testimony a reasonably prudent man would have anticipated that some derangement of the normal action of the locks was to be anticipated, which would require the presence of a lock tender of more experience than Green. In reversing we are not to be understood as expressing any opinion as to the measure of Green's competency.

The defendant also argues that the most highly qualified man, confronted as Green was with the unexpected result of the giving way of the bucket, would have accomplished no more than he did. These questions also were for the consideration of the jury.

The judgment is reversed.

NEW YORK, N. H. & H. R. CO. v. LEHTOHNER.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 202.

1. APPEAL AND ERROR (§§ 1097, 1195*)—DECISION ON FORMER APPEAL—LAW OF CASE.

A decision on a former appeal is the law of the case on retrial and on a subsequent appeal based on the same facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427, 4661-4665; Dec. Dig. §§ 1097, 1195.*]

2. RAILROADS (§ 381*)—CROSSINGS—CROSSINGS BY SUFFERANCE—DUTY OF RAILROAD COMPANY.

Decedent, while traveling a well-recognized pathway leading from a subway station across defendant's track to its station platform, was struck and killed by one of defendant's trains. *Held*, that the court properly charged that a railroad, by acquiescence, may permit what amounts to a usual and well-recognized crossing, where pedestrians do not intrude on the railroad track otherwise than for the purpose of crossing it, and that, if such was the character of the crossing, decedent was not negligent as a matter of law in using it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1285-1293; Dec. Dig. § 381.*]

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, entered upon the verdict of a jury in favor of defendant in error, who was plaintiff below. The action was brought to recover for the death of Lehtohner, who was struck by a locomotive while crossing defendant's tracks. This is the second time the case has come before us. On the first trial a verdict was directed in favor of defendant, on the ground that deceased was walking along on the railroad track, instead of walking along outside of the track, without any reason, except his own convenience. This court reversed, because, although there was testimony in the case which would sustain the above statement, there was also testimony from which the jury might find that deceased who was about to take a train at the West Farms station, was crossing the track at a usual and well-recognized crossing. 188 Fed. 59, 110 C. C. A. 129. The facts are quite fully set forth in our former opinion, and need not be repeated here.

Charles M. Sheafe, Jr., of New York City (I. R. Oeland, of Brooklyn, of counsel), for plaintiff in error.

T. J. O'Neill, of New York City (L. F. Fish, of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. [1] The case now presented is not materially different from that which came before us on the other writ of error. Defendant urges that our former decision was based upon the assumption that the decedent came up the traveled path to a platform on the north side of the tracks and then started to cross to the station on the south side. While it was stated in the opinion that it is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not necessarily negligence as a matter of law to cross from one platform to another, the decision, as a whole, was not based on any such narrow ground. The underlying principle was that a railroad company owes duties to persons on usual and well-recognized crossings and that the traveling public in using such crossings are not necessarily and as a matter of law negligent.

[2] There is evidence in the record tending to show that there was, and had been for some time, a well-recognized, generally traveled pathway from the subway station to the track, reaching it a little east of the north platform, and thence diagonally across the track to the station; that it was known to the railroad company, and was the route usually taken by the station master himself. The court charged:

"Now, even where there is not what we all know as a grade crossing, it may be laid down for law that a railroad may, by its acquiescence, permit what amounts to a usual and well-recognized crossing, where pedestrians do not intrude upon the railroad track otherwise than for the purpose of crossing it, acquiescence, custom, habit, known or presumably known to the railroad company, may create a crossing where the stranger, perhaps, would not see it."

This was a correct statement of the law. It then left to the jury two questions of fact:

1. Was there at this place such a usual and well-recognized crossing?
2. Did the deceased pursue such usual and well-recognized crossing?

It further instructed them that, if either of these questions was answered in the negative, their verdict should be for the defendant. By their verdict the jury answered both these questions in the affirmative. Although the evidence was conflicting, there was sufficient to sustain their verdict. We find no exception which should require a reversal. Judgment affirmed.

ASTRUC v. STAR CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 200.

1. LIBEL AND SLANDER (§ 123*)—"RECKLESSNESS"—"WANTONNESS"—DETERMINATION—QUESTION FOR JURY.

"Recklessness" and "wantonness," as applied in the law of libel, are inferences of fact, to be drawn from the facts proved, and are matters for the determination of the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5999-6001; vol. 8, pp. 7781, 7386, 7387.]

2. LIBEL AND SLANDER (§ 110*)—NONLIBELOUS STATEMENTS—TRUTH.

Where plaintiff, in an action for libel, set forth the whole article alleged to be libelous, including nonlibelous parts, put the whole article in evidence, and read it to the jury, he could not with propriety object to proof that its derogatory, though nonlibelous, statements were true.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 307-314; Dec. Dig. § 110.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This cause comes here upon appeal from a judgment of the District Court, Southern District of New York, entered upon the verdict of a jury for six cents in favor of plaintiff in error, who was plaintiff below. 195 Fed. 349.

Maurice Leon, of New York City, for plaintiff in error.

C. J. Shearn, of New York City, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. This libel was considered in our opinion (193 Fed. 631, 113 C. C. A. 499, 40 L. R. A. [N. S.] 79) upon review of the first trial, when many of the questions which have been argued here were decided. The testimony was substantially the same on both trials.

The trial judge sent the case to the jury with a very careful charge, which fully covered the whole cause and was in substantial conformity to our former decision. We think it unnecessary to discuss the case at length. The plaintiff's contention is that, since the libel was proved to be a reckless and wanton invention of defendant's Paris correspondent, the trial judge erred in leaving the question of mitigation of damages to the jury. The difficulty with this contention is that it presupposes a finding by the court, as a matter of law, that the particular publication was reckless and wanton.

[1] Recklessness and wantonness, however, are inferences of fact, to be drawn from the facts in proof, and are matters which the jury are to determine. The reasons which plaintiff urges for reversal might be good if addressed to the jury, or even to the trial court on a motion for a new trial. That court might properly, if it felt so inclined, have told the jury that the facts would warrant their finding that publication was reckless and wanton; but it might with equal propriety decline to express any opinion of its own on that question, merely charging them that, if they found the publication was reckless and wanton, they might find that there was such malice as would warrant their giving punitive damages. We find no error in leaving that question to be decided by the jury, and they were entitled to have submitted to them everything which disclosed the circumstances under which the article was prepared and published.

[2] Having himself set forth the whole article, including the non-libelous parts, and having put it in evidence and read it to the jury, he could not with propriety object to proof that its derogatory, though nonlibelous, statements were true.

The amount of damages was properly left to the jury, with instructions they might award any sum between six cents and the amount claimed in the complaint. The difference between compensatory and punitive damages was fully and correctly explained to them. We find no error in the rulings on evidence or in the charge.

The judgment is affirmed.

RICHMOND HOSIERY MILLS v. JULIUS KAYSEF & CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 211.

TRADE-MARKS AND TRADE-NAMES (§ 95*)—PRELIMINARY INJUNCTION—IRREPARABLE INJURY.

Complainant, engaged in the manufacture and sale of low-priced cotton stockings under a trade-mark "Wunderhose," sued to restrain defendant's use of the word "Wonderfoot" in connection with the manufacture and sale of high-priced silk stockings, sold under different conditions, on the ground of unlawful competition. Defendant was amply responsible for any damages that might be recovered, and it did not appear that complainant could be seriously injured pending a trial on the merits. *Held*, that complainant was not entitled to an injunction pendente lite, restraining defendant's use of such word.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

On appeal from an order of the District Court for the Southern District of New York denying a motion by the complainant for a preliminary injunction restraining the defendant from using the word "Wonderfoot" in connection with hosiery manufactured by it; the complainant insisting that such use constitutes unfair competition in trade and is an infringement of complainant's trade-mark "Wunderhose."

Albert M. Austin and George W. Case, Jr., both of New York City, for appellant.

Hardy, Stancliffe & Whitaker, of New York City (Charles J. Hardy and Frederick P. Whitaker, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The use of the words "Wunderhose" by the complainant and "Wonderfoot" by the defendant were practically synchronous. The action was commenced by filing the bill of complaint in March, 1911, but the motion for a preliminary injunction was not made until August, 1912, a year and four months thereafter.

The defendant is conceded to be amply responsible for any damages the complainant may recover. No irreparable injury is shown by the complainant, and, in view of the fact that the parties deal in hosiery which differs greatly in material and price, it is not easy to perceive how the complainant can be seriously injured pending the trial. Other than the fact that both parties deal in hosiery, there is slight similarity in the manner in which their goods are offered for sale, and it is at least doubtful whether any confusion can arise in the minds of the purchasing public regarding them.

The testimony as to unfair competition is indeterminate, but the presumptions are against the proposition that the defendant needed to resort to any unfair methods in selling its high-priced silk stockings in competition with the complainant's low-priced cotton stock-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ings. We do not deem it necessary to decide these questions definitely at this stage of the litigation. It is enough that they are not so clearly established in the complainant's favor as to warrant the issuing of a preliminary injunction.

Order is affirmed.

C. H. VENNER CO. v. CENTRAL TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 139.

TRUSTS (§ 365*)—LACHES—SUIT BY MINORITY STOCKHOLDER.

A delay of more than 10 years by a minority stockholder before commencing suit against a reorganization committee to enforce an alleged trust in their favor *held* to constitute such laches as to debar complainant from equitable relief, there being no evidence of fraud.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the C. H. Venner Company against the Central Trust Company of New York and others. Decree for defendants, and complainant appeals. Affirmed.

J. Aspinwall Hodge, of New York City, for appellant.

Albert Rathbone, of New York City (Leland B. Garretson, Albert Rathbone, and A. H. Van Brunt, all of New York City, of counsel), for appellees.

Stetson, Jennings & Russell, of New York City (Francis L. Stetson and Geo. H. Gardiner, both of New York City, of counsel), for individual appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. We agree with Judge Hough that the record shows no evidence of intended fraud or bad faith upon the part of any of the defendants; also, that the complainant has not made out a case against either the Central Trust Company or the Morgan firms.

It will not be necessary to inquire whether the Richmond Terminal Reorganization Committee, the remaining defendant, was under an implied trust to protect the minority holders of the Georgia Company's bonds, as Judge Hough has found and the complainant contends. Conceding that this is so, any cause of action which the complainant had arose not later than 1896, and is barred as stale. We follow the analogy of the statute of limitations. Code Civ. Proc. N. Y. § 388. The committee never acted or pretended to act for the benefit of these minority holders. Its attitude was quite adverse. We discover no excuse for the delay of more than 10 years in filing the bill. If the claim had been promptly presented, the defendants composing the committee would have had the benefit of testimony of which they are now deprived by the death of two of its members. They would also have had the benefit of the testimony of other active

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

participants, who after so long a period are unable to recall the details of a transaction occurring some 13 years previously.

The decree is affirmed.

SCHMIDT v. STANDARD STEEL CAR CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 186.

WORK AND LABOR (§ 28*)—RENDITION AND ACCEPTANCE OF SERVICES—SUFFICIENCY OF PROOF.

Evidence held not to sustain the allegation of a complaint that plaintiff procured a contract for defendant for the sale of railroad cars, to recover for which service the action was brought.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 17, 55; Dec. Dig. § 28.*]

On writ of error to review a judgment of the District Court for the Southern District of New York dismissing the complaint, with costs.

See, also, 202 Fed. 1023.

William P. Maloney, of New York City, for plaintiff in error.

Strong & Cadwalader, of New York City (Francis Sims McGrath and Henry W. Taft, both of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The complaint alleges that in July, August, and September, 1904, one Bitner, at the request of the defendant, performed services for the defendant which resulted in procuring a contract for the sale by the defendant of 1,500 railroad cars to the Interstate Refrigerator Line. These services, it is alleged, were worth \$20,000, which the defendant agreed to pay to Bitner. Bitner assigned the claim to plaintiff.

The evidence, although it shows that Bitner was active in procuring certain cars to be made by the defendant, fails to show that he procured a contract for the sale of 1,500 cars to the Refrigerator Line, or that the Car Company or Pease, who had a contract with the Car Company for the delivery of the cars, employed Bitner to procure such a contract. The complaint is specific as to the terms of the contract. It states, in brief, that Bitner, at the request of the Steel Car Company, procured a contract by which the Car Company agreed to sell 1,500 cars to the Refrigerator Line. Unless the proof shows such a contract, the plaintiff cannot recover. It matters not what else it shows. The testimony falls far short of establishing such a contract. There is no doubt that the defendant desired to sell all the cars possible, and would, if Pease performed his agreement with it, carry out any agreement which he might make; but this does not establish a cause of action against the defendant. In short, the testimony does not prove the contract alleged in the complaint.

The judgment is affirmed, with costs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

EDENBORN v. SIM.

(Circuit Court of Appeals, Second Circuit. April 8, 1913.)

No. 264.

APPEAL AND ERROR (§ 655*)—RECORD—MOTION TO STRIKE.

Where, on a writ of error to review a judgment entered on a referee's report, the record was voluminous and had already been printed, a motion to strike out parts of it would not be granted prior to the hearing on the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2823-2825; Dec. Dig. § 655.*]

In Error to the District Court of the United States for the Eastern District of New York.

Action between William Edenborn and James Sim. From a judgment in favor of the latter, entered on report of a referee, the former brings error. On motion to strike parts of the record. Denied.

Arleigh Pelham, of New York City, for plaintiff in error.

T. B. Strong, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. This voluminous record has already been printed, and it may require very careful scrutiny to determine just what parts of it are not properly before us. For this reason it seems wiser to deny the present motion to strike out parts of it. The questions presented may be disposed of on the main argument.

In making this disposition of the motion, we are not to be understood as intimating any departure from the well-settled practice, announced in decisions of the Supreme Court and of this court, as to what questions are open to review on writ of error from a judgment entered after a hearing before a referee.

DUNCAN et al. v. STOCKHAM et al.

(Circuit Court of Appeals, Seventh Circuit. October 31, 1912. Rehearing Denied March 11, 1913.)

No. 1,896.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—COAL WASHER.

The Stewart patent, No. 657,184, for a coal washer, was not anticipated, and, while not of broad scope, discloses novelty and invention; also *held* infringed.

2. PATENTS (§ 177*)—CONSTRUCTION—IMPLIED MEANS.

A claim of a patent for a combination is to be interpreted to include such connections and relations of the several means of the combination which are named as implied therewith to make them operative in conformity with the specification.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 253, 254; Dec. Dig. § 177.*]

Appeal from the District Court of the United States for the Southern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by William H. Stockham and the Roberts & Schafer Company against James Duncan, George D. Duncan, and William M. Duncan, copartners doing business as the Duncan Foundry & Machine Works, the American Coal Washer Company, James Duncan, and the Lumaghi Coal Washing Company. Decree for complainants, and defendants appeal. Affirmed.

The appellants are defendants in a bill filed by the appellees charging infringement of letters patent, and this appeal is from a decree entered against them as infringers, on final hearing of the issues. The patent in suit is No. 657,184, for a "coal washer," issued to E. A. Stewart September 4, 1900. Its specification and single claim of invention read as follows, after the introductory statement:

"Figure 1 is a side elevation of the coal washer. Figure 2 is a plan view of the coal washer. Figure 3 is a section on line 3 3 of Fig. 1. My machine consists of a framework *A*, which supports the mechanism of the jig, and in which are inclosed tanks *B*, *C*, *D*, and *E*. The bottom of the chamber *C* below the jig box *H* inclines to cause said tank to terminate in a pocket *F*, in which is the bottom or boot of a bucket elevator *G*. The jig *H* is a boxlike structure having a perforated bottom and which reciprocates vertically in suitable guideways *I*. The perforated bottom *J* is inclined from rear to front and is made of perforated metal. At the front of the jig *H* is an opening *K* for the discharge of the washed coal and water, formed by omitting the upper part of the front end wall of the jig *H*. The front end wall below the opening *K* is inclined rearward and downward to the bottom of the jig and terminates in an opening *L* for the discharge of the impurities separated from the coal. The coal is fed into the jig at its rear. The jig *H* is given a vertically reciprocating motion by means of eccentrics *M*, secured on shafts *N*, mounted in bearings on frame *A*. A lateral space is left above the pocket *F*, in which is mounted a perforated bucket elevator *G* to remove the slate. There is a partition which separates the space occupied by perforated elevator *G* from tank *C*, there being merely an opening large enough to allow the impurities to pass from the inclined bottom of tank *C* to the boot *F* of perforated elevator *G*. The jig discharges the clean coal into tank *D*, from which it is elevated by a perforated bucket elevator *O*. The surplus water in tank *D* overflows into tank *E*, from which it is pumped by the centrifugal pump *P* into tank *B*, thus keeping up a constant circulation of water. Between the tanks *B* and *C* is an opening *Q*, which is provided with a valve *R*, which opens when the jig *H* rises and closes when the jig *H* is forced down. Attached to the inside of the tank *C* are metallic plates *S*, and attached to the outside of jig *H* are metallic plates *T*. The size of the inside of the metallic plates *S* is the same as the outside plates *T* on the jig, forming a sliding joint.

"The operation of my washer is as follows: The unwashed screenings are discharged into the jig, and a vertical movement of reciprocation is given the jig by the mechanism provided for that purpose. When the jig *H* is raised, it sucks the water through the opening *Q* from tank *B* to tank *C*. When the jig is forced down, it closes the valve *R*, forcing the water up through the material in the jig *H*. This causes the material in the jig *H* to be suspended a short time in the water during the downward movement of the jig, so as to give the heavier portions an opportunity by the rapid subsidence to arrange themselves as the lower strata, while the lighter portions form the upper strata. When the material reaches the height of the lower edge of the discharge opening, the clean coal, which is uppermost, will pass through and fall upon the chute into the tank *D*, while at the same time there is a constant discharge of impurities through the opening at the bottom of the jig, said impurities falling along the inclined bottom of tank *C* into the pocket *F*, whence they are removed by the bucket elevator.

"Having thus described my invention, what I desire to secure by letters patent is: The combination in a coal washer of a vertically reciprocating jig *H*, provided with a perforated bottom *J*, metallic sliding joints *S* *T* on

its sides, water tank *C*, with inclined bottom, perforated bucket elevator *G*, tank *D*, elevator *O*, tank *E*, centrifugal pump *P*, tank *B*, opening *Q* between tanks *B* and *C*, valve *R* to close opening *Q*, substantially as described."

And the drawings are as follows:

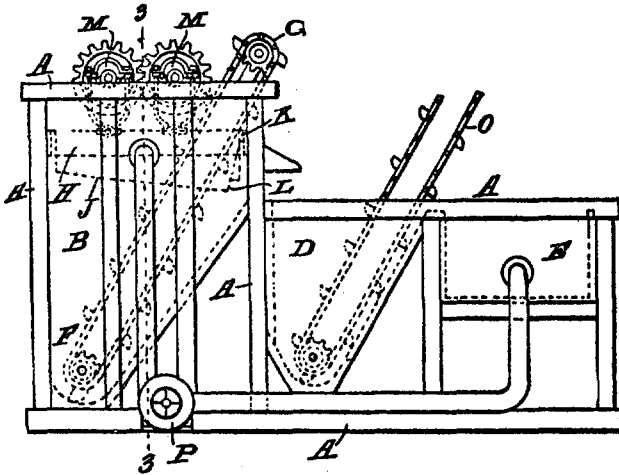


Fig. 1

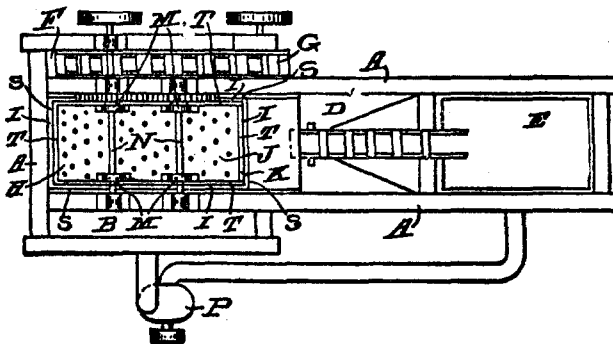


Fig. 2

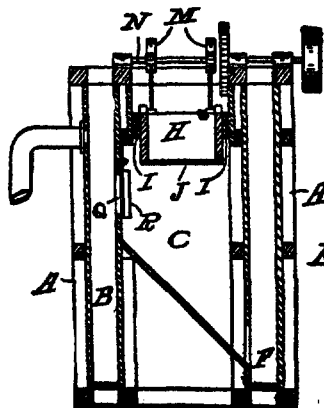


Fig. 3.

Howard G. Cook, of St. Louis, Mo., and Thomas A. Banning, of Chicago, Ill., for appellants.

Parker & Carter, of Chicago, Ill. (Francis W. Parker and Donald M. Carter, both of Chicago, Ill., of counsel), for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The Stewart patent (No. 657,184) in suit is for "an improvement in coal washers," and its means, operation, and objects are well described in the specifications. This appeal is brought for reversal of a decree which upholds the validity of the patent and grants relief against the appellants, as infringers of its single claim of invention, reading as follows:

"The combination in a coal washer of a vertically reciprocating jig *H*, provided with a perforated bottom *J*, metallic sliding joints *S T* on its sides, water tank *C*, with inclined bottom, perforated bucket elevator *G*, tank *D*, elevator *O*, tank *E*, centrifugal pump *P*, tank *B*, opening *Q* between tanks *B* and *C*, valve *R* to close opening *Q*, substantially as described."

The purpose of the structure thus claimed as an improved means is to receive from the dump the product of the mine, in mingled coal and slate, wash and separate the coal from the slate, and deliver the coal through such process in marketable condition. As aptly described in the brief for appellees, the operation is as follows:

"The unwashed and mingled coal and slate enters through the trough at the left and falls into the water in jig *H* at the left side. It moves across the jig because of its inclined bottom, the introduction of the material at the left and its escape at the right, and the flow of water upwardly and to the right through the jig. The washed coal and water escape at the right from the top of the jig and have a free fall into the washed coal tank *D*, and the slate falls through the opening in the bottom of the tank at the right and down into the small hole leading to the refuse elevator *G* in the tank, which is placed alongside of the jig tank *C*. When the jig rises the slate sections act as valves to close the perforations in the bottom of the jig, and then the jig lifts its contents and draws in water through the circulating system from the pump tank *E* and through the valve *R*, while at the same time a portion of the water so lifted flows with washed coal out into the tank *B*. The moment the jig begins to descend, the valve *R* is closed, and the hole between the tanks being full of slate and refuse, the water is confined in the closed jig tank, but is free to move upwardly through the jig and laterally to the right, whereupon a further quantity of water with washed coal moves toward the right through the jig and falls into the tank *D*, while the slate moves toward the right and falls into the bottom part of the tank *C*. Thus the discharge action of the device is continuous. A lively bed of material, which is the condition for successful separation, is maintained by this intermittent upward rush of the whole body of water through the perforations, and by this continuous lateral movement of water and coal and refuse toward the right."

Defenses are set up, challenging the validity of the patent and asserting noninfringement of the invention claimed. We believe infringement plainly appears, if the patent is sustainable, and that the slight variations in structure relied upon for denial thereof do not merit discussion. The contentions of error in upholding the patent claim of invention are: (a) That anticipations appear in prior publications and patents; (b) that the means "lack novelty in view of the

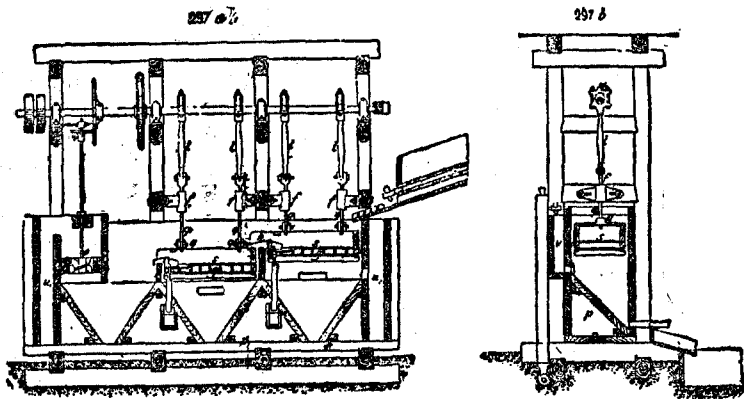
prior art"; and (c) that the structure is a mere aggregation of prior means. Whether one or more of these propositions is supported by the evidence presents the inquiry upon which the merits of the controversy must be determined.

[1] The record exhibits numerous earlier patents for coal washers or separators and ore jiggers—commencing with Bradford's patent No. 143,219, issued in 1873—all showing use of jigs or "jumping jigs," in combination with water tanks and various other means, for like general purpose or analogous uses, and they establish the fact—conceded, as well, on behalf of the appellees and so referred to in the specifications of the patent in suit—that Stewart's device was a mere improvement of such general means of the prior art for the so-called "coal washer." The fact of improvement over these prior devices in operation and results is well established. Its combination or assemblage of means for the purposes of the structure is not disclosed in any one of these prior patents; and we do not understand the argument of counsel for appellants to predicate the defense of anticipation on one or another of such references, in the extended review thereof submitted in their briefs and in the testimony, beyond their undoubted effect to narrow the field of invention which was open to the patentee, Stewart, for his claim in suit. We believe, therefore, that review of these various patents is not needful for discussion of any of the issues raised to defeat the patent, under the limited scope of invention involved herein.

The crucial inquiry of patentability, however, arises out of an important publication of a German text-book, bearing date in 1870. It is referred to in the record as "Rittinger's publication," pleaded and introduced in evidence as an anticipation of the Stewart patent, and the information there published requires careful analysis for solution of issues which are thereby raised. The text-book and supplements are entitled (as translated) "Of the Science of Preparation of Ores," bearing date in 1870 and 1873 and printed in the German language. The publications in evidence are well authenticated as German copies of the work which have been on the shelves of the St. Louis Public Library "continuously since September 2, 1889," and they are of undoubted force as publications open to the public long prior to the date of the invention claimed by Stewart, so that, in so far as they describe with precision a complete and operative means for like purpose, the law applicable to patents charges the patentee with notice thereof, as of the prior art. 1 Robinson on Patents, § VIII.

Rittinger's treatise contains descriptions of methods and drawings of apparatus for treatment of ores, and translations of excerpts from the text are introduced in the record as pertinent citations, together with the drawings referred to, which appear as "plates" in an accompanying atlas. The text relates only to "a fine material (grain) jig machine," for use of water for separation of grains of ore from sand or like refuse—obviously applicable as means for separating gold or precious metals, in placer mining—and neither text nor drawings purport to deal with coal washing, or with problems involved therein for separation of the coarse mineral from slate or other substance

heavier than the mineral. But certain of the drawings and brief descriptive matter are relied upon as anticipations; and the drawings referred to are as follows:



The contentions of the appellants as to the means thus provided and pointed out are stated in their brief as follows:

"Briefly, this Rittinger device consists of a framework supporting a series of tanks, and ore and water-handling mechanism to provide for a compact and unitary structure. At one end of the framework, a jig tank is mounted, in the upper end of which a jig is arranged for vertical reciprocation by means of suitable connecting rods depending from eccentric straps mounted on a shaft driven by a motor. The jig has a perforated bottom plate, which has a lowered portion toward the discharge side of the jig and an opening at this side for the escape of some of the heavy material, containing bits of ore, into a chute, where this material is deposited in a trough, from whence it is to be removed, presumably, by a manual operation. The perforations in the bottom of the jig allow the heavier fine material to sift through and accumulate in the bottom of the jig tank, which tank has an inclined or hoppers bottom, which directs said material to an opening at the bottom of one of its side walls, in which opening is fitted a pipe, closed at the outer end by a plug adapted to be intermittently removed, manually, for the escape of collected fine material, and a part of the water, from the jig tank, into a trough provided for its reception, and from which trough it is removed at intervals, presumably, by a manual operation. A gasket, or leather angle strip, is secured to the lower side of the jig to prevent the escape of water between the sides of the jig and the sides of the jig tank, when the jig is reciprocated. This Rittinger publication shows two jigs in tandem; but in coal washers, as testified to by defendants' witness, Calvin M. Woodward, the jigs are not used in series, but any number of jigs may be used side by side, operating with a common outfit of tanks, elevators, etc. Water is primarily supplied by filling the tanks, after which the jig tank gets its supply from a supply tank located at one end, and from a fresh water supply tank located at one side, of the jig tank, both of which water supply tanks communicate with the jig tank through openings in the partition walls beneath the jig, which openings are covered by simple flap valves hung within the jig tank. These tanks are referred to in the Rittinger translation by Mr. Garrels as 'sluices.' An overflow or ore and water-receiving tank is mounted adjoining the second jig tank immediate the discharge side of said jig. This tank is provided with a hoppers bottom for directing the accumulating material to an opening in the side wall, which opening is closed

by a plug or faucet; this material being withdrawn at intervals by removing this plug, or opening the faucet—a manual operation. This overflow tank has a vertical partition descending from the top of the framework to a point below the water level to provide a separate water pump compartment in which a water screw is disposed for lifting the cleared water over a partition to a water-receiving box, or sluice, which connects with the water supply tank located at one end of the jig tank through a connecting sluice at the bottom of the framework and beneath, at one side, of the jig and overflow tanks. A centrifugal pump may be substituted for the water screw."

This Rittinger device, therefore, alike with the Stewart patent, presents a combination for an ore washer employing these well-known means: "Vertically reciprocating jig," having a "perforated bottom"; water or jig tank with inclined bottom; pump for operating the water; and various old connecting means, including an opening between the water supply chamber and jig tank, covered by a simple valve. Although it is both obvious and conceded that Rittinger dealt with a different problem, in the character of the material to be separated, and that without entire reorganization and change of structure his device could not be made operative for a practical coal washer, the contention in respect thereof is thus summarized in the reply brief submitted on behalf of the appellants: That the foregoing drawings of Rittinger disclose "every element and the combination of all the elements enumerated in the Stewart claim, when supplemented by such obvious mechanical expedients as were known to the art, and as can be supplied * * * by mere mechanical knowledge and skill and without the exercise of invention." We believe the first two issues raised of (a) anticipation and (b) want of novelty, if not the remaining issue (c) of aggregation, rest on the tenability of the above proposition.

In support of this contention the argument proceeds to analyze the single Stewart claim into its assumed elements, under the terms therein used, reading each in the literal general sense of the term named, without reference to certain features "substantially as described" in the specifications, which show the connection in which the element is used and are plainly needful for operativeness in the combination. Upon these premises, the assumed elements of the Rittinger device are compared therewith, element for element, with deduction (as above mentioned) that Rittinger shows each and every element of the Stewart device, in like combination, excepting the two elevator provisions of Stewart, named in the claim as "perforated bucket elevator G" and "elevator O"; and in respect of these provisions the above assertion is made as "obvious mechanical expedients," not involving "the exercise of invention." We believe, however, that neither theory thus advanced for defeat of the patent can be upheld to that end.

On reference to the elevator means of Stewart and their purpose in his combination, if it be assumed that other elements of the claim are rightly interpreted by counsel for the appellants, we are not satisfied that their introduction, in connection with the conceded and obvious reorganization of Rittinger's disclosures, for means for a coal washer, may not have patentable force as a new combination. With Rittinger's

drawings and descriptions presumptively known to the patentee, applicable alone to the separation of fine materials—such as particles of gold and the lighter silt or sand to be treated—invention may well be open, as we believe, for solution of the problem then presented to Stewart for improved means for a coal washer. Although Rittinger's publication may be presumed to furnish aid for solution, can it be accepted as solving Stewart's quest?

"Water tank *C* with inclined bottom" of the patent claim is alleged to be completely met by the "jig tank" shown in Rittinger's foregoing drawing, Fig. 297b, and it is true that striking similarities appear in their drawings respectively. In their relations to the entire means, however, they differ materially in operation and function. The incline bottom of Rittinger's tank receives the deposit of gold cleared by the washing process—as the heavier substance and the sole product of value—and it remains there covered by the water in the tank until removed by the operator. For the purpose of such removal the drawing indicates a small opening (hole or pipe) in the wall of the tank at the foot of the incline, closed by a plug, so that both deposit and water must escape whenever the plug is manually taken out, either at the close of operations, or for clearance of the tank meanwhile. On the other hand, Stewart provides for the washed coal to escape laterally at the side of the jig, with the flow of water sent upwardly through the jig, making a continuous discharge of coal and water into tank *D*; and elevator *O*, provided in tank *D*, automatically conveys the washed coal to its pile, while the water overflows into pump tank *E* and is returned through the circulating system for re-use in washing. The slate (and other refuse), as the heavier material of the "lively bed" of coal and slate in the jig, discharges therefrom below the coal and water discharge, to the inclined bottom of tank *C*, where a constant escape is provided by an opening into boot *F* of the elevator, and perforated elevator *G* automatically carries off the refuse thus deposited in tank *C*. This opening for escape of the slate is well differentiated from the above-mentioned hole and plug of Rittinger's device in this important feature: It intends and permits discharge of refuse through the opening, while the deposit is sufficient to close the opening against any considerable escape of water from the tank, when such escape would otherwise interfere with the circulating system of water above referred to. It is true, as stated in the argument of counsel, that "use of such bucket elevators for the removal of any desired material was an old expedient in the art"; but it is elementary, as well, that such fact is not controlling when the old means is introduced to make a new combination of elements, and that the test of invention is whether elements so united co-operate in a new way for the improved result. We are impressed with novelty in the above-mentioned conceptions of the patentee, as departures from prior devices, in securing automatic separation and conveyance of the coal and slate, together with constant automatic operation throughout the work and both conservation and circulation of the large water supply required for the operations. That the elevators respectively co-operate with all the other elements of the structure—do not serve as mere aggregations

for double use, as contended—we believe clearly appears from the foregoing references to their operation in connection with their intermediate co-operating means. From reception of mixed coal and slate at the jig all provisions of the structure are made co-operative in complete separation of the coal from the refuse.

We are of opinion, furthermore, that the elements of the patent claim are insufficiently stated in the above-mentioned contention of counsel, by way of showing anticipation thereof by Rittinger. While the invention (as before stated) is of narrow scope, it is well exemplified in the specifications and drawings, if not well expressed in the claim, and departures from Rittinger's disclosure plainly appear in these material features: (1) "Vertically reciprocating jig *H*" is provided with perforated bottom *J*, inclined to aid the discharge, together with two discharge openings at the side, one above (marked *K*) for discharging the coal and water (after the "jigging" process) into tank *D*, and the other below (marked *I*) for dropping the slate to the bottom of the jig tank. These provisions are integral parts of the jig, essential to its operation as specified, and no like provisions appear in form or function of Rittinger's jig. Both discharge openings must be treated as included in the claim of the jig "substantially as described." (2) In respect of tank *C* of the patent, the opening provided at the foot of the inclined bottom (as heretofore mentioned) for constant passage of the slate to the elevator connection, while the water is retained in the tank for circulation, differentiates this tank from that of Rittinger in means and function. (3) The structures and arrangement of tanks *B* and *C*, with the opening *Q* and valve *R* between them, are adjusted to provide a function through the operation of the jig, which neither appears nor is attainable in the form of the Rittinger means. Thus, with the various connections shown in specifications and drawings, not only are all means made co-operative for the process of separation, but the desirable system of water circulation plainly appears, constituting an important feature of the invention, not suggested by Rittinger. The objection urged on the part of the appellant, that this system of circulation "is not enumerated in the claim" of invention, is without force, as we believe, for the reason that all means therefor are well pointed out in specifications and drawings, and it is well settled that invention is to be claimed for the means united for the object sought, and not for their respective functions.

[2] The claim in suit does not name all the various means shown in the specifications and drawings for connection of the means or elements named therein to make them operative in the combination; but we believe the claim is, nevertheless, sufficient for enforcement, on reference to the specifications. It is to be interpreted to include such connections and relations of the several means of the combination which are named, as implied therewith to make them operative, in conformity with the specifications. *Consolidated Roller Mill Co. v. Walker*, 138 U. S. 124, 133, 11 Sup. Ct. 292, 34 L. Ed. 920; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 558, 18 Sup. Ct. 707, 42 L. Ed. 1136; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 432, 22 Sup. Ct. 698, 46 L. Ed. 968; *American Fibre-*

Chamois Co. v. Buckskin-Fibre Co., 72 Fed. 508, 515, 18 C. C. A. 662; Thompson-Houston Elec. Co. v. Black River Trac. Co., 135 Fed. 759, 765, 68 C. C. A. 461.

Other contentions, founded on the rulings of the Patent Office in the course of the application for the patent in suit, do not impress us to require discussion, and we are of opinion that the appellants are rightly charged for infringement of the patent.

The decree of the District Court accordingly is affirmed.

FISHEL NESSLER CO. v. FISHEL & CO. et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 209.

1. PATENTS (§ 129*)—SUIT FOR INFRINGEMENT—ESTOPPEL TO DENY VALIDITY.

A patentee, who assigns the patent to himself and another, as partners, is estopped to deny its validity, when sued for infringement by an assignee of his partner's interest, whether such assignment was voluntary, or through a trustee in bankruptcy.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½-186; Dec. Dig. § 129.*]

2. PATENTS (§ 328*)—INFRINGEMENT—DESIGN FOR CLASP PIN.

The Fishel design patent, No. 37,055, for a design for a clasp pin, *held* not infringed.

3. PATENTS (§ 328*)—INFRINGEMENT—JEWEL BAR.

The Fishel patent, No. 884,979, for a jewel bar, *held* infringed.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York. The suit was brought upon four patents; the District Court held that two of them were valid, against defendants, and had been infringed. The appeal brings up these two patents only for consideration. One of them is design patent No. 37,055, for a clasp pin, issued July 26, 1904, to "Henry W. Fishel of New York, assignor to himself and Theodore H. Fishel of New York." The other is United States patent No. 884,979, for a jewel bar, issued April 14, 1908, to "Henry W. Fishel of New York, assignor to himself and Theodore H. Fishel of New York, copartners trading as Fishel, Nessler & Co. of New York."

See, also, 200 Fed. 1023, 118 C. C. A. 665; 203 Fed. 1022.

H. D. Williams, of New York City, for appellants.

L. F. Dittenhoefer, of New York City, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The firm Fishel, Nessler & Co. was composed of the patentee, Henry W. Fishel, and Theodore H. Fishel. This firm and the individual members thereof went into bankruptcy and all their property passed to their trustee. The latter sold these two patents in due course to one Swartz. Subsequently the complain-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant company (Fishel Nessler Company) was incorporated and Swartz thereupon sold and assigned these patents to it; Theodore H. Fishel is its president and general manager. The defendant Fishel & Co. is a corporation, composed of the wife and a son of Henry W. Fishel and one other person. Henry W. is not a director or stockholder, but is the general office man and apparently is carrying on his former occupation through this corporation. It is conceded that it is practically his concern.

At the trial the court directed that the testimony offered by defendants be limited to the issue of infringement "upon the ground that the defendants were estopped from denying the validity of the patents." The court did not write any opinion and the defendant appellants apparently assume that it held that the estoppel was created by the bankruptcy sale, in favor of Swartz the purchaser and of his subsequent assignees. It is a familiar principle that a patentee who transfers his patent to some one else cannot thereafter, when sued by such transferee for infringement, assert that the patent is invalid, and the main argument in the case is directed to the question whether this principle will apply when the transfer is not a voluntary one; certainly the bankruptcy sale was not the voluntary act of the owner of the patent.

[1] We do not think it necessary to examine this question. The patentee was Henry W. Fishel. Voluntarily and long before bankruptcy he assigned to himself and Theodore H. Fishel. Whatever rights Theodore had would pass to the person to whom he might assign them, and for the mere purpose of transferring those rights such assignment would be effective, whether it was voluntary or involuntary. Theodore's rights in the patents have passed, through the bankruptcy sale to Swartz, to complainant, and the original assignor of the patents to Theodore is estopped to assert as against the present holder that the patents themselves are invalid.

[2] Two exhibits are produced, which were concededly made and sold by defendants. They are known as the "Altman Pin" and the "Boston Pin." The witness for complainant says they are identical in appearance with pins manufactured by complainant. If they are, that circumstance is immaterial. He also says that they are identical in appearance with the design covered by the design patent. That patent contains no description of the design; what it is can be ascertained only from the drawings. Comparing these two exhibits with the two drawings of the patent, it is apparent that the "Boston Pin" is markedly unlike the drawings and that the "Altman Pin" has noticeable points of difference, which in our opinion would preclude its being included within the claim of the patent. Infringement of this patent is not shown.

[3] If the only evidence as to infringement of patent 884,979 were that of Theodore H. Fishel, we should not be inclined to find it persuasive, in view of the extraordinary testimony he gave as to the Boston pin being identical in appearance with the drawing of the design patent. But the witness Handwerger identified, by his private workman's mark, a horseshoe pin which he made while in the employ

of defendant corporation, and testified that the setting was precisely that described and claimed in patent 884,979.

The decree is reversed, without costs of this court, and cause remanded, with instructions to decree in favor of defendants on design patent No. 37,055, and in favor of complainant on patent No. 884,979, without costs to either side.

HILDRETH v. LAUER & SUTER CO.

(District Court, D. Maryland. May 5, 1913.)

PATENTS (§ 328*)—VALIDITY—CANDY-PULLING MACHINE.

The Hildreth patent, No. 832,384, for a candy-pulling machine, claim 4, is void, as broader than the invention, being in effect for any means of accomplishing a particular result.

In Equity. Suit by Herbert L. Hildreth against the Lauer & Suter Company. On final hearing. Decree for defendant.

William A. Macleod and George P. Dike, both of Boston, Mass., for complainant.

Richard B. Tippet and E. Walton Brewington, both of Baltimore, Md., for defendant.

ROSE, District Judge. The defendant is a manufacturer of candy. It owns and uses a candy-pulling machine. Plaintiff says that such machine infringes claim 4 of his letters patent No. 832,384, October 2, 1906. That claim is for:

"A candy-pulling machine comprising means for supporting the candy against gravity, means for pulling the candy, and means for producing a relative in-and-out motion of said supporting and pulling means."

Construed literally, this claim covers every candy-pulling machine in which the candy is pulled while supported against gravity, and in which there is a relative in-and-out motion of the supporting and pulling parts of the machine.

In defendant's machine the candy is supported against gravity, but defendant says there is no relative in-and-out motion of the supporting and the pulling members, because the supporting member is stationary, and therefore does not move at all. Dictionary definitions are cited. From these it is argued that there can be no relative in-and-out motion, except among things all of which move. Into such discussion it is not necessary to go. The specifications of the patent in suit make plain the sense in which the words "relative in-and-out motion" are there used. The patent says:

"The relative in-and-out motion of the candy-puller and the candy-hooks may be realized by moving either the candy-puller or the candy-hooks, or both, and the mechanical devices by which this relative motion is accomplished are not essential to the invention."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Such use is not peculiar to the plaintiff, Hildreth. In the machine of the prior Dickinson patent, No. 831,501, a specified relative in-and-out motion is made an essential element. It is, nevertheless, therein pointed out that some of the parts may be stationary and some movable, or all movable, without affecting the operation of the device. The construction which defendant seeks to put upon the claim in suit is therefore too narrow.

In defendant's device are to be found means for supporting the candy against gravity, means for pulling the candy, and means for producing a relative in-and-out motion of the supporting and pulling means. In short, the fourth claim of the plaintiff's patent may be read upon defendant's construction. If the former is valid, the latter infringes.

Defendant says that the patent in suit, and particularly the claim in question, is invalid. For this conclusion it assigns various reasons. It says that complainant's device was anticipated by a machine represented on page 125 of the Engineer's Sketch Book, second edition, 1890. The construction there shown was intended for mixing or incorporating. To fit it to pull candy, some changes and adaptations of it are required. It can be so modified that it will pull candy with greater or less efficiency; but nobody who had not already found out how candy could be pulled by machinery would know how to alter the machine in the Engineer's Sketch Book in order to turn it into a candy-puller.

A skilled machinist would doubtless be able to do the mechanical work of building outright any machine, if he knew in advance precisely what kind of machine it was to be. Instead of making an altogether new machine, it might sometimes be cheaper and quicker to alter an old one. Before he could make such changes, he would have to know how he wanted the machine to work. So far as I can see, there was nothing in the Engineer's Sketch Book which would have told anybody how candy could be pulled by machinery, unless he already knew it.

For nine years after that publication was on the market nobody did find out how to make a machine which would pull candy. In the language of the Supreme Court:

"This very fact is evidence that the man who discovered the possibility of [its] adaptation to this new use was gifted with the prescience of an inventor." *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586.

For very much the same reasons it is unnecessary in this connection to consider any of the prior patents cited by the defendant, with the single exception of No. 831,501, granted Dickinson September 18, 1906.

Candy-pulling is an old industry. To pull by hand is hard. To do it well and on a commercial scale requires a good deal of manual strength, as well as some dexterity. If machinery is not used, the candy must be much handled. Many who eat candy would prefer that other's people's hands should be kept off of it as much as possible. In this country in recent years the consumption of candy, and, indeed,

of almost all food products of which sugar is a large constituent element has greatly increased.

For some reason about 1899 a number of inventors in different parts of the country busied themselves to find out a way of pulling candy by machinery. They appear to have had no means of learning what the others were doing; but, as frequently happens, they all about the same time found out what was the essential principle upon which an effective candy-pulling machine must work. The practical embodiment of this principle took different forms in different minds. Some of the machines were doubtless much better fitted to the conditions of actual use than others. Quite a number of these inventors made applications for patents. Interferences were declared among them. In the end priority was adjudged to one Dickinson, and the patent, No. 831,501, already mentioned, was issued to him September 18, 1906.

The Dickinson machine, like all the others, pulls the candy by giving a relative in-and-out motion to a plurality of pins. Dickinson uses three, one of which is stationary. He says, in effect, that their number is not important, as he speaks of them as a series of pins or hooks. He adds:

"I have also illustrated and described a stationary hook or pin and two traveling shifting pins; but I do not wish to be understood as limiting my invention to such an arrangement, since my invention could be applied in a device where the candy-hook moves back and forth, and where the pins and hooks, although having a shifting action, are relatively stationary. In either case the candy is acted upon in a manner and by means of the shifting hook along a path corresponding to what I term a figure 8."

So far as this record discloses, Dickinson was thus the first to find out the principle upon which an effective candy-pulling machine must operate. In that field Dickinson is a pioneer. Yet defendant says that Hildreth's fourth claim is broader than any of the Dickinson claims. In this connection defendant points out that during the pendency of the interference proceedings Hildreth bought Dickinson's rights. When the two patents were issued, the plaintiff owned both. Defendant suggests that under such circumstances the wording of the claims may not have received that critical attention from the Patent Office officials which might otherwise have been given them. Into such speculations the courts may not enter, nor is there any reason why they should. Upon the records before them they must determine for themselves whether any particular claim in suit is valid or not. In reaching their conclusion they will give due weight to the presumption in its favor raised by its allowance by the Patent Office.

If the defendant is right in saying that the junior patent has been given the broader claim, the case is necessarily at an end. The broadest claim of the Dickinson patent is the first. It is for:

"A candy-pulling machine comprising a plurality of oppositely disposed candy hooks or supports, a candy-puller, and means for producing a specified relative in-and-out motion of these parts for the purpose set forth."

The combination claimed is made up of three elements. There is the same number in that described in the fourth claim of the Hildreth

patent. The second element in each may be taken to be the same. In the Dickinson patent it is described as a candy-puller; in the Hildreth, as means for pulling candy. While the language in which this element is described in the patent in suit has a broader sound than that employed in the Dickinson patent, they probably mean about the same thing. Anything that will pull candy is doubtless a candy-puller.

The first element of the Dickinson combination is a candy-pulling machine comprising a plurality of oppositely disposed candy-hooks or supports, and the third is means for producing a specified relative in-and-out motion of the hooks or supports and the candy-puller for the purposes set forth.

The third element of the Hildreth claim is a means of producing a relative in-and-out motion of the supporting and pulling means. As was said in comparing the second element of the two claims, the language employed in describing the third element in the Hildreth claim suggests a more wide embracing signification than that used by Dickinson. It may be said, however, that this difference is more in seeming than in reality, and that in point of fact these statements are the same in the claim of each patent.

The plaintiff says that the first element of his claim is more restricted than that of the Dickinson claim. Any candy-hooks or supports will serve for the first element of the Dickinson claim. No devices, whether they be hooks, supports, or anything else, will answer the description of the first element of the Hildreth claim, unless they are capable of supporting the candy against gravity.

Plaintiff says that his invention consists in utilizing the hooks or supports of Dickinson's combination so as to support the candy against gravity. He argues that the requirement that his hooks or supports shall serve this purpose makes his claim more limited in effect than that of the Dickinson patent, no matter how general its language may seem to be. For the purposes of this case the plaintiff's position in this matter may be assumed to be correct.

Dickinson and everybody else, of course, knew that the candy, while being pulled, had to be supported against gravity. For this purpose Dickinson supplied a trough in which his pulling machinery operated. In his patent he said:

"I have also shown in the drawings a trough for supporting the candy, but any suitable support may be used which has the capacity for supporting the candy while it is being operated upon."

Plaintiff's contribution to the art, so far as it is covered by the fourth claim of his patent, is confined to the utilization of the hooks of the Dickinson patent for the purpose of supporting the candy against gravity. This claim, giving it the construction most favorable to its validity, is for all means by which in a candy-pulling machine candy is supported against gravity and in which there is a relative in-and-out motion of the supporting and pulling means.

So construed, the defendant contends that the claim is far broader than the invention actually made by the plaintiff, and is so broad that the claim is for a function or the operation of a machine.

Plaintiff can be hardly said to be the first one to whom the idea occurred that the hooks which pull the candy might also support it. Dickinson in his patent expressly refers to his hooks as supports. They do not, however, in the Dickinson design afford any special support to the candy. The language used by him, however, strongly suggests that he thought it was possible they might be so employed. Any one who looked at a Dickinson machine would see that it was very desirable that the hooks or pins which pulled the candy should support it against gravity. Dickinson did not know how this could be done. The question in this case is not whether to find a way of doing it required the exercise of inventive genius, but whether a man who found out one way of doing it would thereby acquire an exclusive right to any and all ways.

In Hildreth's machine the candy is supported against gravity by the same means which pull it. His machine is, however, large, cumbersome, and space-consuming. It will work. It never was put to actual commercial operation on any appreciable scale until after the institution of this suit. It was then taken out of the room in which it had been stored, and again set up and put into daily use. It will pull candy. If a manufacturer has such a machine actually set up on his premises, he can use it and get fairly satisfactory results from it. Still no one who could get one of the machines that were invented only a few months after Hildreth devised his would want one of the latter.

The fourth claim of the patent in suit can be read on the alleged infringing device; but that is true simply because the wording of that claim is exceedingly broad. Both of them pull the candy on essentially the same plan as that described by Dickinson. In each of them, as in his, the candy is made to move along a path corresponding to the figure 8. They both differ from the Dickinson machine in the respect that each of them uses its pulling and holding pins to support the candy against gravity, but the way in which they give this support is quite different.

The important respects in which the machines are alike are the respects in which each are like that of Dickinson. They are about as unlike each other in the other respects as any two machines could be in which the portions of the machines which support the candy against gravity and the pulling portions have a relative in-and-out motion. That is only another way of saying that the defendant infringes only because plaintiff's claim is broad enough to cover every way of doing something which, before he did it, everybody recognized to be a desirable thing to do. He was the first to do it, but his being the first to do it gave him nothing more than a claim to the exclusive right to do it in substantially the way he did it. It did not justify him in claiming the right to shut all others out of every other way of doing it, whether suggested by his discovery or not.

It is not always easy to say when a claim is functional. It is not always necessary. A claim for a function of a machine cannot be sustained. *Westinghouse v. Boyden Power Brake Co.*, 170 U. S.

537, 18 Sup. Ct. 707, 42 L. Ed. 1136. It is hornbook law that a claim which covers more than the patentee really invented is invalid.

Plaintiff's fourth claim appears to be for any way of accomplishing a particular result. If it is, it would appear to be a claim for a function or an operation of a machine. In any event it claims very much more than the plaintiff invented. In either case it must be held invalid.

It was not alleged in argument that defendant infringed any other of the claims of the patent in suit. Some of those claims can be read upon defendant's device. So to read them, however, requires a construction of them which would invalidate them, for the same reasons which have been found fatal to the validity of the fourth.

In view of the conclusion which has been reached, it is unnecessary to consider the other defenses set up.

In an oral and unreported opinion, Judge Maxey, in the Western district of Texas, upheld the validity of the fourth, fifth, sixth, seventh, eighth, fifteenth, and sixteenth claims of the Hildreth patent. His opinion does not appear to have been taken down, or at all events has not been reported or brought to my attention. I regret that I have not had the benefit of his reasoning.

I will sign a decree dismissing the bill, at the cost of the complainant.

PRAIRIE OIL & GAS CO. v. UNITED STATES (INTERSTATE COMMERCE COMMISSION, Intervener).

(Commerce Court, March 11, 1913.)

Nos. 75-80.

1. CARRIERS (§ 25*)—INTERSTATE COMMERCE ACT—PIPE LINE AMENDMENT—CONSTRUCTION.

The amendment of section 1 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379) by Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1284), by providing that the act shall apply "to any corporation or any person or persons engaged in the transportation of oil, * * * by means of pipe lines, * * * who shall be considered and held to be common carriers within the meaning and purpose of this act," is not ambiguous, and was clearly intended to make common carriers of, and subject to the provisions of the act, all owners of interstate oil pipe lines, regardless of their previous status, and although they had never been in fact common carriers, but their lines were used solely for the transportation of their own oil in carrying on their private business.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 25;* Commerce, Cent. Dig. § 81.]

2. COMMERCE (§ 33*)—CONSTITUTIONAL LAW (§ 297*)—MINES AND MINERALS (§ 86*)—INTERSTATE COMMERCE ACT—PIPE LINE AMENDMENT—CONSTITUTIONALITY.

The purpose and effect of the amendment as applied to such a pipe line is to impose upon what was previously a strictly private business public duties as a common carrier, and to convert by force of law a corporation owner, which was before a private corporation, into a public service corporation, and compel it to devote its property to a public use without its consent. In so providing Congress exceeded even the broad powers conferred upon it by the commerce clause of the Constitution, and the amendment as applied to such owners is void, as depriving them of their property without due process of law, by depriving them of its beneficial use and enjoyment.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33;* Constitutional Law, Cent. Dig. §§ 832-834; Dec. Dig. § 297;* Mines and Minerals, Cent. Dig. §§ 216-221; Dec. Dig. § 86.*]

3. COMMERCE (§ 33*)—CONSTITUTIONAL LAW (§ 297*)—MONOPOLIES (§ 16*)—INTERSTATE COMMERCE ACT—PIPE LINE AMENDMENT—CONSTITUTIONALITY.

Such amendment cannot be upheld as imposing, as a condition to the right of owners of pipe lines to transport their own oil from one state into another, that they become common carriers and transport oil for the public, such right being inherent, and not derived from legislation; nor as a valid regulation to prevent monopoly, since the transportation by a private owner of his own oil from the fields of production to refineries or distributing points has no natural tendency to create a monopoly.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33;* Constitutional Law, Cent. Dig. §§ 832-834; Dec. Dig. § 297;* Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.*]

4. CARRIERS (§ 4*)—WHO ARE COMMON CARRIERS—PRIVATE PIPE LINES.

The fact that private pipe lines may be laid across, or in some instances along, public highways, with the consent of the local authorities, or along the right of way of interstate railroads, with the consent

of the railroad companies, does not impress upon them any obligation to become common carriers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1, 462-478; Dec. Dig. § 4.*]

5. COMMERCE (§ 1*)—REGULATION OF INTERSTATE COMMERCE—POWER OF CONGRESS.

Where Congress is without the power under the Constitution to enact and enforce a law as a regulation of interstate commerce, it cannot derive such powers from a state enactment.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

6. CARRIERS (§ 4*)—WHO ARE COMMON CARRIERS—PIPE LINE COMPANIES.

That pipe line companies building interstate lines on private rights of way were incorporated as common carriers in the states of their organization did not make them such in other states, whose statutes do not provide for the incorporation of common carrier pipe line companies, nor prevent them from selling their lines in such other states, and the purchaser had the right to acquire and use them exclusively in its private business, especially where they had never in fact been used otherwise than as private carriers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1, 462-478; Dec. Dig. § 4.*]

Mack, Judge, dissenting.

Separate petitions by the Prairie Oil & Gas Company, by the Uncle Sam Oil Company, by Robert D. Benson and others, by the Ohio Oil Company, by the Standard Oil Company, and by the Standard Oil Company of Louisiana against the United States of America; the Interstate Commerce Commission intervening in each case. On motions for preliminary injunction. Motions granted.

For opinion of the Interstate Commerce Commission, see 24 I. C. C. Rep. 1.

W. S. Fitzpatrick and J. B. F. Cates, both of Independence, Kan. (L. W. Keplinger and C. W. Trickett, both of Kansas City, Kan., on the brief), for Prairie Oil & Gas Co.

Albert L. Wilson, of Kansas City, Mo., for Uncle Sam Oil Co.

W. I. Lewis, of New York City (Arch. F. Jones and R. R. Lewis, both of Coudersport, Pa., and Clarence A. Farnum, of St. Petersburg, Fla., on the brief), for Tide Water Pipe Co., Limited.

John G. Milburn, of New York City (Frank L. Crawford and Walter F. Taylor, both of New York City, on the brief), for Ohio Oil Co.

John G. Milburn, of New York City (M. F. Elliott and Chester O. Swain, both of New York City, on the brief), for Standard Oil Co. and Standard Oil Co. of Louisiana.

Winfred T. Denison, Asst. Atty. Gen., and Blackburn Esterline, Sp. Asst. Atty. Gen. (Thurlo M. Gordon, Sp. Asst. Atty. Gen., on the brief), for the United States.

Charles W. Needham, of Washington, D. C., for Interstate Commerce Commission.

Before KNAPP, Presiding Judge, and HUNT, CARLAND, and MACK, Judges.

KNAPP, Presiding Judge. By an amendment approved June 29, 1906, which took effect 60 days thereafter, the provisions of the act to regulate commerce were extended and made to apply "*to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, * * * who shall be considered and held to be common carriers within the meaning and purpose of this act. * * **"

Subsequently, in June, 1911, the Interstate Commerce Commission on its own motion instituted a proceeding, "In the Matter of Pipe Lines," No. 4,199, to which numerous companies using pipe lines for the transportation of oil, including the several petitioners above named, were made parties respondent. The stated purpose of this inquiry was to determine whether any of the rates, regulations, or practices of the respondents, or either of them, were unreasonable or discriminatory, or otherwise in violation of the act, and to ascertain the manner and method in which their business was carried on, matters respecting which, as the order recites, complaint had been made to the Commission.

During the following months an extended investigation appears to have been conducted, which presumably disclosed, among other things, the principal facts relating to the location, extent, ownership, and activities of the various pipe lines of the respondent companies. After the taking of testimony was concluded, and in the order or notice fixing May 10, 1912, as the date for final hearing, certain questions of law were propounded by the Commission, and it is assumed that these questions were discussed when the matter was argued and submitted. Afterwards, and on June 3, 1912, the Commission made and filed its report of the proceeding, as required by law, and thereupon entered an order in and by which 13 of the respondents therein specified, including the above-named petitioners, were notified and required "to file with this Commission, on or before the 1st day of September, 1912, schedules of their rates and charges for the transportation of oil, in compliance with the provisions of the act to regulate commerce." (The effective date was subsequently postponed for a period which has not yet expired.)

Shortly thereafter the above-entitled suits were brought to set aside and annul this order, the several petitioners basing their right to such relief upon grounds which will presently be stated. The United States filed an answer to each suit, but later withdrew its answer in No. 75, the Prairie Oil & Gas Company Case, and substituted a motion to dismiss for want of equity. In No. 77 the Wellsville Refining Company intervened by leave of the court and prayed that the petition be dismissed, and in No. 78 there was a like intervention by the Cornplanter Refining Company. The Interstate Commerce Commission answered at length in each of the cases. Upon the verified petitions filed by them, respectively, and supporting affidavits the petitioners applied for injunctions pendente lite, and the cases have been argued and submitted on such applications.

Whilst each case differs from the others in various particulars, and perhaps in respects which would be important in other connections, the fundamental questions here involved are common to them all and arise out of facts which are practically undisputed. The crude or natural oil produced in the United States is found in various sections of the country, described as "fields," which are of comparatively limited area and located at considerable distances from each other. The most important of these appear to be the Appalachian field, covering parts of the states of New York, Pennsylvania, West Virginia, southeastern Ohio, Kentucky, and Tennessee; the Lima-Indiana and Illinois fields, covering parts of northwestern Ohio, Indiana, and Illinois; the mid-continent field, covering parts of the states of Kansas and Oklahoma; the Gulf field, covering parts of the states of Louisiana and Texas; the Caddo field in Louisiana and Texas; and other fields in the states of California, Colorado, Wyoming, Michigan, and Missouri. In each of these fields there are hundreds and perhaps thousands of wells from which the crude oil is obtained, and the aggregate output amounts to upward of 200,000,000 barrels per annum.

The oil in its natural state is not well suited to domestic use, and therefore requires a process of refining to prepare it for the needs of consumers. It is inferable from the record that the business of refining crude oil can be profitably conducted only on a large scale and by means of somewhat costly plants, and therefore the number of refineries is comparatively small. These refineries are located for the most part at considerable distances, and sometimes at great distances, from the fields of production, and the customary method of transporting the crude oil to the refinery is by means of pipe lines. The cost of transporting by this method is said to be not more than 25 to 35 per cent. of the cost by any other agency, and it results that practically all the crude oil produced is moved by pipe lines to the various refineries. There are many thousands of miles of pipe lines now in use, and their operations are correspondingly extensive. Some of these pipe lines, aggregating a large mileage, are admittedly subject to public regulation, because their owners are public service corporations engaged in the business of common carriers; but many of them belong to private companies, which use them only in the conduct of their private business. The private lines in most instances are owned or controlled by the refineries to which they transport crude oil and which they exclusively serve.

The construction of pipe lines, such as are owned by these petitioners, involves a large outlay of capital, and few producers of the crude article are able to provide themselves with such a facility for marketing their output. Consequently, and because the cost of railroad transportation is prohibitive, the great majority of oil producers find it to their interest to sell at the wells to the owners of pipe lines, and, as a practical matter, may have no other alternative. For this reason it comes to pass that these private pipe line companies transport not only the oil supplied by their own wells, but also the much greater amount purchased by them from other producers. In the view we take of the questions involved in this controversy, and the

grounds upon which we rest our decision, it is deemed unnecessary to describe the pipe line industry in greater detail or to add anything more in this connection than a brief statement respecting the several petitioners.

The Prairie Oil & Gas Company is a corporation organized in 1900 under the laws of the state of Kansas. It owns and operates a system of pipe lines consisting of gathering lines in the mid-continent field, in the states of Kansas and Oklahoma, a trunk line from that field to Griffith in the state of Indiana, where it connects with the Indiana pipe line, and a trunk line in the state of Arkansas, connecting the Oklahoma pipe line with the pipe line of the Standard Oil Company of Louisiana. This company has no refinery, and its business is confined to producing, purchasing, and selling crude oil, which it delivers to its customers by means of the pipe lines described. Its own wells yield only about 12,000 barrels per day, and it purchases approximately 70,000 barrels per day on the average. Its trunk lines are about 860 miles in length, of which some 300 miles are located on the right of way of the Atchison, Topeka & Santa Fé Railway Company under contract arrangement with that company.

The Uncle Sam Oil Company is a corporation organized in 1905 under the laws of the state (then territory) of Arizona. It owns and operates a pipe line from its wells in the state of Oklahoma to its refinery at Cherryvale, Kan. The extent to which this company purchases oil from other producers, if it engages in that business at all, does not appear from the record.

Robert D. Benson et al. are the members of a partnership, organized in 1878 for the term of 20 years, and reorganized in 1898 for a further term of 20 years, in compliance with the laws of the state of Pennsylvania, and doing business under the name of the Tide Water Pipe Company, Limited. This company transports oil from the Appalachian field in the western part of Pennsylvania, and also oil received through connecting lines from other fields, to the Tide Water Oil Company refinery at Bayonne, in the state of New Jersey. It also owns and operates branch lines in New York and Pennsylvania, and a line extending from Stoy, Ill., through the states of Illinois, Indiana, Ohio, and Pennsylvania. The greater part of the crude oil transported by this company is purchased from other producers. The lines which it owns and the Bayonne refinery which it serves are under common or unified control.

The Ohio Oil Company is a corporation organized in 1887 under the laws of the state of Ohio. It owns and operates pipe lines in the states of Ohio, Indiana, and Illinois, and also leases and operates a line from Negley, Ohio, to Centerbridge, in the state of Pennsylvania. It is an extensive purchaser of crude oil from other producers.

The Standard Oil Company, designated, for convenience, "Standard Oil Company of New Jersey," is a corporation organized in 1882 under the laws of the state of New Jersey, and its principal pipe lines are the following: (a) A line extending from Unionville, in the state of New York, near the boundary line of New Jersey, through the

latter state to its refineries at Bayonne; (b) a line from Centerbridge, in the state of Pennsylvania, near the boundary of New Jersey, through the latter state to its refineries at Bayonne and Bayway; and (c) a line from Fawn Grove, in the state of Pennsylvania, near the boundary of Maryland, through the latter state to its refinery at Baltimore. The record indicates that much the greater part of the oil transported through these lines, and perhaps all of it, is oil which this company has purchased.

The Standard Oil Company of Louisiana is a corporation organized in 1909 under the laws of that state. It owns and operates a refinery at Baton Rouge and a trunk line extending thereto from the town of Ida, near the northern line of Louisiana, and also gathering lines in the Caddo field, in the states of Louisiana and Texas. It purchases a considerable part of the crude oil which its lines transport.

None of the petitioning corporations is organized or derives any of its corporate powers from laws of the state of its creation under which common carrier or other public service corporations are organized, but each of them was formed and has always conducted its operations under and in compliance with state laws which relate to private as distinguished from public business. With certain alleged exceptions, which will be hereafter noticed, it is not claimed that either of the petitioners is under any statutory or legal obligation, other than the amendment in question, to perform the duties or otherwise act in the capacity of a common carrier. None of the petitioners possesses the right of eminent domain or has acquired any part of its property or rights of way by condemnation; nor has either of them received a franchise from any state, municipal, or local government, though each of them has in many instances laid its pipe lines across or along public streets and highways by permission or consent of the local authorities. None of them has ever held itself out as a common carrier or in fact carried oil for others, but each of them has carried only such oil as it produced from its own wells or purchased from other producers, and which it owned when the transportation took place. The pipe lines of petitioners are laid on private rights of way secured by purchase or lease, except that some of them for short distances, and one of them for a distance of some 300 miles, are laid upon and along the rights of way of certain railroads under some contract arrangement with such railroads. In short, so far as their legal status is fixed by the laws of the states of their creation, and so far as their acts and attitude could make them such, all the petitioners carry on a private business, at least in the sense that they transport only their own oil and have always refused to transport for others; and all of them have evidently sought and claimed to so conduct their operations as to avoid any public activity which might subject them to public regulation. Some other facts relating to certain of the petitioners will be referred to in the following discussion of the legal questions to be decided.

The petitioners rely upon two propositions:

1. That the amendment of 1906 applies only to such pipe line companies as were common carriers when the amendment was adopted,

or should thereafter become such by voluntary action, or be so declared in some judicial proceeding, and, consequently, that as to these petitioners the order in question should be set aside because they are not and never have been common carriers, and therefore are not subject to the provisions of the act or the authority of the Commission.

2. That if the amendment applies literally to all persons and corporations using pipe lines for the interstate transportation of oil, and Congress has thereby undertaken to bring within the scope of the act persons and corporations owning private pipe lines used solely for transporting their own oil in the conduct of their private business, the amendment is unconstitutional, because it deprives such persons and corporations of their property without due process of law and takes their property for public use without just compensation, and the order should be set aside for that reason.

[1] We shall not attempt to review at length the argument by which the first proposition is supported, but merely outline the reasons advanced for giving to the amendment a restricted application. Among other things it is said that the entire scope and aim of the act is the regulation of the charges and practices of common carriers; that its provisions are designed and adapted to that purpose, and are not suited to a different purpose; that the intention to bring within such a law persons and corporations carrying on a private business should not be imputed to Congress, if the amendment is reasonably susceptible of a construction in harmony with the other provisions of the regulating statute; and that the language of the amendment justifies such a construction.

In this connection it is argued that the words "engaged in transportation" are equivalent to and mean "engaged in the *business* of transportation"; that this indicates a calling or occupation which is followed for hire, implying transactions and relations between two or more persons, and does not embrace that which one does for himself and by himself alone. It would seem to follow from this interpretation, and the petitioners so contend, that the concluding phrase of the amendment, "who shall be considered and held to be common carriers within the meaning and purpose of this act," limits the preceding declaration respecting the users of pipe lines, and operates to confine the amendment to such persons and corporations as are in fact common carriers or may be adjudged to be such by a court of competent jurisdiction. Stress is also laid upon the word "transportation," which later in the first section is given a broad definition, including "all instrumentalities and facilities of shipment or carriage, * * * and all services in connection with the receipt, delivery, * * * storage, and handling of property transported," terms which are claimed to relate exclusively to the functions of common carriers and to have no application to those who transport only their own property in the conduct of their private business.

These considerations are sought to be fortified by invoking the familiar principle that where a statute permits of two constructions, one of which involves serious questions of constitutional power and right, while the other would be free from constitutional objection,

the latter should be adopted. Numerous cases illustrating and enforcing this principle are brought to our attention, of which one of the latest is the well-known "Commodities Case," *United States v. Delaware & Hudson Company*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836. Upon these authorities the contention is earnestly pressed that the amendment should be held to apply to only such pipe line companies as are or may be adjudged to be common carriers, because the broader construction upon which the government insists, and which would in effect extend the amendment without limitation or qualification to all persons and corporations engaged in the interstate transportation of oil by means of pipe lines, including those who use this means solely for transporting their own oil over their privately acquired rights of way, necessarily gives rise to "grave and doubtful constitutional questions" (213 U. S., *supra*), and perhaps to "a succession of constitutional doubts," as was suggested in the *Harriman Case*, 211 U. S. 422, 29 Sup. Ct. 119, 53 L. Ed. 253.

That the argument thus summarized is not without force may be conceded. The objection to its acceptance does not arise from any doubt concerning the rule of interpretation invoked, for that rule is well settled, but rather from the lack of any substantial basis for its application. It is only when a statute is ambiguous or obscure, or wanting in definiteness, so that its real intent and meaning are uncertain, because the language permits differing interpretations, that the rule in question may be applied. If the legislation is clearly expressed and of unmistakable import, so that there is no room for reasonable doubt as to what the lawmaking body intended to accomplish, the courts are not at liberty to frustrate or modify the legislative intention, but must accept and deal with the statute in accordance with the manifest purpose which it expresses.

To our apprehension the meaning of this amendment is not open to serious question. It is a clear and comprehensive declaration, in no respect indefinite or incomplete. The concluding phrase is not a limitation or restriction, but, on the contrary, was plainly inserted for the purpose of fixing the legal status of the persons and corporations included in precise terms in the preceding description, to the end that they should be regarded and treated as common carriers subject to the act by all officials who are or may be charged with the administration and enforcement of the regulating statute. In our judgment the amendment permits of no other or different construction, and we must therefore accept it as a plain and unambiguous measure, designed to effect a complete and definite purpose.

In support of this view we need cite only the first "Employers' Liability Cases," 207 U. S. 463, 500, 28 Sup. Ct. 141, 146 (52 L. Ed. 297). It seems evident to us that the statute then under consideration was not clearer or plainer than is the amendment in question, nor were its terms any more comprehensive and unqualified. To uphold the constitutionality of that enactment the government stoutly contended that it should not be construed as applying to all the employes of any common carrier engaged in interstate commerce, although all were included in the language defining its scope, but should be held

to embrace only such employ  s as were, or when they were, themselves engaged in interstate commerce; and this view is reflected in the dissenting opinion of Mr. Justice Moody. But a majority of the court, speaking through Mr. Justice (now Chief Justice) White, rejected the argument in an opinion from which the following is quoted:

"So far as the face of the statute is concerned, the argument is this: That because the statute says carriers engaged in commerce between the states, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business and none other of such carriers, and that the words 'any employ  ,' as found in the statute, should be held to mean any employ   when such employ   is engaged only in interstate commerce; but this would require us to write into the statute words of limitation and restriction not found in it. * * * To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another. * * * The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional; but this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose."

So far as the debates in Congress when this amendment was pending may be resorted to for any purpose, they tend strongly to confirm the conclusion above expressed. We are convinced from an examination of what was then said, particularly in the Senate, that Congress undertook and intended by this amendment to make common carriers of and to subject to the provisions of the act as such the owners of private pipe lines, who were not common carriers, and who used their respective pipe lines, and had always used them, solely for the transportation of their own oil, in carrying on their private business; and it is equally clear that Congress enacted the amendment with full knowledge that the question of its constitutionality was involved. In short, we agree with the Commission in what is said in the following excerpts from its report in the pipe line proceeding:

"This seems to be the plain meaning of the act, that all pipe lines carrying oil from one state to another state, no matter what their previous status, should be thenceforward considered and deemed to be common carriers. And, to uphold this construction, reference may be made to the history of this provision. * * * Throughout the discussion there is abundant evidence that Congress passed this act for the purpose of subjecting all interstate pipe lines carrying oil to federal regulation, and took this action consciously, in the presence of the very constitutional question now raised as to its power."

[2] Rejecting, therefore, the first proposition above stated, and holding that the amendment in question applies to the petitioners in these cases, in common with other pipe line companies of like character and business, we come to consider the second proposition. Does this amendment, construed in accordance with the government's contention, which we uphold, exceed the constitutional power of Congress? Would its enforcement invade or take away rights secured to the petitioners by the fifth amendment?

Of the plenary power of Congress to regulate interstate commerce nothing need be said beyond giving it full and complete recognition. That this power may be exercised to the utmost extent, and acknowledges no limitations other than those prescribed in the Constitution it-

self, is established beyond question by a notable line of cases, from *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, decided in 1824, to the latest utterance of the Supreme Court upon the subject. But it is equally well established by numerous decisions that the limitations prescribed are positive and controlling. The same authority that grants the power fixes also the limits within which the exertion of that power must be confined. If, therefore, Congress passes a law which disregards those limits, as by depriving the owners of property of rights which the Constitution protects against invasion, the legislation cannot be upheld, and it becomes the duty of the courts to stay its enforcement.

As was said by Mr. Justice Brewer in *Monongahela Navigation Company v. United States*, 148 U. S. 336, 13 Sup. Ct. 630, 37 L. Ed. 463:

"But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment. * * * Congress has supreme control over the regulation of commerce; but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this fifth amendment, and can take only on payment of just compensation."

And in *Adair v. United States*, 208 U. S. 180, 28 Sup. Ct. 283, 52 L. Ed. 436, 13 Ann. Cas. 764, the Supreme Court, speaking by Mr. Justice Harlan, used the following language:

"We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1, 196 [6 L. Ed. 23]; *Lottery Case*, 188 U. S. 321, 353 [23 Sup. Ct. 321, 47 L. Ed. 492]."

In attempting to apply these basic principles to the question now presented, we are led to observe at the outset the real significance of this amendment as disclosed by the intention with which it was enacted and the purpose which it seeks to accomplish. It does not undertake to regulate the business in which these private pipe line companies are and always have been engaged. Indeed, it assumes that the legal status of such companies, under the laws of the states of their creation and tested by the nature of their activities, was that of persons pursuing a private occupation; and it attempts by a legislative declaration to make that private occupation a public calling and to impose upon those who pursue it the duties and obligations of common carriers. Before the law was enacted their business was private; by force of the law itself that business is made public. Nothing which they were then doing is subjected to regulation, but they are in effect commanded to do something else which would be of public concern; and by simply declaring them to be common carriers they are made to devote their property to public use against their will and under the regulations prescribed by the act. Thus the owner of a private pipe line which was built upon private rights of way, and which has been used solely for the transportation of his own oil, is required to open and extend its use to whomsoever may desire its enjoyment, no matter with what resulting inconvenience and injury to himself.

And this is concededly the intent and purpose of the amendment. It is not designed to regulate some public use to which private property has been voluntarily devoted, but it attempts by an act of legislation to transmute the agencies of private business into instrumentalities of public service. In aim and necessary effect it compels these private pipe line companies to relinquish the exclusive use for which their pipe lines were provided, and in which they have always been employed, and to place them at the disposal, for a compensation which public authority would have the right to determine, of all such persons as might tender oil for transportation. When the principle involved in this amendment is apprehended, when its far-reaching scope and power are perceived, does not the reflecting mind almost instinctively reject it as unsound and unjust? Is it not at variance with any reasonable conception of the rights and immunities of private property and the conditions under which it may be taken for public use? How can the conclusion be avoided that it operates and must operate to deprive the petitioners of their property without due process of law and to take that property without just compensation?

Upon principle and authority it is not to be doubted, and counsel for the government do not contend otherwise, that to effect an invasion of the rights protected by the fifth amendment it is not necessary that the actual physical possession of property should be taken. It is sufficient if the owner be deprived of its exclusive use and enjoyment. This proposition is broadly stated by the Court of Appeals of New York in *Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543, in the following language:

"What the Legislature cannot do directly it cannot do indirectly, as the Constitution guards as effectually against insidious approaches as an open and direct attack. Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment or the power of disposition at the will of the owner."

And in *Weems Steamboat Co. v. People's Co.*, 214 U. S. 345, 355, 29 Sup. Ct. 661, 663 (53 L. Ed. 1024, 16 Ann. Cas. 1222), the Supreme Court gives the principle concrete application, as follows:

"A private wharf on a navigable stream is thus held to be property which cannot be destroyed or its value impaired, and it is property the exclusive use of which the owner can only be deprived in accordance with established law, and if necessary that it or any part of it be taken for the public use due compensation must be made. The owner of a private wharf on a navigable stream does not, on that account only, hold it by a different title from the owner of any other property which he may use himself or permit others whom he may select to use, while at the same time denying its use by any one else."

And this suggests the clear distinction between the question here presented and the questions decided in a number of well-known cases.

all of kindred character, such as *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247, *Brass v. North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757, and *Cotting v. Kansas City Stock Yards*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92. Nor did the earliest of these, *Munn v. Illinois*, establish any new principle of law, but only gave effect to an old one, as the Supreme Court said in *Dow v. Biedelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. Ed. 841. Indeed, it had long been held by the courts of England, as well as the United States, that when one devotes his property to a use in which the public has an interest he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but as long as he maintains the use he must submit to the control.

But this legislation is not of that character. None of these petitioners has at any time transported oil for others, or used its pipe lines for any other purpose than the transportation of its own oil which it had produced or purchased prior to the transportation. Nor has anything been done by them which can be claimed to effect a devotion of their property to a public use or to give the public an interest in its use, since they have always refused to carry oil for the public or to permit the use of their lines except for the transportation of their own property. The effect of the amendment is to change the nature and quality of their business from private to public, by requiring them to share with others the facilities which they have provided for themselves alone and to employ those facilities in the service of the public. In our judgment, this is something essentially different from and quite beyond the power delegated to Congress to *regulate* commerce among the states; and we are persuaded that a law which in intention and result deprives the owners of private property of its exclusive enjoyment and compels the devotion of that property to public use, in the manner attempted by this amendment, involves an exercise of legislative power in plain contravention of the fifth amendment. No federal statute of like aim and import has been brought to our attention, and no authority has been cited which sustains the validity of such legislation.

Among the cases referred to in argument, aside from those before mentioned, is *Cargill v. Minnesota*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619, which is of the same class as *Brass v. North Dakota*, *supra*, and others involving various aspects of the same general question. Without reciting the facts of that case or quoting at length from the opinion, it is sufficient to say that the Supreme Court upheld a Minnesota statute which in effect required the Cargill Company to take out a license for carrying on the business *in which it had voluntarily engaged*. It is true this company had never received into its warehouse any grain except its own, but the state court held that the warehouse in question could be fairly regarded as "a sort of public market place, where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in

interest, acts as market master, weighmaster, inspector, and grader of the grain"; and this was deemed to be of sufficient public concern to justify the state in supervising *the business actually conducted*. The Minnesota law made no attempt to change the character of that business, nor did it seek to compel such concerns as the Cargill Company to store or handle grain for the public, or to otherwise act in the capacity of public warehousemen. Had such a requirement been imposed a very different question would have been presented. This is indicated in *Brass v. North Dakota*, supra, where the Supreme Court said respecting a law of that state which declared certain classes of buildings in which a warehouse business was conducted to be public warehouses:

"We do not understand this law to require the owner of the warehouse, built and used by him only to store his own grain, to receive and store the grain of others. Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of other persons for profit."

It is not necessary in these cases to consider the circumstances under which or the extent to which business activities, whether public or private, may be regulated by public authority. That is not the point in dispute. That the business of these petitioners, as it is and has been carried on, may be subjected to regulation need not be in any wise questioned. But it is one thing to exercise public control of a private business which *as such* should be placed under public supervision; it is quite another thing to require that business to be changed from private to public and compel those who are engaged in it to assume the responsibilities of a public calling.

The distinction we are here pointing out, and which seems to us controlling, is indicated in *Weems Steamboat Co. v. People's Co.*, supra. For that reason, and because of its general bearing upon the controversy in these cases, we quote from the opinion at some length as follows:

"The case of *Munn v. Illinois*, 94 U. S. 113, 127, 24 L. Ed. 77, has, in our judgment, no bearing upon the question before us. In that case and in those cited therein the discussion was in regard to the right of owners of property of the nature described to charge what they pleased for the doing of the business in which they were engaged. Their property was being used with their consent by and its use devoted to the public to any extent desired, and the only question was in regard to the compensation which they were entitled to ask for the business thus done. The complaint was that the charges were too great and were a violation of a law of the state and were not reasonable, and the answer made by the owners of the property was that it was their private property, and they had the right to charge what they pleased. The court said: 'As you have devoted your property to a use in which the public has an interest, you have granted to the public an interest in that use, and the right, on the part of the state, to regulate charges which you shall make to the end that they shall be just and reasonable.' If the owner of one of these wharves had devoted it to the public use, and permitted the public to use it as it desired, and demanded compensation for such use, the question as to the amount of such compensation might be raised as in the *Munn* class of cases, to be determined with reference to the reasonableness of the charge. But this is no such case. The Legislature has passed no law regarding rates, if that were material, and the reasonableness of the charge is not under consideration. The right to use the property has been withdrawn by the owner as to the public in general, including defend-

ant. The only question is whether a third person has the right to use a private wharf on tendering reasonable compensation therefor, because there is no other wharf at the place, or because it would be more convenient to such third person to so use it, or because the former owner of the wharf had permitted the public to use it, although the present owner refused to consent to such use. There is no more reason why such property should be held subject to the right of others to use it against the will of its owner than there is for any other kind of property to be so held."

Without referring to other authorities in this connection, we proceed to examine the particular grounds upon which the government relies to sustain the validity of this legislation.

[3] It is argued, in the first place, that the amendment should be construed as in effect prohibiting these petitioners and other private pipe line owners from transporting their own oil from one state to another by means of pipe lines, except upon condition that they transport oil for the public and become common carriers of that commodity. This appears to have been the view of the Commission, as disclosed by the following paragraph in its report:

"So far as we are informed, the Supreme Court of the United States has never been called upon to pass upon a question of this character, and while it may be conceded that Congress could not impose upon a private pipe line the duties and responsibilities of a common carrier, it is not clear but that the provisions of this act could be upheld upon the ground that Congress was establishing a condition to which any pipe line company must conform which transported oil across a state border."

Putting aside the suggestion that neither the form nor apparent intent of the amendment supports such a construction, since in terms it prohibits nothing and does not purport to establish a condition, and granting for argument's sake that it may and should receive the interpretation here claimed for it, we are led to reject the contention because it involves an erroneous assumption. It assumes that one who engages in the dealings or activities which constitute interstate commerce is not exercising an inherent right that springs from the nature and necessities of social order, but is merely enjoying a privilege which Congress can take away if it chooses or permit on such conditions as it sees fit to prescribe. But this view, so far as we are aware, has never received judicial sanction. The contrary was held in the first case involving the meaning and scope of the commerce clause which reached the Supreme Court, *Gibbons v. Ogden*, supra, when Chief Justice Marshall included the following in his oft-quoted opinion (9 Wheat. page 211, 6 L. Ed. 23):

"In pursuing this inquiry at the bar it has been said that the Constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it."

Without citing other authorities, it is sufficient to quote the forcible statement of the principle by Chief Justice White in the *Employers' Liability Cases*, supra, 207 U. S. 463, at page 502, 28 Sup. Ct. 141, at page 147 (52 L. Ed. 297):

"It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not

within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed the freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures."

In the light of these decisions, nothing further need be said in this connection in answer to the argument here considered.

In the second place it is urged, and this appears to be the ground upon which the government chiefly relies, that the amendment should be upheld as a valid regulation of interstate commerce to prevent monopoly, or, as it is said, to prevent a tendency to monopolize, and therefore any incidental injury which results must be regarded as immaterial. This position is indicated by the following paragraph in the reply brief of the learned Assistant Attorney General:

"The argument that these pipe lines are not themselves monopolies within the meaning of the Sherman Act [Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200)] is wholly irrelevant. That act applies only to concerns that are already monopolies, or are attempting (*intentionally*) to monopolize. The present act is designed to go *beyond* the Sherman Act. The Sherman Act cuts down the full-grown plant. The pipe-line amendment pulls up the roots from which it grew. It does not prohibit the private operation of these pipe lines because they *are* monopolies, but because such private ownership has proved itself to be the *source* of monopolies, because it contains an *inevitable tendency* toward monopoly."

This contention also appears to involve the assumption that the amendment prohibits these petitioners, and other companies of like character, from transporting their own oil by means of pipe lines, unless they also transport for others and become common carriers of that article. We have already endeavored to show that the legislation cannot be sustained even if this construction be accepted; but since such a construction seems to be suggested in support of the monopoly argument now considered, it may be suitable to add some observations to what has already been said. As heretofore stated, the amendment in terms applies to all persons and corporations engaged in the interstate transportation of oil by means of pipe lines, whether their business be extensive or insignificant, "who shall be considered and held to be common carriers within the meaning and purpose of this act." When this amendment was adopted in 1906 there were quite a large number of persons and corporations owning private pipe lines which they used in carrying on the business in which they were severally engaged, and the amendment operated upon all of them when it went into effect. They were thereby subjected to all the applicable provi-

sions of the act and declared to be common carriers within its meaning and purpose. The exclusive use of their pipe line properties, which they had theretofore enjoyed, was brought to an end, and those properties in effect appropriated for the use and benefit of others and required to be thereafter operated as public facilities in accordance with the provisions of the regulating statute.

The properties whose status was thus attempted to be changed had been acquired by the respective companies under the laws of the states of their creation, and without violation or evasion of any federal enactment. Each of these concerns was carrying on a legitimate business, whether producing oil in the crude state of a natural deposit, buying and selling it in that condition, or manufacturing an article better adapted to the needs of consumers by the process of refining; and the transfer of the crude oil by pipes from wells to tanks, from tanks to points where delivery was made to customers, or by refiners from points of production or purchase to their refineries, were in every sense legitimate business operations. Equipped with these valuable aids to their private pursuits, the pipe line owners all at once find themselves subject to a law which obliges them to become common carriers of oil under stringent regulations. It is idle to say that they can avoid the obligations which this amendment imposes by going out of the pipe line business. Practically speaking, they have no such election, because the discontinuance of pipe line transportation involves the virtual destruction and loss of their pipe line properties.

Nor is this alternative contemplated by the enactment. On the contrary, the only rational view of its intent and purpose assumes that these pipe lines would be kept in operation under the law which devoted them to public use. It is the "necessary or natural" effect of a statute which must be taken into account, as the Supreme Court said in *Minnesota v. Barber*, 136 U. S. 320, 10 Sup. Ct. 862, 34 L. Ed. 455; and it is beyond question that the persons and corporations brought within the reach of this amendment were not expected to abandon the pipe lines which they had constructed, but rather and beyond doubt to continue their use as public facilities under public regulation. The amendment was plainly designed to subject to public use these private pipe lines as they were then in operation and because in the nature of the case they must continue to be operated. The alternative of abandonment was not in contemplation, and there is no basis for the assumption here considered.

Can the amendment be sustained as a valid regulation to prevent monopoly or a tendency to monopoly? It is not open to doubt that Congress has power to legislate, within constitutional limits, for the prevention or suppression of monopoly; and the exercise of that power is manifested in the enactment of the potent and far-reaching anti-trust law of 1890. It is quite evident, however, and the government makes no claim to the contrary, that nothing which these petitioners are doing or have done amounts to a violation of the anti-trust law, for here there is no combination, no absorption or control of one by another, no concerted action of any sort, not even a common understanding. This being so, it must result that the amendment in

question, upon the theory now considered, is of broader scope and much more drastic character than the enactment of 1890, and that, as above stated, is the government's contention.

It will be observed that the amendment makes no mention of monopoly, and therefore does not purport on its face to be a measure for breaking up an alleged monopoly and preventing its continuance. But disregarding the absence of any declared purpose, and taking into account the circumstances under which the amendment was adopted, we may properly consider its validity upon the assumption that the real, though undisclosed, purpose was to destroy that degree of control of the oil business which is claimed to result from the private ownership of pipe lines and which is asserted to be monopolistic. The province of the courts in such an inquiry is defined in *Minnesota v. Barber*, supra, 136 U. S. 320, 10 Sup. Ct. 864, 34 L. Ed. 455, as follows:

"Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

And in *C., B. & Q. Ry. v. Drainage Com'rs*, 200 U. S. 593, 26 Sup. Ct. 350, 50 L. Ed. 596, 4 Ann. Cas. 1175, it was said:

"If the means employed have no real, substantial relation to public objects which government may legally accomplish, if they are arbitrary and unreasonable beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt."

We are therefore to determine whether there is any real and substantial relation between the assumed purpose of the amendment, which is the prevention of monopoly, and the means adopted to accomplish that result, namely, depriving petitioners of the exclusive use of their private pipe lines and requiring such lines to be operated for the benefit of the public, and whether the means so employed are arbitrary, unreasonable, and beyond the necessities of the case.

It is quite impossible for us to perceive any such relation, unless the operation of a private pipe line tends necessarily by its nature and the function it performs to produce a monopoly. The government asserts that this is the case and bases its argument upon that proposition; but neither in brief nor oral argument is there any statement of the ground or reasons upon which the assertion is predicated. Explanation is wanting of how it happens, or why it follows, or from what facts it is deduced, that the private operation of a pipe line in the private business of its owner produces, or has any tendency to produce, the conditions and results which the law denounces as a monopoly. Much is said about the debates in the Senate when the amendment was pending, and reference is made to the report of the Commissioner of Corporations submitted shortly before, which gives a full account of the investigation that Congress had previously or-

dered. But we find nothing either in the debates or the report which has any appreciable bearing upon the question now considered. The discussions in the Senate and in the report of the Commissioner deal with the conditions of unified ownership or control by the Standard Oil Company of a great portion of the pipe lines of the country, including the common carrier pipe lines, and the resulting advantage and power of that company, which were alleged to constitute an unlawful monopoly. But this comes quite short of disclosing how or why a private pipe line used solely in its owner's private business becomes of necessity, or can become while so employed, a facility which he may be forbidden to use, or the use of which he may be compelled to give to the public, because it is claimed to be a monopoly or to have a monopolistic tendency.

We are therefore unable to see that the Standard Oil Case has any application to the present controversy. That case involved the monopolization or tendency to monopoly which was alleged to result from the combined control by the Standard Oil Company of New Jersey, through its dominant ownership of the stocks of numerous companies, of the greater part of all the pipe lines of importance throughout the country, both public and private, together with numerous refineries and facilities for marketing which were potentially competitive. *Standard Oil Company v. United States*, 221 U. S. 70-77, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. The Supreme Court held that this vast combination and the methods of dealing which its power enabled it to enforce constituted a monopoly forbidden by law. But that is far from saying that private pipe lines separately owned by dealers in oil or refiners, and used by them in the private business in which each is separately engaged, are or can be a monopolistic possession. In short, there is no process of reasoning which sustains the contention that the ownership and operation of private pipe lines, such as are here involved, tends in the nature of things to or results in monopoly.

We have searched the decisions in vain for any definition of monopoly, any statement of its elements, or description of its characteristics, which would include or apply to the activities of these petitioners and similar pipe line owners. In the absence of some contract or combination between competitors, some mutual agreement or understanding which has in view or actually results in restricting competitive freedom, all of which are here wanting, it would seem that monopoly by a single individual must consist of or be effected by some acts or series of acts or continued course of dealing which operates to deprive others of privileges or opportunities which rightfully belong to them and which they would otherwise enjoy. But how does the possession of a private pipe line by one of many oil producers or dealers take from the others any privilege or opportunity which is rightfully theirs or which they are justly entitled to share with the more fortunate owner? Of what right can they be said to be deprived, or in what respect are they subjected to any injury or disability which is illegal?

True, the possession of a pipe line enables its owner to transport his oil to the refinery or other market at very small cost compared with any other means of conveyance. The practical result may be, and in most instances doubtless would be, that other producers find it to their interest to sell the output of their wells to the owner of the pipe line, and in this sense it may be said that they are obliged to sell to him. Granted that his pipe line gives him such command that he is able to control or even fix the selling price of the crude article in that particular field or territory, upon what sustainable theory can it be claimed that other producers are deprived of anything which rightfully belongs to them because they do not or cannot provide themselves with the same means of reaching the market? And upon what conception of constitutional rights can it be contended that Congress has the power to transform this private pipe line into a public facility and require its owner to become a common carrier? If this can be done, if a mere act of legislation can change the legal status of his property from private to public and compel him against his will to devote that property to public use, with all the burdens and obligations which he must thereby assume, is not the fifth amendment as to him shorn of its vitality and its protective power reduced to a shadow?

In the nature of things one who owns private property of substantial value has an advantage over those not fortunate enough to have similar possessions, and this advantage ranges through all degrees. It frequently results in commercial dominance of precisely the same sort and quite as complete as the alleged monopoly here considered. But the advantage so acquired, whatever its degree, is not monopolistic, nor are we able to see that it has any tendency, much less an inevitable tendency, to bring about the conditions which constitute an unlawful monopoly, except upon the socialistic theory that all private ownership is indefensible and that everything should be held in common. The simplest conception of private property implies possession which is exclusive and enjoyment from which others may be debarred; it cannot otherwise be *private*. The advantage which comes from its legitimate use is a necessary incident of private ownership, and it is a misuse of terms to say that this advantage tends to monopoly. Although the private use of private property excludes others from the benefits and opportunities which the owner enjoys, and which might accrue to others if they shared in that use, yet this is not monopolization, whatever its indirect consequences, because those who are excluded have no rightful claim to that which belongs to the owner himself. It is only repeating to say that the private use by petitioners of the pipe lines in question has no relation to monopoly, and in no correct sense of the word tends to monopoly, since such use does not exclude others from any privilege which is rightfully theirs and involves only that exclusion which is inseparable from the possession and enjoyment of private property. It may be that the greater number of oil producers are virtually compelled to sell their output to the owners of private pipe lines, because they are unable or unwilling to build pipe lines of their own, or because there are no common carrier pipe lines to which they have access; but we are quite unable to see

how the situation in which such producers are placed gives them the right, or what constitutional power Congress can exert to endow them with the right, to use the private lines of petitioners and other private companies, or how the denial of such use is a monopolistic exclusion, or indicates a tendency to monopoly, which deprives these private owners of the protection guaranteed by the fifth amendment. In our judgment there is no basis for the contention that the pipe line amendment has any real or substantial relation to the monopoly alleged to result from the nature and methods of pipe line transportation.

This conclusion in effect disposes of the kindred contention that any injury to private pipe line owners resulting from the amendment is not a taking of their property but is merely incidental to the legitimate exertion of governmental power. The paragraph already quoted from *Minnesota v. Barber*, 136 U. S. 320, 10 Sup. Ct. 864, 34 L. Ed. 455, declares it to be the duty of the court, in considering legislation of this character, to inquire "whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

Keeping in mind the unmistakable intent and meaning of this amendment, it seems to us quite obvious that its "necessary or natural operation" must impair and measurably destroy rights of ownership and use which the Constitution protects from invasion, and accomplish inevitably a taking of property within the meaning and intent of the fifth amendment. As already pointed out, the amendment does not in terms or contemplation prohibit the continued use of these private pipe lines by their respective owners, nor does it attempt to regulate in any way their use and operation *as private lines*. It does neither of these things. It goes much further, and aims at something essentially different, since it undertakes to deprive the owners of private pipe lines of the exclusive use of their property, devotes that property to the service of the public, and compels them to become common carriers against their will. Does not this of necessity amount to a taking of private property for public use, and how can it be reasonably claimed that the resulting injury is only incidental? We have examined all the cases cited by counsel and many others which deal with the police powers of the states and the exercise of analogous powers by Congress, but none of them reaches the question here presented or gives support to the government's contention. It seems to us too plain for argument that these private pipe lines cannot be legislated into public facilities, and that the amendment necessarily deprives the owners of such lines of their property rights without just compensation.

"The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If in the execution of any power, no matter what it is, the government, federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner." *C. v. B. & Q. Ry. v. Drainage Commissioners*, *supra*, 200 U. S. 593, 26 Sup. Ct. 350, 50 L. Ed. 596, 4 Ann. Cas. 1175.

So much was said in argument about the Commodities Case that we refer to it briefly for the purpose of pointing out the fundamental difference, as we conceive, between the question there decided and the question involved in the cases at bar. In that case the Supreme Court was dealing with a law prohibiting railroad companies, which are common carriers in a complete and peculiar sense, from transporting their own property, with certain exceptions. It is unquestionably a valid regulation of interstate commerce to require the public carriers of that commerce to charge like rates for like service and to make no unjust discrimination between persons or places. To give full effect to such a fundamental principle of regulation, Congress has ample power to prevent anything which impairs its full operation. It may therefore prohibit any use of an interstate railroad which is inconsistent with or antagonistic to the equal public use which such a railroad is bound to afford, or which is liable to defeat in any respect or degree the public purpose for which it is chartered. But it is an altogether different proposition to say that Congress, under the guise of regulating interstate commerce, may by a legislative decree convert these private pipe lines into public utilities and force their unwilling owners to take upon themselves the obligations of common carriers. We find nothing in the Commodities Case which is at all at variance with the views herein expressed or which tends to support the validity of this amendment.

It is hardly necessary to observe that the legislation under review involves no question of public morals, or health, or safety, and therefore it seems plain that the doctrine of the Lottery Case and similar decisions has no application to the present controversy.

[4] It remains to consider briefly some minor contentions, which appear to be more or less relied upon by the government, and which perhaps should not be left unnoticed. One of these contentions is based upon facts which are common to all private pipe line companies; the others arise out of facts which are peculiar to one or more of these petitioners.

1. The pipe lines of each company are in numerous instances laid across, and sometimes along, public streets and highways, usually below the surface, under permission of the local authorities. From this circumstance or condition it is suggested that the petitioners bring their pipe lines within the regulating power of Congress, as they might not if there were no use or occupancy of lands dedicated to the public for highway purposes. Upon this point we concur in the opinion expressed by the Commission in its report, as follows:

"* * * It appears that the usual policy of the lines is to deal with the owner of the abutting property in acquiring such highway rights upon the theory that such abutting owners own also the fee in the highway, and that the public right therein is a mere easement of passage. That this is the general rule of law there can be no doubt, and the few exceptions occur in states where the question here at issue is unlikely to arise. We are of the opinion that a pipe line is not impressed with the obligations of a common carrier merely because, by arrangement with the abutting owner, it uses a public highway for right of way purposes."

Accepting this as a correct statement of the law, it follows that Congress has no power to compel a private pipe line owner to become a common carrier of oil merely because his pipe line crosses or is laid along public highways.

2. We also agree with the Commission that the validity of this amendment is not sustained by the fact that the pipe lines of some of the petitioners, for shorter or longer distances, are laid upon the rights of way of certain interstate railroads under contract arrangements between the pipe line owners and such railroads. Whatever may be the right of a railway company to permit such use of its property or the authority of Congress to prohibit it, we are clearly of opinion that the power to compel these petitioners to become common carriers of oil, if that power be otherwise wanting, is not brought into existence as to them by the circumstance that portions of their lines are constructed and operated on railroad rights of way. Whether or not a given pipe line company is a common carrier depends upon the business in which it engages and for which its pipe lines were provided, and not upon the character of the route upon which those lines are located.

[5] 3. As above stated, the Prairie Oil & Gas Company was organized in 1900 under the laws of the state of Kansas. Subsequently, in 1905, the Legislature of that state passed a law containing this provision:

"All pipe lines laid, built, or maintained for the conveyance of crude oil within the state of Kansas are hereby declared to be common carriers, and said conveyance of said oil shall be in the manner and under the restrictions in this act provided." Laws 1905, c. 315.

We are of the opinion, without reviewing the argument, that this law was passed in disregard of the Constitution of the state of Kansas and is therefore invalid; and it appears not to have been enforced in that state. Moreover, it seems sufficient to say, as the Commission in substance says, that federal power in such a case is not derived from a state enactment, and that, if Congress is without power to compel private pipe line companies to become common carriers of oil in interstate commerce, a state statute is not less ineffectual. In this connection it is rather interesting to observe that the Uncle Sam Oil Company claims to be prohibited by the laws of the state of its creation from engaging in the business or acting in the capacity of a common carrier.

4. It appears that portions of the lines of the Prairie Oil & Gas Company and of the Uncle Sam Oil Company were laid through Indian lands under a permit granted by the Secretary of the Interior. Among the rules and regulations for granting rights of way to pipe line companies prescribed by the Secretary of the Interior on December 2, 1906, was the following:

"And no application for the construction of a pipe line will be approved unless the applicant agrees that such pipe line shall be held to be a common carrier and agrees to all the provisions hereof."

We are satisfied from the record that the permit to the Prairie Oil & Gas Company was granted prior to the date mentioned and under regulations which did not contain the quoted condition. This being

so, there is no basis for contending that this company assumed any public obligation by reason of the fact that it was permitted to lay its lines across the lands in question. Moreover, we incline to the opinion, from examination of the law under which the Secretary acted, that he had no authority to impose such a condition (*United States v. McMurray* [C. C.] 181 Fed. 723); and this, perhaps, accounts for the circumstance that the condition was eliminated in 1909, as we understand the matter, and has not since been required. It is also to be noted with reference to this contention that no part of the lines of these companies, including those laid across Indian lands, has ever been used as a common carrier line or for any other purpose than to transport the property of its owner.

[6] 5. The remaining contention relates to the pipe lines of the Standard Oil Company of New Jersey, and is based upon facts which, so far as deemed material, may be summarized as follows: The line from Unionville across the state of New Jersey to the Bayonne refinery was built upon private rights of way and put into operation in 1882 by the National Transit Company, which, under the terms of its charter, is a common carrier in the state of Pennsylvania. About May 1, 1894, this line was transferred to the New York Transit Company, which was incorporated under a law of the state of New York, by virtue of which it became a common carrier within that state. The line from Centerbridge to the Bayway and Bayonne refineries was built upon private rights of way and put into operation in 1897 by the National Transit Company. The line from Fawn Grove to the Baltimore refinery was likewise built upon private rights of way and put into operation about 1885 by the National Transit Company.

The New York Transit Company was never reincorporated in the state of New Jersey, nor was the National Transit Company ever reincorporated in the state of New Jersey or the state of Maryland. In neither of these states is there any law providing for the organization of common carrier pipe line companies, and neither of the corporations mentioned has ever possessed or attempted to exercise the right of eminent domain in New Jersey or Maryland. Nor has either of them, under the laws of those states, or by virtue of any agreement connected with its acquisition of rights of way or otherwise, ever assumed the obligations of a common carrier, or at any time acted in that capacity, in the states in which the lines in question are located.

Subsequently these three lines were sold and transferred to the Standard Oil Company of New Jersey, one of the petitioners herein. The preliminary steps appear to have been taken in November, 1905, and the sale consummated by delivery of deeds of conveyance in July, 1906. Shortly afterwards the purchaser took over the entire operation of the lines, and has since used them exclusively for transporting its own oil to the refineries mentioned; and we assume for present purposes that this transfer was made in anticipation of the passage of this amendment or some similar law, and to avoid any undesired consequences which might follow from such legislation if the lines remained in the possession of their former owners.

Nevertheless we are unable to see that the facts here referred to

place the owner of these particular lines on any different footing from other private pipe line companies as respects the validity of the pipe line amendment. The former owners were never under obligation by their charters or otherwise to perform the duties of a common carrier in New Jersey or Maryland. They never had held themselves out as common carriers in those states; nor had either of them in fact carried oil therein, except for a single customer. The fact that the transit companies were organized as common carriers in New York and Pennsylvania did not make them common carriers in New Jersey or Maryland; nor, in our opinion, would it prevent them, even if they had been carrying for the public, from discontinuing such service in the latter states and becoming therein purely private pipe line companies. *Weems Steamboat Co. v. People's Co.*, supra. We think it also clear that they had the right to sell these New Jersey and Maryland lines to the Standard Oil Company, that the purchaser had a right to acquire and use them exclusively in its private business, and that no public obligation was thereby assumed or public duty imposed (*Oman v. Bedford-Bowling Green Stone Co.*, 134 Fed. 64, 67 C. C. A. 190); and it is equally clear that neither the right of the transit companies to sell nor the right of petitioner to buy was affected by the assumed motive for the transaction. Without amplifying the argument we have no hesitation in holding that, if the amendment in question is invalid as to the other private pipe line companies, for the reasons above stated, it is equally invalid as to this petitioner and the particular lines here considered.

This discussion might be prolonged almost indefinitely, for the underlying question is full of suggestions; but enough has been said to indicate the general reasons upon which we base our conclusion. We are impressed with the serious and unwelcome responsibility of invalidating in any respect an act of Congress, because it manifests an exertion of power in excess of constitutional limitations. But we cannot escape the conviction that this pipe line amendment, which we must construe according to its undoubted meaning, is an act of legislation which plainly invades the rights secured to these petitioners by the fifth amendment, and we cannot, therefore, do otherwise than stay the enforcement against them of the Commission's order. Without reference to other considerations which might justify preliminary injunctions in these cases, we have purposely placed our decision upon grounds which in effect determine the controversy, and we have done so to avoid occasion for protracted trials and to aid an early review by the court of last resort.

A preliminary injunction will be granted as prayed for in each of the above-entitled cases, and it is so ordered.

MACK, Judge (dissenting). I concur with the majority of the court in their construction of the statute. Because of the conclusions reached on the constitutional question, it is unnecessary for me to differentiate the several petitioners or to express any opinion on the so-called minor contentions.

On the fundamental question of the constitutionality of this legislation, under which, in effect, interstate transportation of oil by pipe lines is prohibited unless the transporter will act as a common carrier subject to the provisions of the interstate commerce act, I am compelled to dissent. It is conceded in the majority opinion that an act of Congress is constitutional if its object is within the realm of federal authority, and if the means employed for its accomplishment have a real and substantial relation thereto, and are not arbitrary, unreasonable, and beyond the necessities of the case.

A doubt, however, is not to be resolved against but in favor of the validity of legislation. Courts should not declare a statute unconstitutional until they are satisfied thereof beyond a reasonable doubt. Whether consistently carried out in practice or not, this has ever been a fundamental rule in our jurisprudence. *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606. While its application alone would compel me to dissent in this case, I do not rest my conclusions upon the existence of a reasonable doubt. In my judgment, the act is within the power of Congress to regulate interstate commerce.

This power may be exerted for many purposes: directly, to remove restraints thereon or obstructions thereto; indirectly, to conserve the public health or morals or to promote the general welfare. The means to be adopted for the accomplishment of a legitimate purpose rest in the sound discretion of Congress subject only to the limitation hereinbefore stated. As the Supreme Court in its most recent decision bearing on this question says (*Hoke v. U. S.*, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. —, Feb. 24, 1913):

"Congress may adopt not only means necessary but convenient to its exercise and the means may have the quality of police regulations."

What, then, is the object of this act? Its aim is neither completely to take from the owner or absolutely to prohibit his use of pipe lines theretofore within his exclusive control; it does, however, condition that use in interstate commerce upon his permitting a like use by the general public on payment of reasonable compensation therefor; the alternative is to cease to operate them or to dispose of them.

Clearly, therefore, the general purpose is to regulate interstate commerce in oil; the immediate specific object is to remove a serious obstruction to the free play of competitive forces in the industry, to prevent a monopolization of a part of such commerce. It is immaterial that this purpose is not proclaimed in the act itself; the history of the legislation and the debates, particularly in the Senate, leave no room for doubt as to the evils which Congress and the public generally believed to exist.

In 1905 the House of Representatives had directed an investigation of the oil industry by the Bureau of Corporations. In 1906 a first report (59th Cong., 1st Sess., H. R. Doc. 812) was made, primarily on the operations of the Standard Oil Company. (This was followed in 1907 by two more elaborate reports, as well as by a report of the Interstate Commerce Commission, 59th Cong., 2d Sess., H. R. Doc. 606.) The relation of pipe lines and pipe line transportation to

the development of the industry was fully detailed; it was therein demonstrated, not merely that the unification of many of these lines under the Standard Oil Company was the keystone of its practical monopoly in the refined products, but also that the possession of the only pipe line in any field necessarily gave the owner thereof control in the distribution of oil there produced. He was for all practical purposes the sole available customer for the greater part of crude oil and could thus ordinarily fix the price to be paid therefor. This was due to the utter practical impossibility of competition between one dependent upon railroad transportation and one who could transport his crude product through pipe lines. The important customer of the crude oil producer is the refiner. But as refineries are generally and more advantageously located in the great markets and near the sea-ports, and not in the oil fields, most of the crude oil must be transported. Physically, this could be done in barrels or tank cars by railroad; economically, railroads cannot compete with pipe lines, because the actual cost of railroad transportation is three or four times that of pipe line transportation.

A pipe line, however, is not a transportation facility readily available to the producer, as is a horse and wagon, or to-day even an automobile, to the average farmer. In the developed stage of the oil industry it is, in its very nature, analogous to the instrumentalities used by common carriers and other public-service corporations. Ordinarily these lines are hundreds of miles in length. Like railroads, there are trunk and branch lines; to construct them requires large capital; to duplicate them between an oil field and its natural market would usually involve economic waste similar to that caused by paralleling railroad lines.

An individual or corporation controlling the pipe line transportation in any field would thus have the same opportunity of monopolizing the distribution of the crude oil from that field as the owner of the only railroad in any section would have to monopolize the distribution of most articles produced or manufactured along the line. His ownership gives him the practical power of monopolizing the purchase of the goods and of fixing the price thereof, and thereby of monopolizing interstate commerce therein, at least, in certain territories. In the one case, as in the other, governmental regulation is essential to check this evil.

The actual situation in 1906, as reported to Congress, was that most pipe lines, both common carrier and private, were under the domination of the Standard Oil Company. The Commissioner of Corporations had said that it had "all but a monopoly of the pipe lines in the United States," and that "its control of them was one of the chief sources of its power." 59th Cong., 1st Sess., H. R. Doc. 812, pp. 36 and 37.

In *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. —, the Supreme Court says:

"The existence of power is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."

And so it may well be that, even if the primary purpose of the act were to prevent the use of the pipe lines as an essential element in and for the purpose of building up the Standard Oil Company's monopoly in the refined products, the power of Congress is not to be denied merely because some other lines are brought within the terms of the act.

To determine, then, whether the means adopted to secure these legitimate ends are reasonable or not, we must consider what remedies were available by which the channels and instrumentalities of interstate commerce could be kept open so that all producers on payment of a reasonable compensation might be enabled to compete freely in their natural markets.

Government ownership either through condemnation by eminent domain or through the construction of new lines would be possible; but at this time, and until every other available measure of relief shall have proved ineffective, such a radical departure from the previous policy of regulation, entailing, in the judgment of many, evils far greater than those attempted to be cured, cannot be deemed so feasible an alternative as to necessitate its adoption. Subjection of *common carrier* pipe lines to the stricter supervision and regulation prescribed by the interstate commerce act would afford only partial relief; many, if not most, of the important lines were not operated by common carriers.

Disintegration of the Standard Oil Company under the Sherman Act would probably result in freer competition, but it would not give the necessary relief to independent producers, who would still have to sell to the private pipe line owner or stimulate effectively the construction of independent refineries, which, under a régime of private pipe lines, would have difficulty in securing the crude product.

The only feasible remedy was the one adopted by Congress, to make the existing facilities available to the public generally, by prohibiting their use except on this condition. That thereby the exclusiveness of private ownership was invaded does not render the act unconstitutional. The case of *Weems Steamboat Co. v. Peoples Co.*, 214 U. S. 345, 29 Sup. Ct. 661, 53 L. Ed. 1024, 16 Ann. Cas. 1222, held only that at *common law and without statutory grant* no one could compel another to permit the use of his property for just and reasonable compensation merely because the property, a private wharf, was a desirable or even an essential facility of commerce. The court, however, expressed no opinion on the validity of legislation compelling such permission.

Congress, like the state Legislatures, can authorize the actual destruction of private property if such destruction be reasonably essential to the accomplishment of a legitimate legislative purpose. *Hipolite Egg Co. v. U. S.*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364. It may prohibit and it has absolutely prohibited certain forms of interstate commerce. *Hoke et al. v. U. S.*, *supra*; *The Lottery Case*, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492.

Under the Sherman Act, disintegration of vast combinations of capital has been decreed, irrespective of the depreciation therein produced in the value of property. *Standard Oil Co. v. U. S.*, 221 U. S.

1, 31 Sup. Ct. 502, 56 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. Under the commodities clause common carriers are prohibited from transporting certain of their own property, and are thus compelled to part with the ownership before transportation, regardless of the loss suffered thereby. *U. S. v. D. & H. Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836. By the Carmack amendment the burden of responding in damages to a shipper for losses occasioned by the acts of independent, but connecting, carriers is imposed upon the initial carrier "as a condition of continuing in that traffic." *A. C. L. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7.

And in cases not involving common carriers, prohibition acts adopted under a state power no more extensive than that granted to Congress by the commerce clause as limited by the fifth amendment have been held constitutional, despite the practical destruction thereby of most of the value of brewery and distilling plants. *Mugler v. Kansas*, 123 U. S. 625, 8 Sup. Ct. 273, 31 L. Ed. 205. And if a state, in the regulation of private business, such as banking, in order to promote the public welfare, may "go from regulation to prohibition except upon such conditions as it may prescribe" (*Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. [N. S.] 1062, Ann. Cas. 1912A, 487; see *Engel v. O'Malley*, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. Ed. 128), is the federal government to be denied the use of like means?

The power to regulate cannot, of course, be used, either directly or by the imposition of conditions precedent to the exercise of the right to engage in interstate commerce, as a subterfuge to extend the jurisdiction of the federal government to those matters over which the states have exclusive control. *Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. The amendment in question, however, makes no such attempt. The condition thereby imposed is not in any sense a regulation of domestic commerce; it is directly and essentially a regulation of interstate commerce alone.

The remedy prescribed by this amendment is far less drastic than that adopted to abate other restraints on interstate commerce; that it is feasible is demonstrated by the fact that many pipe lines are operated by common carriers, and that in at least two states, Kansas and West Virginia, all pipe line carriers are declared by statute to be common carriers. Therefore, in my judgment, it cannot be deemed an unreasonable or arbitrary exercise of legislative power.

But if, as is contended, the act cannot be sustained as a legitimate regulation of commerce, if it amounts to a taking of private property for public use, does it afford the owner the just compensation to which he is constitutionally entitled? To deprive one of the entire or partial use of property is a taking thereof. A distinction, however, may well be made in the method of compensation, dependent upon whether the owner is deprived of his title, of the possession, or only of the exclusive use. *Otis Co. v. Ludlow Co.*, 201 U. S. 140, 26 Sup. Ct. 353, 50 L. Ed. 696, and *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171, are cases in which only the exclusive-

ness of the owner's use of his property was invaded; his title and possession were undisturbed. In the former, only a right of action in tort was given to the upper riparian landowner for the damages that would be caused from time to time by overflowing his land pursuant to a statutory right granted to the builder of a dam; in the latter, while payment for the easement of bringing water through a neighbor's private irrigation ditch was required under a statute granting individual owners of arid land the right so to use the private property of others, no security was provided for the share of maintenance expense to be paid from time to time. Each of the statutes was held to be constitutional.

In the present case, just and reasonable compensation for the use to be made from time to time of these pipe lines is secured, and it may well be doubted whether any other or additional compensation can constitutionally be demanded merely because of the change in the status of the pipe line owner to that of a common carrier and the consequent subjection of the line itself and of the owner to the regulatory supervision of the Interstate Commerce Commission.

In re OXLEY et al.

(District Court, W. D. Washington, S. D. April 28, 1913.)

No. 846.

BANKRUPTCY (§ 346*)—TAXES—PRIORITY OVER EXPENSES OF ADMINISTRATION.

Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), which requires the court to order the trustee to pay all taxes legally due and owing in advance of the payment of dividends to creditors, should be construed in accordance with equitable principles; and where taxes due a county are a lien on the property of a bankrupt, the greater portion of which has been taken to satisfy a mortgage, leaving no more than sufficient to pay the costs and expenses of administration, it is within the power of the court to require the county to resort to the mortgaged property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. § 346.*]

In Bankruptcy. In the matter of William A. Oxley and Thomas R. White, individually and as partners doing business as Oxley & White and as the McKinley Park Drug Company, bankrupts. On review of order of referee. Affirmed.

Lorenzo Dow and H. G. Fitch, both of Tacoma, Wash., for Pierce County.

Raymond J. McMillan, of Tacoma, Wash., for trustee.

CUSHMAN, District Judge. This matter is for decision upon a petition of Pierce County, Wash., for a review of the referee's order denying an application of the county for the payment of certain taxes for the years 1910 and 1911, to the exclusion of the costs of administration of the bankrupt estate.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The taxes have been lawfully assessed. If preferred to the costs and expenses of administration, nothing would remain of the estate for the payment of such costs and expenses, which equal or exceed the small amount remaining in the hands of the trustee. Eight-ninths of the property of the bankrupt was taken from the estate by the foreclosure of a mortgage—the estate consisting of a stock of drugs, and the only property remaining is cash in the trustee's hands realized upon the remaining one-ninth.

It must be presumed that the taxes were assessed equally against the entire estate—that taken upon the mortgage foreclosed as well as the remainder. It is not claimed that the county has lost its lien upon that portion of the estate taken under the mortgage; but it is contended, upon the part of the county, that its taxes should be paid out of the fund, in preference to anything else; that there is no obligation on its part to look beyond the fund in the trustee's hands.

The trustee relies upon the following authorities: *State of New Jersey v. Lovell*, 179 Fed. 321, 102 C. C. A. 505, 31 L. R. A. (N. S.) 988, 24 Am. Bankr. Rep. 562; *In re Halsey Elec. Generator Co. (D. C.)* 175 Fed. 825, 23 Am. Bankr. Rep. 401; *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, 4 Am. Bankr. Rep. 163; *Collier on Bankruptcy*, pp. 17, 18; *Bispham's Principles of Equity*, § 340.

The authorities on the general question of whether state and county taxes are to be preferred to the costs and expenses of administration do not appear to be uniform. *Collier on Bankruptcy* (9th Ed.) p. 889, B, and citations; *City of Waco v. Bryan*, 11 Am. Bankr. Rep. 485, 127 Fed. 79, 62 C. C. A. 79; *State of New Jersey v. Lovell*, 24 Am. Bankr. Rep. 562, 179 Fed. 321, 102 C. C. A. 505, 31 L. R. A. (N. S.) 988.

The bankruptcy statute directs the court, in making provision for the payment of claims, to order the trustee to pay all taxes "legally due and owing by the bankrupt to the United States, state, county, district or municipality, in advance of the payments of dividends to creditors." In construing this statute, no sufficient reason appears for disregarding principles of equity, which are to be applied generally in bankruptcy proceedings. *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Collier on Bankruptcy* (9th Ed.) 21, § B.

A familiar principle of equity is that of marshaling assets and securities. Where a creditor has a lien on two funds in the hands of the same debtor, and another creditor has a lien on one of them only, equity, on the application of the latter, will compel the former to make his debt out of that fund to which the latter cannot resort. 26 Cyc. 927; *Bispham's Principles of Equity*, § 340.

The county has one lien upon the property taken upon the mortgage and upon the property from which the trustee realized the money now in his hands, and, by virtue of the bankruptcy statute, upon the money so realized. *Pierce's Code* 1912, tit. 501, § 215; *Rem. & Bal. Code*, § 9235; *Klickitat Warehouse Co. v. County*, 42 Wash. 299, 84 Pac. 860; *City of Puyallup v. Lakin*, 45 Wash. 368, 88 Pac. 578; *Lewis Cons.*

Co. v. King County, 60 Wash. 694, 111 Pac. 892. The officers of this court have no rights beyond their claim upon the fund in the trustee's hands.

No reason, based upon any equitable principle, has been advanced why the county should not be required to first exhaust its remedy against the mortgaged property, before resorting to the trustee's fund. The fact that the property foreclosed upon and the fund in the trustee's hands have both passed from the debtor's control and are now in the possession of separate persons—the trustee acting merely in a representative capacity—does not appear to be a sufficient reason for taking this case out of the rule regarding the marshaling of assets and securities.

The referee's order will be affirmed.

UNITED STATES ex rel. GOLDBERG v. WILLIAMS, Commissioner of Immigration.

(District Court, S. D. New York. April 23, 1913.)

1. ALIENS (§ 46*)—EXCLUSION—COMMISSION OF CRIMINAL OFFENSE—MISAPPROPRIATION BY PARTNER.

That an alien, applying to enter the United States from Austria, admitted the misappropriation of partnership funds, and that he brought to the United States money which his partner in Austria had contributed to the firm, such admission did not show the commission of an offense in Austria, under the American law that a partner cannot be guilty of embezzling partnership property, in the absence of proof that the Austrian law was to the contrary.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 105; Dec. Dig. § 46.*]

2. ALIENS (§ 49*)—EXCLUSION—PUBLIC CHARGE.

Where an alien, applying to enter the United States, was not shown to have been under any disability, and possessed quite a large sum of money, he could not lawfully be excluded, on the ground that he was likely to become a public charge, though he may have owed the money to another.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 107; Dec. Dig. § 49.*]

Habeas corpus by the United States, on the relation of Benjamin Goldberg, against William Williams, Commissioner of Immigration, to obtain petitioner's release from custody under a deportation warrant. Writ granted. Petitioner discharged.

John D. Nussbaum, of New York City (Ralph Barnett and Morris Jablow, both of New York City, of counsel), for relator.

Henry A. Wise, U. S. Atty., and John N. Boyle, Asst. U. S. Atty., both of New York City, for respondent.

NOYES, Circuit Judge. [1] The immigration authorities found that the alien had admitted the commission of the crime of embezzlement and that was one ground for the order of deportation. I am unable to find in the record a basis for this finding. The alien did admit the misappropriation of partnership funds. He admitted that he

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

brought to this country money which his partner had contributed to the partnership. He admitted that he owed his partner the money. But it would be quite inconsistent with his testimony to say that he admitted the receipt of the moneys in any other way than as a partner. It is, however, a well settled rule of law in this country that while a partnership is in existence a partner *cannot* be guilty of embezzling partnership property. This may not be the Austrian law and the alien may be subject to extradition. So when all the facts are shown the alien may not come within our rule. But this court must take the law of this country in the absence of proof of foreign law and must deal with the alien's statements rather than with outside proof. And if the alien were being tried for the offense of embezzlement and his whole testimony before the immigration authorities were put in as the evidence against him, it is very doubtful whether a judgment of conviction would stand. Much more, such statement cannot be held to constitute an admission of the commission of the crime.

[2] The second ground upon which the alien was ordered deported was that he was likely to become a public charge. There is no evidence in the record, however, upon the question of the ability of the alien to earn a livelihood and support himself; he is not shown to be under any disability and he is shown to possess quite a large sum of money although he may owe it to another. Under the decision of the majority of the court in *United States v. Williams* (C. C. A.) 200 Fed. 541, findings of immigration authorities may be reviewed; some evidence must be shown to justify a judgment of deportation. This evidence I am unable to find in the present case.

I am extremely reluctant to interfere with the action of the immigration authorities in this case. The alien certainly seems to be an undesirable person. But in view of the limitations of the statutes and the governing rules of law, I am constrained to hold that he is unlawfully ordered deported and, consequently, he must be released from custody. And it is so ordered.

SOUTHERN LUMBER CORPORATION v. DOYLE et al.

DOYLE et al. v. SOUTHERN LUMBER CORPORATION.

(District Court, E. D. South Carolina. December 5, 1912.)

1. SPECIFIC PERFORMANCE (§ 81*)—CONTRACTS ENFORCEABLE—CONTRACT FOR SALE OF STANDING TIMBER—AGREEMENT FOR ESTIMATE OF QUANTITY.

Complainant contracted to sell to defendant two tracts of timber land and the standing timber on a number of other tracts, the price to be a stated sum per thousand feet of the merchantable timber on all the tracts, to be determined by a named person as estimator, whose estimate should be conclusive. The agreed instructions delivered to such estimator defined what should be considered merchantable timber to include such as would be cut by a good lumberman under the then economic conditions prevailing in the county, and required the estimator to personally instruct his cruisers, and to personally make the office computations from the data collected in the field. *Held*, that the acceptance of such estimator was of the essence of the contract, and that where fraud was not proved, and there was not such performance as would prevent placing the parties in their original situation, a court of equity could not, at suit

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

of one of the parties, set aside the estimate, have a new one made by a person selected by the court, and then decree a specific performance of the contract based thereon, which would be to enforce a contract the parties had never made, and perhaps would not have made.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 215; Dec. Dig. § 81.*]

2. SPECIFIC PERFORMANCE (§ 130*) — CROSS-BILL FOR RESCISSION — RELIEF WHICH MAY BE GRANTED.

In such case, where complainant refused to accept the estimate, and brought suit to obtain a new one and a specific performance, and defendant on such refusal gave notice of rescission, and filed a cross-bill therefor, the court has power, on an equitable adjustment between the parties of cross-claims growing out of a partial payment by defendant, and the cutting of timber by defendant in reliance on the contract, to decree a rescission as of the date of decree, leaving to either party his right of action at law to recover damages for breach of contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 424, 425; Dec. Dig. § 130.*]

In Equity. Suit by the Southern Lumber Corporation against George A. Doyle, H. J. Thieker, Julia Doyle, and J. A. Thrall, copartners as the Winyah Lumber Company, with a cross-bill. On final hearing. Decree in part for each party.

Willcox & Willcox, of Florence, S. C., for complainant.

Walter Hazard, of Georgetown, S. C., Howard Cornick, of Knoxville, Tenn., and J. P. K. Bryan, of Charleston, S. C., for defendants.

SMITH, District Judge. This case came on to be heard upon the pleadings, the testimony, and the report of the special master, and counsel for all parties having been fully heard, it is thereupon adjudged as follows:

On the 19th day of April, 1909, the Southern Lumber Corporation entered into a contract with the defendants, as copartners under the firm name of the Winyah Lumber Company, for the sale of the standing timber upon some 13 different tracts of land, and also of 3 parcels of land containing in the aggregate some 732 acres. The price to be paid for all the timber and land so agreed to be sold was to be \$2 per 1,000 feet for all the merchantable pine, cypress, and poplar timber upon all the tracts, except as to one tract, upon which the price was to be at the rate of \$1.50 per 1,000 feet; in other words, all the standing timber and land agreed to be sold were to be sold for a price to be measured by the aggregate amount of the merchantable pine, cypress, and poplar timber upon all the tracts, upon which the price was to be computed at the rate of \$2 per 1,000 feet, except in the case of one tract, in which case it was to be computed at the rate of \$1.50 per 1,000.

The contract further provided that the parties should at the earliest possible moment secure the services of Messrs. C. A. Schenck & Co., of Biltmore, N. C., as inspectors and estimators, who should be charged with the duty of inspecting and estimating the timber upon the said several tracts of land, and whose report and estimate, when filed by them in writing in duplicate with the parties to the contract, should

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be deemed and taken to be final and conclusive. The contract further provided that, immediately upon the filing of the report and estimate of the inspectors, the plaintiff, the Southern Lumber Company, should execute and tender to the Winyah Lumber Company a proper deed or deeds of conveyance for all the said timber and land, and the Winyah Lumber Company, the defendants, should upon the tender of such deed of conveyance pay the purchase price to be determined in the manner above set forth. Upon the execution and delivery of the contract the defendants paid to the complainant the sum of \$500 on account of the purchase price of the property.

In accordance with the provisions of the contract the services of C. A. Schenck & Co. were secured as inspectors and estimators, and the parties in May, 1909, signed a memorandum, which was delivered to Messrs. C. A. Schenck & Co., containing the instructions to govern C. A. Schenck & Co. in making their conclusions as to the matters referred to them under the contract. These instructions contained the following provisions:

"3. A merchantable tree belongs to a merchantable kind like pine (long leaf, short leaf, and spruce pine), cypress, cedar, poplar, red oak, and must contain merchantable logs, viz., logs of such size and quality which a good lumberman, understanding his business, would cut and is used to cut under the present economic conditions now prevailing in Horry county. We rely on the judgment of C. A. Schenck and of his cruisers in this connection, and their judgment shall be final.

"4. The amount of lumber contained in the merchantable trees shall be ascertained by C. A. Schenck as that number of feet b. m., one inch thick, which a good millman would obtain from the merchantable logs, contained in the trees under the economic conditions now prevailing in Horry county. The cruisers' tally shall show the merchantable kinds, the number of trees, the diameters at breast height, and the number of merchantable logs contained in the trees. * * *

"6. C. A. Schenck shall personally instruct and superintend his cruisers, and none of the parties signing this instrument shall have the right to give the cruisers any instructions.

"7. All of the office computation of data collected in the field shall be done by C. A. Schenck."

C. A. Schenck & Co. sent their cruisers to the locality, who went there and examined the timber and made a report thereon; and thereafter, on or about the 4th day of August, 1909, C. A. Schenck & Co. filed with the respective parties to the contract a written report in duplicate, wherein they reported the entire amount of the merchantable pine, cypress, and poplar timber located and contained upon the various tracts of land mentioned in the contract to be 2,410,741 feet board measure.

Immediately upon the receipt of the report of C. A. Schenck & Co. by the complainant, the Southern Lumber Company, it expressed dissatisfaction with the report, and claimed it to be incorrect, and insisted upon C. A. Schenck & Co. making a new estimate, which was refused by C. A. Schenck & Co. Upon the filing of the report of C. A. Schenck & Co. the defendants notified the complainant that they were ready and willing to pay for the timber and receive a conveyance therefor, the purchase price to be paid by them to be based upon the estimate and report of C. A. Schenck & Co. The complainant, fail-

ing to procure a re-estimate from C. A. Schenck & Co. of the timber on the land, thereupon on January 21, 1910, filed the bill of complaint in this case, in which it alleges that the complainant had insisted that the estimate of the said C. A. Schenck & Co. was incorrect, grossly unfair, and constituted a fraud upon the rights of the Southern Lumber Company, but expressed its willingness, upon a proper estimate being made, to comply with the terms of the contract, to which proposition the defendants refused their assent. The bill further alleges that the estimate of C. A. Schenck & Co. was grossly inaccurate and the result of gross partiality to the defendants, and of such gross negligence or incompetence as to constitute it a fraud on the complainant's rights; the timber on said lands amounting at least to 9,075,000 feet.

The bill of complaint further alleged that, notwithstanding the plaintiff had refused to execute the conveyance for the timber based on the estimate of C. A. Schenck & Co., the defendants had nevertheless gone upon the lands embraced in the contract, and had cut and removed, and were still cutting and removing, the timber therefrom, and that the complainant was ready to carry out its contract as soon as a correct estimate of the amount of the timber should be made, and prayed an injunction against the defendants, requiring them to cease trespassing upon and cutting and removing the timber from the premises described until a conveyance should be made to the defendants, after an ascertainment of the amount of standing timber on the premises under the direction of the court, and asking that the defendants be required to account for the quantity of timber cut and removed from the premises.

The bill is not very specific in the terms of its prayer as to what relief is desired by the complainant from the court, beyond the injunction against the continuance of the trespass and cutting of the timber and an accounting for the timber cut and removed. The language of its second prayer is principally for an injunction, although the pleading has been treated in argument upon the assumption that it was a prayer that the court should set aside the estimate made by C. A. Schenck & Co., and then decree that a new estimate should be made under the order and direction of the court, and require the defendants to pay the purchase price computed according to the results of such new ascertainment, and thereupon that the decree of conveyance be made to the complainant by the defendants according to the terms of the contract. The pleading has been treated as if a decree of that kind was asked, although the terms of the prayer are very indefinite; but treating it as if such were the case, and giving to complainant the benefit of whatever relief the allegations of the bill would warrant, then the bill of complaint is a bill chiefly for specific performance, to require the defendants to perform the contract, that is to say, to perform the contract as may be modified by the finding of the court, viz., that the court should set aside the estimate made by C. A. Schenck & Co., and, having set aside that estimate, should require a new estimate to be made by estimators appointed by the court, and then, upon the coming in of that new estimate, should require the defendant to pay to the plaintiff the amount of the purchase price, to be computed according

to the results of such new estimate, and the complainant convey to the defendants the standing timber and lands mentioned in the contract.

The defendants filed their answer, alleging that upon the filing of the report of C. A. Schenck & Co. they had advised the complainant that they were ready to pay the price computed according to the report of C. A. Schenck & Co.; but the plaintiff had refused to receive it, and had refused to execute the conveyance to the land and timber mentioned in the contract. The answer denies that the estimate of C. A. Schenck & Co. was fraudulent, or a fraud upon plaintiff's rights, but, on the contrary, affirmatively alleges that it was carefully, properly, conscientiously, and correctly made, and that the plaintiff was not entitled to the relief demanded. The defendants further admit that they had gone upon the land prior to the completion of the estimate by C. A. Schenck & Co., and had cut certain timber, which is to be settled for by the payment of the contract price upon the estimate coming in, but alleges that this was with the knowledge, consent, and express permission of the plaintiff.

In addition thereto the defendants filed a cross-bill in the case, in which they set up that they had been misled by the statements of the plaintiff as to the amount of timber in entering into the contract complained of, the amount of timber possessed by the complainant having been grossly exaggerated, and this exaggeration having led to the defendants incurring expenses for the utilization of the timber which were not warranted by the actual timber on the land; that nevertheless, upon the coming in of the estimate of C. A. Schenck & Co., they made offer of the purchase price based upon such estimate, but that complainant had refused to receive it; that they tendered the payment required by such estimate to the plaintiff, and required the execution of the deed of conveyance of the timber and land mentioned, but the plaintiff had refused to execute the deed; that the estimate made by C. A. Schenck & Co. was in accordance with the methods adopted in advance with the approval of the complainant, and that the report was impartial and fair, and that there was no gross partiality or unfairness towards complainant, or favoritism shown to defendants; that thereupon, on the 22d of January, 1910, defendants gave notice to complainant, and demanded that complainant comply with the terms of the contract, or that the defendants would regard such failure equivalent to a rescission of the contract, and would declare the same rescinded, which was done; that immediately subsequent to such rescission the defendants had removed their logging railroad and equipment and camps from that locality, and if they were now required to purchase the timber and carry out the contract it would put them to great and unreasonable damage; that they had been put to an expense in procuring the estimate of C. A. Schenck & Co., which was to be paid one-half by each party, of the sum of \$462.15; that they had also paid \$500 on account of the purchase money, and that at the request of complainant they had paid the other one-half, being its share, of the expenses of C. A. Schenck & Co., amounting to \$462.15, making a total of \$1,424.30 which the defendants were entitled to recover of the complainant—and pray a decree of the court that the contract be

declared rescinded, null, and void, and that the plaintiff be decreed to pay to the defendants the amount due as aforesaid.

Due replications having been filed in the case to the bill and cross-bill, the matter was by the court referred to a special master, to take the testimony and also to find the facts from the testimony taken, which was done. To the findings of fact of the special master the defendants have excepted. The complainant has filed no exceptions to his findings.

[1] The first question for the determination of the court upon the hearing of the cause is as to the right of the complainant to the relief sought under the allegations of the bill of complaint. The bill, as before stated, is a bill for specific performance of a contract for the sale of standing timber and land. It is, however, different from the usual bill for specific performance of a contract, inasmuch as it requires something to be done affecting the terms of the contract anterior to that performance. It seeks that the court should first set aside the estimate made by the estimators agreed upon in the contract; next, that the court, having set aside that estimate, should have an estimate made by estimators of its own—that is, to be appointed by the court—and that upon the coming in of the said new estimate, and its confirmation by the court, that the court should decree specific performance of the contract based upon such new estimate, as if that were the estimate named in the contract.

The bill is not the ordinary bill to set aside an award made in a case of arbitration. Where parties have by agreement submitted certain questions to arbitrators, and the arbitrators make an award, a bill can be filed in equity for the purpose of setting aside, or in proper cases enforcing, that award. If the award be set aside, unless the cause contains other elements of equitable jurisdiction, the function of the court of equity ceases, and the parties are remitted to their legal rights as they stood before the agreement to submit the issues to arbitration. In the ordinary case of actions under a building contract, where the work done and the amount due is to be ascertained by the certificates of an agreed architect or engineer, before action can be brought to recover an amount not authorized by the certificate given, the certificate made must be first set aside, which can be done by a proceeding in equity, and then the parties are remitted to their actions at law as if no such certificate had been made or required, unless the case presented is one which permits the court to proceed and administer entire relief. Under the present bill, however, more than that is required. It is not a bill limited to setting aside an award, or setting aside an estimate by agreed estimators; but, in addition to that, it seeks to have a new estimate made by the court, and, after that estimate is made, then to have specific performance decreed, so that three things are sought to be done by the court: (1) To set aside the estimate; (2) to have a new estimate made under the direction of the court; (3) to decree specific performance based upon that new estimate.

In this case by the terms of the contract certain specified persons were agreed upon to make the estimate, viz., C. A. Schenck & Co.

They were the estimators agreed upon and relied upon by parties, either of whom had the right to refuse to enter into the contract at all unless the estimate which was to fix the price should be made by estimators agreeable to them. In other words, the making of the contract at all was subject to the will of the two parties. They had a right to consent to make the contract only upon the condition, if they chose to insert it, that the estimate should be made by estimators accepted by them as competent for the purpose.

The contract expressly names C. A. Schenck & Co. as the persons to make the estimate. An examination of the contract and of the instructions subsequently given shows that there was reposed in the persons so selected to make an estimate a great deal of power in the way of determination of the amount of timber to be paid for. They are to estimate the quantity of the "merchantable" timber, merchantable both as to size and quality, and as to such as would be cut under the "then economic conditions prevailing in Horry county." It will be seen from this that the use of the word "merchantable" in itself implies a great power of selection on the part of the estimators. They could omit all trees which were not up to size or quality, or which were in their opinion not merchantable. It may be, also, that they could omit all trees which from their location or position or environment were not merchantable, in the sense that it would not be economically possible to utilize them for sawmilling purposes. They could not be cut and hauled to the mill for the purpose of being sawed at a price which would be remunerative. All these are elements of selection in the contract, the determination of which was left to the judgment of C. A. Schenck & Co.

Further it was stipulated in the instructions that C. A. Schenck should himself personally instruct and superintend his cruisers, and make all the office computation from the data collected in the field. Under these circumstances it is evident that the parties might well consider the person selected to make an estimate as of the highest importance. He should be a person of such wide knowledge and experience, both in the matter of the knowledge of trees themselves, or forestry, and in the knowledge of the practical handling, cutting, and sawing of trees, as would qualify him to judge what trees were, from size, quality, position, and environment, merchantable timber within the meaning of the contract. While a party to the contract might be willing to submit the making of such an estimate to the determination of one person, whom he considered entirely qualified, he might reasonably be wholly unwilling to submit them to the determination of another, chosen by some one else.

The acceptance of C. A. Schenck & Co. as estimators to make the estimate was reasonably of the essence of the contract. If of the essence of the contract, for the court to undertake to substitute new estimators in the lieu and place of C. A. Schenck & Co. would be in effect to make a new contract for the parties. The court could not set aside the estimate as made, and require C. A. Schenck & Co. to make a new estimate. C. A. Schenck & Co. are not before the court. They are not even shown to be within the jurisdiction of the court. A new

estimate, if made, would have to be made by some one selected by the court, probably wholly disconnected with C. A. Schenck & Co., and possibly unacceptable to either party. It would be substituting the court's opinion of a competent person for the opinion of the parties to the contract.

The case is different from the case where there is simply a general provision that the matter should be submitted to arbitrators or estimators, without particular persons being selected or agreed upon as such. In that case the personnel of the arbitrator is not made a part of the contract; the substantive part of the contract is simply that there should be an arbitration or an estimate. The exact person who shall make that estimate has not been considered of sufficient importance to incorporate it in the contract as a part of the conditions upon which either party assents to it. Where a contract embodies, as incidental to its main purpose, that there should be an arbitration or estimate of matters of fact or results of computation, and not that that estimate or award should be made by a particular selected person, the court may in a proper case proceed, and decree that the estimate or award should be made, and in certain cases select a person to make the estimate or award. But where the person to make the estimate should be one who should possess special qualifications and capacity for the purpose, and is so specifically agreed upon and chosen as to be a substantive part of the contract, so as that the contract is not simply that an estimate or an arbitration should be made, but that the estimate or arbitration should be made only by a specified person, then for the court to appoint a different person to make it would be in effect to make a new contract.

To illustrate: Suppose that C. A. Schenck had refused to be employed for the purpose as contemplated by the contract, or suppose that C. A. Schenck, who by the contract was personally to perform certain specified functions, had died before the work of estimation should be entered on. It seems to the court that in such case there is little doubt but that, unless the parties could agree upon a new person to act, the contract would have failed, because the party agreed upon as a substantive part of the contract to make the estimate refused or was not able to do so. The rule seems to be that:

"Where, in a contract of sale of real estate at a price to be fixed by appraisers chosen by the parties, the stipulation for the valuers is not a condition nor the essence of the agreement, but is subsidiary or auxiliary to its main purpose and scope, and the parties may not be left or placed in statu quo by a refusal to enforce the contract, a court of equity may determine the price itself by its master or by appraisers of its own selection, and may enforce specific performance of the agreement of sale. But where the stipulation for the appraisers is a condition or the essence of the contract of sale, and a refusal to enforce it will leave the parties in their original situation when the agreement was made, a court of equity will not specifically enforce it." *Castle Creek Water Co. v. City of Aspen*, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660 (C. C. A., 8th Cir.).

See, also, *Union Pac. Ry. Co. v. Chicago*, 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265; *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161.

The exceptions to the rule that a court of equity will not enforce a contract, where the stipulation for the particular estimator was of

the essence of the contract, would seem to be where, under the terms of the contract, one party places himself in such position by the execution or part execution of his part of it, relying in good faith upon the estimate being thereafter made, that it is impossible for him to be placed in his original situation, or where it is established that the failure to have the estimate made as required by the contract has been due to the fraud or fraudulent procurement of the other party, and that the conditions have been so altered that an action at law would give no adequate relief to the party injured.

The present cause does not appear to fall within the category of either of these exceptions. The complainant, anterior to its refusal to accept the estimate of C. A. Schenck & Co., was not called upon under the contract to do, nor is it shown to have actually done, anything in reliance upon the future estimate so changing its position as to make it inequitable to leave it to its legal rights under the contract. Nor does it appear from the testimony now before the court that the defendants have acted fraudulently in the procurement of the estimate of C. A. Schenck & Co., or in the evasion of the contract.

The special master finds that the estimate made by C. A. Schenck & Co. was "grossly incorrect," and that the evidence establishes to his mind that there was merchantable timber upon the lands largely in excess of the amount reported by C. A. Schenck & Co. He further finds that no officer, agent, or employé of the complainant accompanied the estimators sent over the lands by Schenck & Co., nor was the complainant advised when the estimate would be made, but that employés of the defendants accompanied the estimators for some time at least, and assisted them in "cruising the lands." He further finds that C. A. Schenck did not personally superintend his cruisers, or leave his place of business near Asheville, N. C., in this regard, and that the estimators were sent from Biltmore, N. C., into Horry county, and were materially assisted by the defendants' employés in their cruises over the lands.

The instructions given by the parties to C. A. Schenck & Co. did not require that C. A. Schenck should personally leave his office in North Carolina to go over the lands. The instructions contemplate that the work in the field should be done by "cruisers" who should be personally instructed and "superintended" by C. A. Schenck, who was personally to do the "office" computation on data collected by these cruisers "in the field." Schenck was to select, instruct, and "superintend" these cruisers. The contract does not seem to contemplate that this "superintendence" included Schenck's own presence in the field.

Without going into a consideration whether the testimony supports the special master's findings on the other points, it is enough to say that his findings are not to the effect that "fraud" was perpetrated by defendants in procuring, or Schenck & Co. in making, the estimate. He finds that Schenck & Co.'s estimate was grossly incorrect as to the amount of timber, but that may result from the different methods of determining "merchantability" and of computing the content in board measure between Schenck & Co. and the witnesses whose testi-

mony is relied on by the special master. There is no such fraud shown by the special master's findings or the testimony now before the court as would bring this case within the category of cases in which the defendant has by his own fraud so procured the nonfulfillment of a contract that a court of equity will decree its specific performance to protect the other party. The court therefore holds that under the circumstances no case is now presented in which, even if the court should set aside the estimate, it should decree a specific performance of the contract.

The next question is as to what decree complainant is entitled under the bill and testimony, which, while refusing a specific performance, may yet leave it open to complainant to assert any legal rights it may have in an action at law for damages. Complainant contends that unless and until the estimate is set aside by a court of equity the complainant will have no right to proceed at law. Under the general rule in this regard complainant would have no right to bring an action *upon* the contract to recover the value of the timber and lands agreed to be sold, other than for the amount according to the estimate, unless that estimate be set aside. If the estimate were set aside for fraud this might leave the complainant free to bring an action for the real value of the timber on the assumption of a true estimate. If the estimate be not set aside, the complainant would be limited in any action under the contract to the amount of the estimate, and under the circumstances of this case and the actions of both parties no action of law would now appear to lie for that amount against the defendants.

This rule, however, does not necessarily apply to an action, not *under*, but for a fraudulent *breach* of, the contract; i. e., if the defendants fraudulently procured a false and fraudulent estimate, for the purpose of evading the contract and compelling the complainant to convey for less than the agreed price, or for the purpose of evading the contract and defeating the proposed sale, then an action at law might lie against the defendants, not under the contract for the true agreed price, but for its fraudulent breach and for the damages thereby caused to the complainant, and this decree is not intended to preclude the assertion of any such legal rights if they exist.

The defendants having received no deed from the complainant, and having themselves refused also to proceed further with the contract, the complainant is entitled to the permanent injunction prayed in the bill against any further cutting or removing of timber.

[2] The cross-complainant having in the cross-bill prayed for a cancellation of the contract of sale, and it appearing that the cross-defendants do not desire a continuance of that contract, unless a new estimate be ordered by the court, the relief sought in the cross-bill will be granted to the extent that the contract will be decreed vacated, but only from the date of the decree herein, and not so as to prejudice any legal rights either party may have against the other anterior to the date of the decree by reason of any breach entitling either to an action at law against the other and not concluded by this decree.

The cross-complainants, having come into the court and affirmatively sought the relief prayed in their cross-bill, and received the relief

awarded by the court thereon, must also be required to submit to the rule that "he who seeks equity must do equity"—a principle applicable not only to the position of the complainant in seeking relief, but to the power of the court in awarding it against him, viz., that one who seeks the aid of a court of equity must accept such terms as the court may impose, under the rules and principles of a court of equity, as the price of the decree given him.

The bill alleges that the defendants cut and removed timber away from the premises without the leave or authority of the complainant. If such be the case, the defendants are liable for the damages of the trespass, and will be required to have the same ascertained and decreed to be paid in this cause as damages inflicted by the defendants by means of the contract now sought by them to be vacated, and must be paid as an equitable condition of the vacating of the contract.

The value of the timber cut by the defendants with complainant's consent from the Macklen tract by consent of complainant is reported by the special master as \$306.66, for which the complainant is entitled to a decree against the defendants. The defendants paid \$500 on account of the purchase money under the terms of the contract, and further paid \$462.15 for the complainant's one-half of the costs and expenses of Schenck & Co., for the total of which, \$962.15, the defendants, under the terms of the cross-bill, are entitled to a decree against the complainant.

In addition, the complainant will be entitled to a decree for the other timber cut and removed by defendants from the premises. If it shall have been cut and removed with the consent and permission of complainant, to be paid for at the contract price, then the decree will be for the quantity of timber cut and removed at \$2 per 1,000 feet. If, however, it was cut and removed without permission, under circumstances amounting to a trespass, the damages are measured by a very different rule, and should be ascertained by a jury, and in the formal decree to be entered, embodying the results of the conclusions of law and fact herein found, provision will be made for an issue to a jury to ascertain such damages.

The costs in the cause on the original bill will be paid by the defendants, and those arising on the cross-bill by the cross-defendants. The matter of the costs on the issue to be as may be hereafter ordered by the court.

In re SELMAN HEATING & PLUMBING CO.

(District Court, N. D. Alabama, S. D. April 14, 1913.)

No. 11,975.

1. COMMERCE (§ 40*)—TRANSACTIONS CONSTITUTING INTERSTATE COMMERCE—SALE OF GOODS—PLACE OF PASSING OF TITLE.

The question whether or not a sale is one in interstate commerce is not to be determined by the time and place of the technical passage of title, or of the legal completion of the sale, but the entire transaction must be taken into consideration.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. § 40.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COMMERCE (§ 40*)—TRANSACTIONS CONSTITUTING "INTERSTATE COMMERCE"—SALE OF GOODS.

A bankrupt, doing business in Alabama, ordered three car loads of furnaces from petitioner, a corporation of another state. Two car loads were received and accepted, but, on notice of shipment of the third, bankrupt objected that it was premature, because it was not ready to receive it, nor prepared to meet the payment on the terms of credit given. It was then agreed that it should receive the furnaces and hold them on consignment, with the right to sell by consent of petitioner in each case. Afterward bankrupt agreed to purchase the same, and gave its notes at the prices fixed by the original order. *Held*, that the transaction was continuous from the beginning, and the sale referable to the original order, the subsequent modification being merely for the purpose of postponing the time of delivery, that the sale was one in "interstate commerce," not affected by the Alabama statute making void contracts to be performed in the state by foreign corporations, which had not complied with the requirements to entitle them to do business in the state, and the notes were valid and provable against the bankrupt's estate.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. § 40.*

For other definitions, see Words and Phrases, vol. 4, pp. 3724-3731.]

In the matter of the Selman Heating & Plumbing Company, bankrupt. On petition of the Peck-Williamson Heating & Ventilating Company to review order of referee disallowing a part of its claim. Reversed.

Henry Bentley, of Cincinnati, Ohio, for petitioner.

Max J. Winkler, M. M. Ullman, and R. Du Pont Thompson, all of Birmingham, Ala., for trustee.

GRUBB, District Judge. This is a petition filed by the Peck-Williamson Heating & Ventilating Company to review an order of the referee disallowing in part its claim filed against the bankrupt estate. The referee, upon motion of the trustee to expunge, disallowed an item of \$2,400, the price of a car load of furnaces, shipped the bankrupt corporation by the petitioner on August 3, 1911. This item was disallowed by the referee upon the theory that the contract under which it was incurred by the bankrupt was void by reason of the failure of the petitioner, which was a foreign corporation, to qualify as required by the Constitution and laws of Alabama to do business in that state. It is conceded that at the time of the transaction the petitioner had not properly qualified itself to do business as a foreign corporation in Alabama, and that under the decisions in that state, which are followed in the federal courts, all contracts made by it and to be performed in Alabama are avoided by such failure, except such as relate to transactions of interstate or foreign commerce. The question, the solution of which determines the review, is whether the transaction, which is the basis of the asserted claim of petitioner, is one relating to commerce between states.

The facts of the transaction are not in doubt or dispute. The bankrupt corporation had placed an order with petitioner for three car loads of furnaces, payment to be made on the usual terms of credit. Two cars were delivered to and accepted by the bankrupt

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

under the terms of this order. Upon advice of the shipment of the third and last car of the order, the bankrupt protested against receiving that car, asserting that it was prematurely shipped, and because its immediate receipt would inconvenience the bankrupt as to storage, and also in paying for it on the terms of credit. After correspondence it was agreed that the terms of the sale should be modified, and the furnaces received by the bankrupt on consignment only, and handled for and stored at the expense of the petitioner, with the understanding that the bankrupt, by permission of petitioner in advance in each instance, might sell the furnaces from stock to its customers. The furnaces were received and stored for petitioner under this arrangement on their arrival. None were sold to customers before bankruptcy intervened. On December 18, 1911, the bankrupt by letter offered to buy these furnaces then stored with it, and after some correspondence with petitioner, on January 22, 1912, the petitioner agreed to sell the furnaces to the bankrupt. Nothing was then said as to the price, but it was assumed between both parties that the original selling price was to govern. The petitioner about that date received in payment the bankrupt's note for \$2,400, a renewal of which constitutes the item in controversy.

[1] The contention of the trustee is that the original sale was rescinded before the goods were received by the bankrupt, and that it received them at first upon consignment only, and that the only sale that was made was afterwards consummated in Alabama, and while the goods sold were in Alabama, and for that reason was not a transaction in interstate commerce. The petitioner contends that the transaction from the original sale, through the consignment, and to the final sale was a continuous one; that the consignment and final sale were modifications merely of the original sale, which concededly was an interstate transaction; and, consequently, that the entire transaction was one of interstate commerce.

The trustee lays stress upon the time and place where the sale was consummated, and where the title to the property passed, and if these circumstances are controlling, the transaction was clearly not an interstate one, since it is conceded that the only sale which had the effect to pass title to the bankrupt occurred after the property sold was in Alabama, and that delivery to the bankrupt, as purchaser, there first occurred.

In the case of *Dozier v. Alabama*, 218 U. S. 124, 127, 30 Sup. Ct. 649, 650 (54 L. Ed. 965, 28 L. R. A. [N. S.] 264), the Supreme Court said:

"No doubt it is true that the customer was not bound to take the frame unless he saw fit, and that the sale of it took place wholly within the state of Alabama, if a sale was made. But as was hinted in *Rearick v. Pennsylvania*, 203 U. S. 507, 512 [27 Sup. Ct. 159, 51 L. Ed. 295], what is commerce among the states is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed. It was agreed that the frame should be offered along with the picture. The offer was a part of the interstate bargain, and as it was agreed that the frame should be offered 'at factory prices,' and the company and factory were in Chicago, obviously it was contemplated, if not agreed, that the frame should come on with the picture. In fact, the frames were

sent on with the pictures from Chicago, and were offered when the pictures were tendered, as part of a transaction commercially continuous and one, at prices generically fixed by the contract for the pictures, and by that contract represented to be less than retail or usual prices, in consideration, it is implied, of the purchase already agreed to be made. We are of the opinion that the sale of the frames cannot be so separated from the rest of the dealing between the Chicago company and the Alabama purchaser as to sustain the license tax upon it. Under the decisions the statute as applied to this case is a regulation of commerce among the states, and void under the Constitution of the United States. Article I, § 8; *Robbins v. Shelby County Taxing District*, 120 U. S. 489 [7 Sup. Ct. 592, 30 L. Ed. 694]; *Caldwell v. North Carolina*, 187 U. S. 622 [23 Sup. Ct. 229, 47 L. Ed. 336]; *Rearick v. Pennsylvania*, 203 U. S. 507 [27 Sup. Ct. 159, 51 L. Ed. 295]."

In the case of *Rearick v. Pennsylvania*, 203 U. S. 507, 512, 27 Sup. Ct. 159, 160 (51 L. Ed. 295), the Supreme Court said:

"Commerce among the several states' is a practical conception not drawn from the 'witty diversities' ([*Yaites v. Gough*], Yelv. 33) of the law of sales. *Swift & Co. v. United States*, 196 U. S. 375, 398, 399 [25 Sup. Ct. 276, 49 L. Ed. 518]. The brooms were specifically appropriated to specific contracts, in a practical, if not in a technical, sense. Under such circumstances it is plain that, wherever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce. In *Brennan v. Titusville*, 153 U. S. 289 [14 Sup. Ct. 829, 38 L. Ed. 719], pictures were sold by sample, as the brooms were here, and although the pictures were consigned to the purchasers directly, the railroad collecting the price, there was no discussion of the question whether the title had passed. In *American Express Co. v. Iowa*, 196 U. S. 133, 143 [25 Sup. Ct. 182, 49 L. Ed. 417], that question was referred to only to be waived. In *Caldwell v. North Carolina*, 187 U. S. 622 [23 Sup. Ct. 229, 47 L. Ed. 336], the pictures were consigned to the defendant, an agent, as here, with the additional facts that the pictures and frames were sent in large packages, which were opened by the agent on their arrival, and that the pictures then for the first time were put into their proper frames, and, for all that appears, then for the first time appropriated to specific purchasers. In the court below all the judges agreed that the title did not pass until delivery. 127 N. C. 521, 526, 527 [37 S. E. 138]. This court intimated nothing to the contrary."

These cases clearly hold that the question as to whether or not the transaction is one in interstate commerce is not to be determined by the time and place of the technical passage of title or of the legal completion of sale. The conceded fact that title in this case passed, and the sale was completed by delivery after the property had arrived in Alabama, is not, therefore, conclusive.

[2] It must be admitted that the transaction in its inception was an interstate one. Its subsequent modification was intended not to change the ultimate character of the transaction, but to provide security to the seller pending the delayed settlement of the purchase money. The same purpose might have been accomplished by the buyer's giving a mortgage on the property to secure the unpaid purchase money, and in that event no tenable question as to its interstate character could have arisen. The car of furnaces which was the subject-matter of the transaction was one of three ordered together. The two first cars delivered were interstate shipments beyond question. What are the facts that distinguish the third from the two first? The furnaces delivered in the two first cars overstocked the bankrupt, and embarrassed it for storage room for the other furnaces, and, more seriously, for the means to pay for the others until the first were dis-

posed of. This impelled the bankrupt to complain of the early delivery of the third car. The difficulty as to storage appears to have been overcome by the bankrupt. The financial difficulty proved more obstinate. It was finally surmounted by the seller agreeing to postpone payment by taking security. The form of security adopted by the parties was the retaining of title through a consignment of the property to the buyer in lieu of a present sale. The seller was unwilling to extend the buyer a long term of credit. The buyer was not in a position to purchase on a short term. Both parties desired that the completion of the transaction be deferred merely, and not called off altogether. The natural method of meeting this situation was to postpone delivery and the passing of title to the buyer by committing the property to the custody of the buyer as agent of the seller until such time as the buyer became financially able to handle the purchase, and to secure the seller in the interim by its retention of title and ownership of the goods until the arrival of such time. This obviated the necessity of returning the property or of storing it elsewhere than with the buyer, and the consequent expense of re-shipment or rehandling.

The intent of the parties was not to rescind the trade, but to postpone it, and the method pursued was for the purpose of maintaining the status during the postponement pending the final completion of the transaction. In this view, the transaction was a continuous one from its inception to the final sale in January, 1912, which, in effect, related back to the original sale. Being single and continuous from its inception, the property came into the state free from the chance of being sold by a new bargain in the state to the original buyer, as much so as if the seller had taken a mortgage as his security, instead of the consignment agreement. The cases of *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, 84 C. C. A. 167, *In re Monongahela Distillery Co.* (D. C.) 186 Fed. 220, *Chicago Portrait Co. v. Macon* (C. C.) 147 Fed. 967, and *Parsons-Willis Lumber Co. v. Stuart*, 182 Fed. 779, 105 C. C. A. 211, support this conclusion.

The case of *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 520, 24 Sup. Ct. 370, 48 L. Ed. 538, is relied upon as in conflict with the conclusion reached. The effect of this case was to determine that:

"Goods brought in original packages from another state, after they have arrived at their destination and are at rest within the state, and are enjoying the protection which the laws of the state afford, may, without violating the commerce clause of the Constitution, be taxed without discrimination like other property within the state, although at the time they are stored at a distributing point, from which they are subsequently to be delivered in the same packages, through the storage company, to purchasers in various states."

The taxability of the petitioner's property while in the possession of the bankrupt in this state is not the question presented for decision in this case. In the case of *Swift v. United States*, 196 U. S. 375, 399, 25 Sup. Ct. 276, 280 (49 L. Ed. 518), distinguishing the case last mentioned from that then being considered by it, the Supreme Court said:

"It should be added that the cattle in the stockyard are not at rest, even to the extent that was held sufficient to warrant taxation in *American Steel & Wire Co. v. Speed*, 192 U. S. 500 [24 Sup. Ct. 365, 48 L. Ed. 538]. *But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the states*, but depends upon whether the tax so far affects that commerce as to amount to a regulation of it.

In the case of *Rearick v. Pennsylvania*, 203 U. S. 507, 513, 27 Sup. Ct. 159, 161 (51 L. Ed. 295), the Supreme Court said:

"Some argument was made, to be sure, that, even if the defendant was engaged in interstate commerce when he delivered the goods, still the ordinance bound him. *American Steel & Wire Co. v. Speed*, 192 U. S. 500 [24 Sup. Ct. 365, 48 L. Ed. 538], was especially relied upon. But that decision did not modify the cases that we have cited. It dealt with a case where a mass of nails and iron wire was collected at Memphis from other states, by a manufacturer, for all purposes; some of the goods to be sold on the spot, some ultimately to be forwarded to purchasers in other states, but no package being consigned to or intended for any special customer, or free from the chance of being sold by a new bargain in Tennessee. Under such circumstances the goods were liable to taxation in that state. The distinction between that case and the present does not need further emphasis. In view of the many decisions upon the matter, we deem further argument unnecessary to show that the judgment below was wrong."

The case at bar resembles the *Rearick Case*, and is unlike the case of *American Steel & Wire Co. v. Speed*, which is there distinguished.

The effect of the Alabama law, if applied to the transaction involved here, is not merely to impose a nondiscriminating tax upon the petitioner's property while it is within the state of Alabama and under the protection of its laws, but to absolutely forbid the petitioner from engaging in interstate commerce until it has complied with the Constitution and laws of Alabama with respect to foreign corporations engaging in business within the state. This would be an attempt on the part of the state to regulate interstate commerce, which it is not competent for it to do.

The order of the referee, disallowing and expunging the portion of the claim contested, is set aside, and the claim, as filed, is established, so far as the contested item is concerned.

UNITED STATES ex rel. ARONOWICZ v. WILLIAMS, Immigration Com'r.

(District Court, S. D. New York. May 2, 1913.)

1. HABEAS CORPUS (§ 23*)—DEPORTATION OF ALIENS—BOARD OF SPECIAL INQUIRY—FINDINGS—CONCLUSIVENESS.

A finding of the board of special inquiry, based on the report of official medical officers, that an alien, seeking to enter, was a feeble-minded person, and therefore subject to deportation, was conclusive, as provided by Immigration Act Feb. 20, 1907, c. 1134, § 10, 34 Stat. 901 (U. S. Comp. St. Supp. 1911, p. 505), notwithstanding the opinions of other physicians to the contrary; the court having no jurisdiction to determine such an issue on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. § 23.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. HABEAS CORPUS (§ 54*)—PETITION—REQUISITES.

A petition for habeas corpus to review the exclusion of an alien, after alleging that petitioner was excluded by the board of special inquiry on the ground that she was insufficiently developed mentally, alleged that petitioner has been informed and verily believed that all the acts and proceedings of the board were illegal, void, null, and wanting in jurisdiction in respect to the said petitioner, and contrary to the rules, regulations, and statutes in pursuance of the Constitution of the United States. *Held*, that such allegations were mere conclusions, and that the petition was insufficient for want of facts.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 51; Dec. Dig. § 54.*]

Habeas corpus to review exclusion of immigrant.

LACOMBE, Circuit Judge. The relator is a girl of 17, who came here with her parents. She was examined by three of the official medical officers, who certified that she was feeble-minded. Thereupon the board of special inquiry examined her, and, basing their conclusion upon the certificate which was before them, found that this alien came within the excluded classes, being a "feeble-minded person." Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 500).

[1] Counsel for relator presents affidavits made by two physicians, who have visited her at Ellis Island, and who swear that in their opinion she is not feeble-minded, but in perfect health, physically and mentally. Upon the strength of this, counsel asks for a reversal by this court of the decision of the board. The respondent has also presented the report of an expert alienist physician, confirming the conclusions of the official examining surgeons, and stating the observations which induced his conclusion. That was wholly unnecessary. This court has no authority to dispose of any such controversy. If relator's counsel had taken the trouble to read the Immigration Act of 1907 before making his application, his clients might have been saved the expense of this futile examination and argument. By the tenth section of the act it is provided that a decision of the board of special inquiry, based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens afflicted with any mental disability which would bring such alien within any of the classes excluded from admission under section 2. The courts cannot retry the question.

[2] Moreover, the petition for the writ is itself insufficient. It asserts that the alien was excluded by the board of special inquiry on the ground that she was not sufficiently mentally developed, and states that the petitioner, her father, believes she is in good health and is willing to provide for her. These averments indicate no reason why the finding of the board should be questioned. The petition then charges:

"That your petitioner has been informed and verily believes that all the acts and proceedings of the aforesaid board of inquiry were illegal, void, null, and wanting in jurisdiction in respect to said Kennie Aronowicz, and contrary to the rules, regulations, statutes, and Constitution of the United States."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

These allegations scrupulously avoid stating a single fact upon which it will be contended the board of special inquiry were without jurisdiction or acted illegally. Such general averments of legal conclusions, without the slightest indication of the facts on which they are predicated, have been held by the Supreme Court insufficient to support a writ of habeas corpus. *Craemer v. Washington State*, 168 U. S. 129, 18 Sup. Ct. 1, 42 L. Ed. 407. See, also, *Low Wah Suey v. Backus*, 225 U. S. 473, 32 Sup. Ct. 734, 56 L. Ed. 1165. If the government had moved on the petition itself to dismiss the writ, such relief would not have been inappropriate.

The writ is dismissed.

UNITED STATES ex rel. GONCALOES et al. v. WILLIAMS, Immigration Com'r.

(District Court, S. D. New York. May 2, 1913.)

HABEAS CORPUS (§ 23*)—DEPORTATION OF ALIENS—BOARD OF SPECIAL INQUIRY—FINDINGS.

Findings of a board of special inquiry that aliens applying to enter, none of whom had sufficient money to take them to their destination and pay their passage back to the country from whence they came, were liable to become public charges, and excluding them for that reason, were conclusive, and could not be reviewed on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. § 23.*]

Scope of review on habeas corpus to procure release of persons sought to be extradited, see note to *Bruce v. Rayner*, 62 C. C. A. 506.]

Habeas corpus for aliens excluded upon arrival.

LACOMBE, Circuit Judge. These aliens were all examined before the board of special inquiry. None of them had money enough with him to take him to his destination and pay his passage back to Portugal. None of them had any relative here legally bound to support him. The board saw them all, and was able to form its own judgment as to their physical and mental qualifications. It excluded them all as liable to become public charges. That finding is conclusive, and cannot be reviewed here.

If the counsel who argued these causes had read the record of their testimony, he must have known that any application to review the board's finding thereon would be futile, a waste of his own time and of his client's money. If he did not know this, it must have been because he had not familiarized himself with the provisions of the act and the numerous decisions of this court thereon. Without such familiarity, it would seem unwise—to use no harsher word—for counsel to undertake to act for these ignorant aliens and their not much more intelligent friends here.

The writ is dismissed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

UNITED STATES *ex rel.* KUTAS *v.* WILLIAMS, Immigration Com'r.

(District Court, S. D. New York. May 2, 1913.)

1. HABEAS CORPUS (§ 23*)—DEPORTATION OF ALIENS—REVIEW—FINDINGS OF BOARD OF SPECIAL INQUIRY.

Findings of a board of special inquiry that an alien, applying to enter, was afflicted with lack of physical development for his age, which affected his ability to earn a living, and, having only \$20 on arrival, was likely to become a public charge, were conclusive, and not reviewable on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. § 23.*]

Scope of review on habeas corpus to procure release of persons sought to be extradited, see note to *Bruce v. Rayner*, 62 C. C. A. 506.]

2. HABEAS CORPUS (§ 85*)—EXCLUSION OF ALIENS—EVIDENCE—BOND TO SUPPORT.

Where an alien, applying to enter, was found to lack physical development for his age, and excluded because he was liable to become a public charge, an affidavit by his cousin, who was a responsible person in business in the United States, offering to enter into a legal obligation with sufficient sureties that the alien would not become a public charge, could not be considered on a writ of habeas corpus to review the order of deportation; its acceptance being discretionary with the Secretary of Labor, as provided by Immigration Act Feb. 20, 1907, c. 1134, § 26, 34 Stat. 906 (U. S. Comp. St. Supp. 1911, p. 515).

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.*]

Habeas corpus and certiorari to review action of the immigration authorities.

LACOMBE, Circuit Judge. [1] Relator was excluded upon a finding of the board of special inquiry that he is liable to become a public charge. The record shows that he came here alone; his passage being paid by his parents in Russia. Upon arrival he had \$20. He has two brothers, who are employed here, one earning \$25, the other \$15, a week, who offer to take care of him; but neither is under any legal obligation to support him. The three examining surgeons certify that they found him "to be afflicted with lack of physical development for the age he claimed to be, sixteen, which affects his ability to earn a living." Upon this certificate and their own observations of the alien, who was examined before them, the board reached the conclusion above indicated. Such conclusion is final. This court has no jurisdiction to review or modify it. See opinions filed to-day in *Cases of Aronowicz*, 204 Fed. 844, and *Goncaloes*, 204 Fed. 846.

[2] An affidavit has been submitted made by a responsible person in business here, who is a cousin of the relator, and who offers to enter into a legal obligation, with sufficient sureties, that relator will not become a public charge. Such an offer, however, is not one that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the court can consider. Its acceptance is discretionary with the Secretary of Labor. Section 26, Immigration Act.

The writ is dismissed, and relator remanded to the immigration authorities.

UNITED STATES ex rel. LA FATA v. WILLIAMS, Immigration Com'r.

(District Court, S. D. New York. May 2, 1913.)

ALIENS (§ 54*)—DEPORTATION—GROUNDS—PHYSICAL DEFECT—MEDICAL REPORT—REVIEW.

Immigration Act Feb. 20, 1907, c. 1134, § 10, 34 Stat. 901 (U. S. Comp. St. Supp. 1911, p. 505), provides that the decision of the board of special inquiry, based on the certificate of the examining medical officers, shall be final as to the rejection of aliens affected with any physical disability which would bring such alien within any of the excluded classes. *Held*, that where an alien 36 years of age, with only \$40, applying to enter the United States, was examined by three medical officers, who certified that he was afflicted with valvular heart disease which affected his ability to earn a living, on which the board found that the applicant was liable to become a public charge, such finding was conclusive on the courts, notwithstanding a certificate by an independent physician that the valvular insufficiency of the heart was very slight, and otherwise he was in normal health.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

Habeas corpus to review exclusion of immigrant.

LACOMBE, Circuit Judge. The alien, aged 36, arrived here with \$40. He was examined by three official medical officers, who certified that he was "afflicted with valvular disease of the heart, which affects ability to earn a living." He then came before the board of special inquiry, which, after examining him and considering the certificate, found that he was liable to become a public charge, and that he had a physical defect which may seriously affect his ability to earn a living.

Relator's counsel seems to assume that this court will review the conclusion of the board, based upon the certificate of the medical officers, and has presented a letter from a physician, not in government service, who has examined the man and writes that, except for a very slight valvular insufficiency, he is in normal health. The government also presents the opinion of another independent physician, confirming the conclusion of the government medical officers. This will be found in the papers in the Aronowicz Case, 204 Fed. 844, decided yesterday. This court has no jurisdiction to decide such a controversy. The act (section 10) makes the certificate of the official medical officers "final as to rejection of the alien."

The recent Cases of Castro (D. C.) 203 Fed. 155, and Mylius (D. C.) 203 Fed. 152, on which relator's counsel relies, have no bearing whatever on the proposition now before the court.

The writ is dismissed, and relator remanded to immigration authorities.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CLEVELAND, C. C. & ST. L. RY. CO. v. HIRSCH.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1913.)

No. 2,291.

1. COURTS (§§ 282, 284*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—"CASE ARISING UNDER LAWS OF UNITED STATES."

A case arises under the Constitution or a law of the United States, so as to be within the jurisdiction of a federal court, whenever its correct decision depends on the construction of either.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 826, 831; Dec. Dig. §§ 282, 284.*]

2. CARRIERS (§ 32*)—CONTRACT WITH SHIPPER—LEGALITY—DISCRIMINATION IN RATES.

A contract by which an interstate railroad carrier leased ground to a dealer in scrap iron and secondhand railroad material for a term of five years, with privilege of renewal, at a rental not much exceeding one-tenth of its actual rental value, in consideration of receiving the lessee's shipments, both interstate and intrastate, at regular rates, with the understanding that the reduced rental was in fact a concession on freight charges, is invalid, as giving the lessee a preference or advantage by allowing a rebate or concession, in violation of Interstate Commerce Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3155), and Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1911, p. 1310). It is also invalid as affecting intrastate shipments, under 1 Gen. Code Ohio, § 505 et seq., containing provisions similar to those of the federal acts, and under the previous law of the state as settled by decision.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

3. COURTS (§ 494*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—INCIDENTAL QUESTIONS.

Where a federal court has acquired jurisdiction of a suit for cancellation of such contract as one arising under a federal law, it also has jurisdiction incidentally to determine the validity of the contract under the law of the state, so far as it affects intrastate business.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1355-1371; Dec. Dig. § 494.*]

Jurisdiction in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co.*, 35 C. C. A. 7; *Earnhart v. Switzler*, 105 C. C. A. 262.]

4. CONTRACTS (§ 137*)—VALIDITY—LEGALITY OF CONSIDERATION.

A contract is illegal where an essential and indivisible part of the consideration is tainted with illegality.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 701-712; Dec. Dig. § 137.*]

5. CONTRACTS (§ 138*)—ILLEGALITY OF INSTRUMENT—RIGHT TO CANCELLATION—PARTIES IN PARI DELICTO.

Complainant, a railroad company, leased premises to defendant for a term of 5 years with privilege of an additional term of 20 years. The consideration for the lease was illegal, in that the rental reserved was less than the actual rental value of the property; the difference being a concession granted to defendant on account of shipments to be made on complainant's road at schedule rates. Under the law of Ohio the lease, being void, created a tenancy from year to year only. Prior to the expiration of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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5-year term complainant repudiated the lease and commenced suit for its cancellation at the end of that term. *Held*, that it was not precluded from maintaining such suit by the fact that it was particeps criminis, the lease as to the renewal term being executory, and its continuance being contrary to public policy, but that it could not require an accounting for rental accrued prior to the commencement of the suit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company against I. C. Hirsch. Decree for defendant, and complainant appeals. Reversed.

This was a suit in equity to set aside a lease under which Hirsch occupies certain of the company's land, and to require him to deliver up the premises and render an accounting. The basis of the suit was that the rent reserved was virtually nominal, and that the transaction was a subterfuge, which was intended to and did operate to give to Hirsch an undue preference, in violation of the Interstate Commerce Act. The averments of the bill may be summed up as follows:

The company is a common carrier engaged in interstate commerce, and as such is subject to the provisions of the act to regulate commerce, approved February 4, 1887, and its amendments; that in August, 1904, the company and Hirsch entered into a written agreement, whereby the company granted to Hirsch the right to use and occupy the land in question, comprising 6.58 acres, situated on its line of railroad in Hamilton county, Ohio, for a term of 5 years, beginning September 1, 1904, with the privilege of an additional term of 20 years. The company further agreed to, and did, inclose the land by a fence and construct such side tracks as were required to handle the business of Hirsch. As part of the consideration of the agreement, Hirsch was to give to the company all of his in and out bound freight business that could be handled by its lines at rates equal to those of any of the company's competitors (the company to be given a reasonable opportunity to meet any lower rate which might be offered by any competing road). Hirsch was also continually to prosecute on the premises the business only of dealing in scrap iron and secondhand railway materials. The rental in terms reserved was \$275 per annum; and it is averred that the reasonable rental value of the land was \$2,421.60 per annum; that "thereby it was agreed" that the company "should allow to said Hirsch, and Hirsch should receive" from the company, "in consideration of the said shipments and as a concession upon the freight charges to be paid by him, the sum by which said rental * * * was less than the fair rental value of the premises, being a sum upwards of \$2,000 per annum, all of which was well known to the said Hirsch and intended by him to be the effect of said agreement." This excess in rental value greatly exceeded the revenue received from Hirsch for the years 1906, 1907, 1908, and 1909 on shipments, both intrastate and interstate (the latter comprising much the greater portion of the traffic); and it is further averred that the effect of the agreement was that, instead of the company receiving from Hirsch the regular published traffic rates for the transportation of his freight, it has in fact been paying to Hirsch a large bonus for shipping goods over its lines, and that Hirsch was so accorded an unreasonable preference and advantage over all other persons shipping over its lines, and that all other persons engaged in the same business in the city of Cincinnati were subjected to "an undue and unreasonable prejudice or disadvantage."

Decree sought declaring contract void, enjoining occupancy of property, requiring delivery of possession, and an accounting for reasonable rental from date of contract. The case was disposed of below upon an amended bill and demurrer. The demurrer was sustained, and the company appealed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Harmon, Colston, Goldsmith & Hoadly, of Cincinnati, Ohio (George Hoadly, of Cincinnati, Ohio, of counsel), for appellant.

Kramer & Bettman, of Cincinnati, Ohio (Gilbert Bettman, of Cincinnati, Ohio, of counsel), for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). [1] The first ground of the demurrer challenged the court's jurisdiction, but nothing was stated in the argument nor is anything found in the briefs on this subject. The company was incorporated under the laws of Ohio and Indiana, and is a citizen of each of the states, having its principal office and place of business in Cincinnati; and Hirsch is a citizen and resident of Hamilton county, Ohio, doing business there in the name of I. C. Hirsch Iron & Steel Rail Company. The only perceivable ground of jurisdiction is that the cause arises under a law of the United States. The bill shows that a substantial portion of the service intended, and in fact performed, under the contract in dispute, is of an interstate character; and although the amended bill does not in all respects strictly comply with the rule touching jurisdictional averment, yet we think enough is definitely stated, without resorting to argumentative inference (*Shulthis v. McDougal*, 225 U. S. 561, 569, 32 Sup. Ct. 704, 56 L. Ed. 1205), to show that the controversy arises in material part under the Interstate Commerce Act. Since a correct decision of the case must depend on the construction of portions of that law, jurisdiction of the court below sufficiently appears. The familiar rule laid down by Chief Justice Marshall (*Cohens v. Virginia*, 6 Wheat. at *379, 5 L. Ed. 257) furnishes the answer to this feature of the demurrer:

"A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either."

So in *Tennessee v. Davis*, 100 U. S. 257, 264 (25 L. Ed. 648), the court said:

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted."

See *In re Lennon*, 166 U. S. 548, 553, 17 Sup. Ct. 658, 41 L. Ed. 1110; *Macon Grocery Company v. Atlantic Coast Line*, 215 U. S. 501, 506, 30 Sup. Ct. 184, 54 L. Ed. 300; *Second Employer's Liability Cases*, 223 U. S. 1, 56, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. (C. C.)* 54 Fed. 730, 732, 19 L. R. A. 387; *Kalispell Lumber Co. v. Great Northern Ry. Co. (C. C.)* 157 Fed. 847, 848; *Lovell v. Newman & Son*, 227 U. S. 420, 421, 33 Sup. Ct. 375, 57 L. Ed. —.

[2] The only remaining ground of the demurrer is that complainant has not made such a case as entitles it to any relief in a court of equity. The first question naturally arising under this ground is whether the contract is valid or void. Analysis of the averments of the amended bill, as epitomized in the statement, plainly shows un-

der the demurrer that the railroad company agreed to turn over property to Hirsch for a period of 5 years, from September 1, 1904 (with the privilege of an additional term of 20 years), at a yearly rent of more than \$2,000 less than its true rental value, in consideration of the rent reserved and of the privilege of carrying Hirsch's in and out bound freight at competitive rates. This excess rental value was much more in each of the years of 1906 to and including 1909 than the total annual revenue which the company derived in those years from traffic, both intrastate and interstate, shipped and received by Hirsch. It results that during those years the company not only furnished Hirsch with free transportation of his in and out bound freight, but also paid him additional sums in the form of rental value for the privilege of doing so. True, the traffic of Hirsch might in other years yield revenue greater than the excess rental value, but such contribution of the company would be none the less in amount or certain in its effect.

It is urged that this at last means nothing more than a "cheap lease," and that railroad companies are entitled to give inducements to business concerns to locate along the lines of the companies and so to increase the traffic. But the amended bill is still more specific. It is averred, in respect of this excess rental, that "thereby it was agreed" that the company should allow and Hirsch should receive such excess, not alone in consideration of Hirsch's shipments, but "as a concession upon the freight charges to be paid by him," and that this was "well known to * * * Hirsch and intended by him to be the effect of said agreement." Whether it was intended by these averments to charge that the company was less guilty than Hirsch as respects any violation of law in entering into the contract, and so augment the right to maintain the suit, is not made definite, and cannot be considered on the demurrer. Presumably the company knew the rental value of its property at the date of the contract, and the circumstances under which it was entered into, as well as at the time it made the averments; yet this is of no practical importance in determining the validity of the contract, since intent is imputed where the effect of the instrument is to violate the law. Whatever may be said of the contract on its face, it must be tested in connection with such facts as are well pleaded; and the averments concerning the excess in rental value are positive statements of fact.

So far as its validity is concerned, the contract cannot be effectively distinguished from that of the Pfalzers, which was recently condemned in *United States v. Union Stockyards*, 226 U. S. 306, 308, 33 Sup. Ct. 83, 57 L. Ed. —. That contract provided that if the Pfalzers would construct a packing plant adjacent to the stockyards, and maintain and operate the plant for a period of 15 years, and either buy and use in their slaughtering business only such live stock as moved through the stockyards, or pay the same charges thereon as if the stock had passed into the stockyards and had been purchased there, they should receive \$50,000 from the Stockyard Company, which under its charter and certain facts disclosed was held to be also a common carrier subject to the Interstate Commerce Law. Mr. Justice Day said (226 U. S. 308, 33 Sup. Ct. 89, 57 L. Ed. —):

"In other words, this plant in effect may pay for the services of the Stockyard Company up to the sum of \$50,000, with the bonus given to the Pfaelzers for the location of their plant in juxtaposition to the stockyards. * * * Any other company with which it has made no contract would be compelled to pay the full charge for the services rendered, without any rebate or concession. Another company might have a contract for a larger or smaller bonus, and thereby receive different treatment. Certainly as to the company which receives no such bonus there has been an undue advantage given to and an unlawful discrimination practiced in favor of Pfaelzer & Sons. * * * It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever, and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms."

See, also, *Chicago & Alton R. R. Co. v. Kirby*, 225 U. S. 155, 165, 166, 32 Sup. Ct. 648, 56 L. Ed. 1033; *Chesapeake & Ohio Ry. Co. v. Standard Lumber Co.*, 174 Fed. 107, 115, 98 C. C. A. 81 (C. C. A. 4th Cir.); *E. E. Taenzer & Co. v. Chicago, R. I. & P. Ry. Co.*, 191 Fed. 543, 549, 112 C. C. A. 153 (C. C. A. 6th Cir.); *Elwood Grain Co. v. St. Joseph & G. I. Ry. Co.*, 202 Fed. 845, 847 (C. C. A. 8th Cir.).

These decisions fairly illustrate the necessity to examine into the substance and effect of a transaction, regardless of the form it is given, when attempting to test its validity under the Interstate Commerce Law. Any endeavor to square a transaction with that law must take into account its evident purpose to treat all shippers of interstate commerce alike. The object of requiring tariffs to be published is not only to impose upon the carrier the duty of equality in service and rates, but also to enable shippers to protect themselves in that behalf. If a carrier of interstate freight permits a shipper to occupy any of its lands, as here, as a means of either reducing or absorbing its published rates in such shipper's favor, the transaction is clearly violative of that provision of the Elkins Law which forbids the giving or receiving of "any rebate, concession, or discrimination, in respect to the transportation of any property in interstate * * * commerce," etc. (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1911, p. 1310]), also as preserved by the Hepburn amendment (Act June 29, 1906, c. 3591, § 2, 34 Stat. 587, 588 [U. S. Comp. St. Supp. 1911, pp. 1291, 1292]), and likewise of section 3 of "An act to regulate commerce" prohibiting "any undue or unreasonable preference or advantage" (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. Stat. 1901, p. 3155]). *United States v. Union Stockyard*, supra.

It is vain to say that this unduly deprives the carrier of any private right of property. Such a contention, and it is made here, fails to observe the direct connection between the use made of the property, through reduced rental, and the concession and discrimination made as to rates. The power of Congress under the commerce clause to denounce such a device as this for reducing rates is quite as clear as is its power to regulate the rates themselves. This in no wise militates against the right of a carrier to let or permit the use of its property at a reasonable rental. Whatever else may be said of the contract in dispute, it is denounced by the law, and, as to interstate freight, is void.

[3, 4] It is claimed, however, that, since intrastate traffic is involved under the contract, it is not enough simply to show that the contract

is violative of the Interstate Commerce Act. There are two answers to this: In the first place, the settled rule is that the courts regard a contract as illegal where an essential and indivisible part of its consideration is tainted with illegality. *Armstrong v. Toler*, 11 Wheat. 258, 271, 6 L. Ed. 468; *E. E. Taenzer & Co. v. Chicago, R. I. & P. Ry. Co.*, supra, 191 Fed. 550, 112 C. C. A. 153; *Widoe v. Webb*, 20 Ohio St. 431, 435, 5 Am. Rep. 664; *McQuade v. Rosecrans*, 36 Ohio St. 442, 448. There is nothing in the present contract to indicate an intent to distinguish between the two classes of commerce, interstate and intrastate; the traffic, as well as the use of the premises, is treated as an entirety. But, independently of this, the contract is quite as certainly opposed to the statute law of Ohio as it is to that of Congress. If, then, we are right in holding that the court below acquired jurisdiction because the case arose under a law of the United States, it was open to the court below also to pass upon the effect of the local statute (*Siler v. Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191, 29 Sup. Ct. 451, 53 L. Ed. 753; *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 63, 64, 33 Sup. Ct. 192, 57 L. Ed. —; *Traction Co. v. Bridge Co.*, 202 Fed. 184 [C. C. A. 6th Cir.]; *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 25, 26, 33 Sup. Ct. 410, 57 L. Ed. —), and so may be considered here.

True, the statute of Ohio is not referred to in the amended bill; but the facts that intrastate service was intended to be and is performed under the contract, and that the charges therefor are affected by it, are as distinctly averred as they are respecting interstate service and charges; and these averments we think justify the application of the substantive law of the state. *Erie R. Co. v. White*, 187 Fed. 556, 558, 109 C. C. A. 322 (C. C. A. 6th Cir.); *Garrett v. Louisville & N. R. Co.*, 197 Fed. 715, 718, 117 C. C. A. 109 (C. C. A. 6th Cir.). Still it is said, and was decided below, that the federal courts have no power to determine any question as to intrastate traffic involved under the contract. It is enough to say of this question that it arose as an incident to jurisdiction acquired upon another and sufficient ground. Certainly a United States court has power to decide such a question, where, as in this case, the matter is incidentally and necessarily included in the issue of validity, or not, of a contract designed to accomplish a unitary purpose. It may, in passing, be observed of the Ohio statute, as it might be of some of the applicable acts of Congress, that the act was passed subsequent to the date of the contract; but the act makes no exception in favor of such contracts and the right to prohibit them was within the legislative power. *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 478, 479, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Elwood Grain Co. v. St. Joseph & G. I. Ry. Co.*, supra (C. C. A.) 202 Fed. 847.

Section 505 (1 Ohio General Code, 172) requires each railroad to file with the Public Service Commission schedules, which shall be open to public inspection, showing all rates for transportation of property and any service rendered in connection therewith. Section 507 contains substantially the same requirement as to joint rates respecting traffic carried over two or more connecting lines in the state. Section 510 provides:

"No railroad shall charge, demand, collect or receive a greater or less compensation for the transportation of * * * property, or for any service in connection therewith, than is specified in such printed schedules, including schedules of joint rates, as being then in force. The rates, fares and charges named therein shall be the lawful rates, fares and charges until they are changed as provided in this chapter."

Section 567 prohibits—

"undue or unreasonable preference or advantage to a particular person * * * or to any particular description of traffic, in any respect whatsoever. * * *"

Section 568 provides:

"Whoever, being a person, firm or corporation, knowingly accepts or receives a rebate, concession or discrimination in respect to transportation of property wholly within this state or for service in connection therewith, whereby such property by false billing, false classification, false weighing or other device, is transported at a less rate than that named in the published tariffs in force, or whereby any service or advantage is received other than that therein specified, shall be fined," etc.

In the absence of any decision of the Supreme Court of Ohio construing these statutes, and none has been cited or found, we are disposed to hold, for reasons already stated, that the annual concessions made by the company in favor of Hirsch in the form of rental value, not reserved, are prohibited by the Ohio statute. Moreover, the policy so declared by the law of Ohio is expressive of a policy long prevailing in the state as it has been interpreted by its Supreme Court. We refer to cases which differ in their facts from the facts in this case, but the underlying principles there announced are in substantial harmony with such statutory policy, and the common law as well. *Scofield v. Railway Co.*, 43 Ohio St. 571, par. 3 of syl., 3 N. E. 907, 54 Am. Rep. 846; *State ex rel. v. C., N. O. & T. P. Ry. Co.*, 47 Ohio St. 130, 139, 23 N. E. 928, 7 L. R. A. 319; also *Baltimore & Ohio R. Co. v. Diamond Coal Co.*, 61 Ohio St. 242, 251, 55 N. E. 616, where Judge Shauck, in alluding to *Scofield v. Railway Co.*, supra, in which a contract was declared unlawful because it provided for a discrimination in rates, said:

"It was there also held that the provisions of statutes and special charters prohibiting such discriminations are but declaratory of the common law."

We therefore hold that the contract in dispute is also void as respects intrastate commerce.

[5] However, it is earnestly contended that the railroad company is *particeps criminis*, and that under the maxim, "*In pari delicto potior est conditio defendentis*," a court of equity will not interfere. It must be conceded that the learned counsel states the general rule prevailing in equity and at law. *St. Louis Railroad v. Terre Haute Railroad*, 145 U. S. 393, 407, 12 Sup. Ct. 953, 36 L. Ed. 748. It need scarcely be said that a suit would not lie to enforce the present contract; but it does not follow that the complainant is not entitled to any relief whatever. While the case just cited is distinguishable from the present case, it affirms certain settled principles which we think are applicable here. That was a suit to set aside and cancel a lease granting a continuous term of 999 years. The lease and the property had been delivered 17 years before the suit was commenced,

and meanwhile no steps had been taken to repudiate the contract. The lease, although *ultra vires*, was regarded as a fully executed contract, and the court refused to interfere for that reason. 145 U. S. 408, 12 Sup. Ct. 953, 36 L. Ed. 748. It is to be observed that the instrument involved in the present case may be regarded as a lease within the decision in *Thomas v. Railroad Co.*, 101 U. S. 78, 79, 25 L. Ed. 950; that its term was 5 years, with a privilege of an extension for 20 years more; and that complainant repudiated the lease at the threshold of the extension term. Besides, in the course of the opinion in *St. Louis Railroad v. Terre Haute Railroad*, *supra*, 145 U. S. 407, 12 Sup. Ct. 957, 36 L. Ed. 748, Justice Gray said:

"While an unlawful contract, the parties to which are in *pari delicto*, remains executory, its invalidity is a defense in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose. *Adams on Eq.* 175. Consequently, it is well settled, at the present day, that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and canceled, upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defense. *Story, Eq. Jur. par. 700a*, and cases cited; *Simpson v. Howden*, 3 Myl. & Cr. 97; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 282."

The illegality involved in the contract at bar does not appear on its face; but depends on external evidence as to facts and as to purpose, and this evidence might be lost by lapse of time. The contract is in substance and effect described in the amended bill, and a copy of it was filed as an exhibit. It purports to require Hirsch to pay a specified rent and the company to carry his freight at its published rates. Its vice consists in the excess in rental value averred, and the purpose of concealing and transposing this excess as before pointed out. It is most difficult to see how the company could decline to carry Hirsch's freight, for primarily it is in terms entitled to, and presumably it receives, full rates. The company hardly could offer its own contract, or the extraneous facts before alluded to, to excuse performance of its duties as a common carrier. Its loss arises collaterally out of Hirsch's use of its property at a nominal rental. It would seem, therefore, that this condition must continue, unless equitable relief can be granted.

Moreover, as stated, the company repudiated the contract at a time when its first term was about to expire and the additional term to commence. This suit was begun August 19, 1909, and the original term of 5 years was to expire September 1st following. The additional term was provided for in these words:

"The company hereby licenses and permits * * * the licensee [Hirsch] to use and occupy for a term of five (5) years, with the privilege of an additional term of twenty (20) years from September 1, 1904, to September 1, 1909."

It is averred in the amended bill that on January 28, 1909, Hirsch gave the company notice:

"That he elected to continue the said agreement in force for the further period of twenty (20) years, and to exercise the privilege of such further term contained in said agreement."

Confessedly, as respects a valid agreement, a notice like this, under a covenant such as the one quoted, would be sufficient to entitle the

tenant in possession to the enjoyment of the additional term (*Ferguson v. Jackson*, 180 Mass. 557, 558, 62 N. E. 965; *Darling v. Hoban*, 53 Mich. 599, 602, 19 N. W. 545; *Caley v. Thornquist*, 89 Minn. 348, 350, 94 N. W. 1084; *Kentucky Lumber Co. v. Newell*, 105 S. W. 972, 32 Ky. Law Rep. 396, 398—Court of Appeals); still according to the terms of the contract, and we think the better rule, the privilege could not have created in Hirsch anything more than a present demise to take effect at the expiration of the first term (*De Friest v. Bradley*, 192 Mass. 346, 351, 78 N. E. 467). Apart from this, we are considering a void agreement; it was entered into in Ohio, concerning the use of land there situated, and the rule of the Supreme Court of the state respecting an entry and the payment of rent under a lease for a term of years at an annual rent, which for any reason is void, "creates a tenancy from year to year upon the terms of the lease, except as to its duration." *Railroad Co. v. West*, 57 Ohio St. 161, 165, 49 N. E. 344. See, also, 1 Wash. Real Prop. (6th Ed.) §§ 823, 824, p. 508. The company's disavowal of the contract occurred 12 days before the expiration of the term then existing (and 13 days before the time fixed for the commencement of a new term), no matter whether Hirsch's rights be considered with reference to the contract or his tenancy from year to year. If the company had retracted after its execution and delivery of the contract, and without delivering possession of the premises, the decision of this court in *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415, would have been a direct authority entitling the company to relief. As pointed out in the opinion of the present Mr. Justice Lurton, when distinguishing that case from *St. Louis R. R. v. Terre Haute R. R.*, Lord Selborne, in *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 283, said:

"When the immediate and direct effect of an estoppel in equity against relief to a particular plaintiff might be to effectuate an unlawful action, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy."

Apparently the portion of the decision in *McCutcheon v. Merz Capsule Co.*, which was in favor of that company, was based upon the principle thus announced by the Lord Chancellor. This principle is laid down also in *Parkersburg v. Brown*, 106 U. S. 487, 503, 1 Sup. Ct. 442, 27 L. Ed. 238. There is a distinction, however, between the *McCutcheon* Case and the present case that must not be overlooked. The *Merz Capsule Company* entered into the illegal agreement there involved and delivered a deed conveying its property, but it did not surrender possession and it distinctly repudiated the agreement. Its grantee, the *United States Capsule Company*, sought forcibly to obtain possession of the property. This court affirmed the decree below, which declared the illegality of the agreement and the deed, but the court restrained appellants from interfering with the title or possession of appellee under color of such agreement and deed. At the close of the opinion Judge Lurton said (71 Fed. 796, 19 C. C. A. 117, 31 L. R. A. 415):

"Under all these circumstances, to hold that the complainant is estopped to rely upon the illegality of the agreement and conveyance to which it was a party would be to effectuate an unexecuted unlawful object, and aid in the defeat of a legal prohibition. The door of this court should not be closed

against one seeking to extricate himself from an unlawful connection, provided relief is sought without delay, and before the contract is executed, or other persons have irrevocably acted in reliance upon its supposed legality."

Judge Story said in his work on Equity Jurisprudence (section 298, p. 303, 13th Ed.):

"Relief is not granted where both parties are truly in *pari delicto*, except in cases where public policy would thereby be promoted."

Again in the same section, at pages 301, 302:

"But in cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis* is not in equity material. The reason is that the public interest requires that relief should be given, and it is given to the public through the party."

See 2 Pomeroy's Eq. Jur. (3d Ed.) § 941, and cases cited.

But in view of the disapproval of a class of cases cited and others distinguished in the decision of *St. Louis Railroad v. Terre Haute Railroad*, 145 U. S. 406, 12 Sup. Ct. 953, 36 L. Ed. 748, relief only to a limited extent can be granted in the present case, and that is allowable, if at all, because (1) the new term had not commenced to run, either under the contractual privilege of extension or the yearly tenancy, at the time this suit was brought, and so the contract as to that period was executory; and (2) the ground of illegality of the contract does not appear on its face, and the evidence thereof might be lost by lapse of time. We are unable to see why either party could not have retracted at the threshold of the new term, since he plainly could have done so at the beginning of the original term. The opening of the new term, as well as of the original, would seem to have been an appropriate *locus poenitentiae*. It does not appear that any rights of third persons had intervened, and, assuming that both parties were equally in the wrong, it is carrying the rule (in *pari delicto*, etc.) beyond the reason for its existence to refuse, at such a time and under such a contract as this, either to declare the law or grant purely negative relief. Not to do this would, as respects the new term in the instant case, bring to pass the very thing that the law expressly forbids. The granting of such relief is not to enforce the contract; it is to prevent its renewal. The rule just alluded to is bottomed on the idea that the law is best subserved by leaving the parties where it finds them (1 Story, Eq. Jur. [13th Ed.] § 298, p. 303; *McMullen v. Hoffmann*, 174 U. S. 639, 669, 670, 19 Sup. Ct. 839, 43 L. Ed. 1117); but obviously this reason ceases wherever such a course would in practical result be to effectuate, if not to sanction, the forbidden act. Indeed, as already sufficiently appears, this constitutes an exception to the rule; and we apply it to the executory portion of the contract in dispute, because the reason of the exception seems to us to be as pertinent to either of two separable terms as it is to a single term under a lease. And if it were necessary to show anything more concerning the principle applicable to executory contracts, we might add to what was said in *McCutcheon v. Merz Capsule Co.*, Justice Gray's recognition of the principle in *St. Louis Railroad v. Terre Haute Railroad*, 145 U. S. 407, 12 Sup. Ct. 957, 36 L. Ed. 748:

"If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory."

See, also, *Spring Co. v. Knowlton*, 103 U. S. 49, 58 to 60, 26 L. Ed. 347; *Block v. Darling*, 140 U. S. 234, 239, 11 Sup. Ct. 832, 35 L. Ed. 476. We are not unmindful of the possession in defendant; but that does not seem sufficient to entitle him to demand a new term under a void lease any more than under a yearly tenancy. The case upon this record is so far analogous to *McCutcheon v. Merz Capsule Co.* as to warrant the relief we accord.

We conclude, upon the facts admitted by the demurrer, that Hirsch is not entitled under this contract to hold or use the premises, and that, subject to the right of removal of such improvements and other property as he may have on the premises, he should be enjoined from further use and occupation thereof under color of the contract. Nor can the company have an accounting for rent claimed to have accrued prior to the commencement of the suit. Whatever rental value was given to Hirsch as a concession upon freight rates or otherwise must be treated the same as if its equivalent had been paid to Hirsch in money; and it is not claimed, as plainly it could not be, that the aid of a court could be invoked to recover cash payments of that character. *Equitable Life Soc. v. Wetherill*, 127 Fed. 947, 951, 62 C. C. A. 579. As respects the excess in rental value over the rent reserved, the contract must be regarded as acquiesced in and fully performed, at least up to the time of the beginning of the suit. But if it should appear that since then Hirsch has occupied the premises, and that the company has not received any rental therefor, or otherwise countenanced the contract, it should be accorded an accounting for the reasonable rental value of the premises from that time until Hirsch shall cease to use and occupy them. This would not be to enforce the contract; it would be to prevent defendant from receiving the benefits of the use of the property without paying for them. *Parkersburg v. Brown*, supra; *Standard Savings & Loan Ass'n v. Aldrich*, 163 Fed. 216, 221, 89 C. C. A. 646, 20 L. R. A. (N. S.) 393 (C. C. A. 6th Cir.).

The decree below is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrer, and for further proceedings in conformity with this opinion.

COAL & IRON RY. CO. v. REHERD.

(Circuit Court of Appeals, Fourth Circuit. February 11, 1913.)

No. 1,077.

1. CONTRACTS (§ 231*)—CONSTRUCTION—PRICE—CONSTRUCTION CONTRACT—EXCAVATION—"EARTH."

Where a railroad construction contract divided material to be excavated into earth, loose rock, and solid rock, and provided that the term "earth" should cover all clay, sand, gravel, loam, and all earthy material containing loose stones and boulders of not over three cubic feet, such provision was plain and unequivocal, not subject to explanation by parol, and as matter of law included a substance encountered, called "gumbo," or "bull-wax," which was a form of clay; and hence the court erred in refusing to charge that such material was within such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

classification, and that plaintiff was only entitled to recover the price fixed by the contract for the excavation of earth or its removal.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1046, 1047, 1051, 1052; Dec. Dig. § 231.*]

For other definitions, see Words and Phrases, vol. 3, p. 2304.]

2. CONTRACTS (§ 170*)—CONTEMPORANEOUS CONSTRUCTION—CHARACTER OF MATERIALS.

Where a railroad construction contract provided that it should not be affected by any verbal agreement or inferences drawn from conversations had on the subject, and by its express terms certain "gumbo" found by the contractors in the course of their excavation was within the contract definition of the term "earth," and payable at the price specified for the excavation of earth, the fact that the railroad company's engineers had verbally promised that the contractors should be paid a higher price for the excavation of the "gumbo," and had allowed a higher price in certain of the specifications, did not constitute such a contemporaneous construction of the contract as would entitle plaintiff to recover a higher price therefor in an action on the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

3. CONTRACTS (§ 303*)—PERFORMANCE—UNEXPECTED DIFFICULTIES.

Unexpected difficulties, which a contractor encounters in the performance of a particular piece of work at a stated price, do not excuse him from the obligation of his contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409-1443; Dec. Dig. § 303.*]

4. CONTRACTS (§ 232*)—COMPENSATION—CONSTRUCTION CONTRACT—CHANGE OF LINE—ESTIMATES BY ENGINEERS.

Where a contract for railroad construction provided for payment on the last day of each month during the progress of work on an estimate by the engineer in charge, and that all claims for extra work shall be filed before the end of the month during which the work was done and be at once adjusted, and that the decision of the consulting engineer in case of dispute should be final and conclusive, the parties waiving any right of action, suit, or other remedy at law or otherwise, estimates and classifications of quantities of work made by the engineers covering a change in a part of the line provided for by the contract, for which no claim for extra work was ever filed by the contractors, were conclusive against their right to recover additional compensation therefor, in the absence of a showing of fraud, gross mistake, or bad faith on the part of the engineers.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1071-1094; Dec. Dig. § 232.*]

5. CONTRACTS (§ 287*)—RAILROAD CONSTRUCTION—ESTIMATES AND CERTIFICATES BY ENGINEERS—CONCLUSIVENESS.

Where a railroad construction contract provided that the bids for excavations should include a haul of 800 feet, and that the contractors should be allowed extra for overhauls amounting to 100 feet or more, and also provided for payment on engineers' estimates, and that the determination of the engineers should be conclusive in matters of difference, the work in connection with overhauls having been estimated and certified by the engineers as the work progressed, the contractors were concluded thereby, in the absence of fraud, gross mistake, or bad faith.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1308, 1309, 1312-1316, 1318-1338, 1340-1342, 1344-1346, 1348, 1350, 1351; Dec. Dig. § 287.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. EVIDENCE (§ 448*)—WRITTEN INSTRUMENTS—INTERPRETATION—PAROL PROOF.

Where a railroad construction contract provided that prices fixed for excavation should contemplate a haul of 800 feet, and that, if the average haul exceeded that distance, an additional sum per cubic yard for each additional 100 feet of increase should be allowed, such provision was plain and definite, and parol evidence was inadmissible to aid in its interpretation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 448.*]

7. DAMAGES (§ 85*)—LIQUIDATED DAMAGES—CONSTRUCTION CONTRACT—ADDITIONAL WORK—DELAY.

Where a railroad construction contract provided for forfeiture of \$50 a day as liquidated damages for the contractors' failure to complete the contract within the period specified, the fact that the railroad company, by changing the line, necessitated the performance of additional work, while giving the contractors the right to a reasonable extension in which to perform the same, did not relieve them from liability for the penalty in so far as it applied to unnecessary delay in completing the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 179-181, 183-187; Dec. Dig. § 85.*]

8. RECEIVERS (§ 210*)—AUTHORITY—TERRITORIAL EXERCISE.

A receiver appointed by a state court has no jurisdiction as a matter of right to exercise functions outside the state of his appointment, and without more may not institute a suit in a federal court sitting in another state.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 417-420; Dec. Dig. § 210.*]

9. RECEIVERS (§ 210*)—AUTHORITY—SUIT IN FEDERAL COURT—PROCEEDINGS TO ACQUIRE AUTHORITY.

A receiver of certain railroad contractors, having been appointed by a Virginia state court, without authority instituted an action against defendant railroad company in the United States Circuit Court for the Northern District of West Virginia. Thereafter the receiver filed an ancillary bill in the state court of West Virginia, under which an order ratifying his appointment as receiver was made, and by which he was authorized to intervene and prosecute as a party plaintiff and as receiver the action pending in the federal court, which he had previously brought, with full authority, etc. *Held* that, though such proceedings were irregular, they were sufficient to entitle plaintiff to continue the suit as though a new suit had been instituted.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 417-420; Dec. Dig. § 210.*]

10. COURTS (§ 311*)—FEDERAL COURTS—RESIDENCE OF PARTIES—RECEIVERS.

Where the receiver of a partnership authorized to sue was a citizen of another state, his right to maintain an action in the federal courts by reason of diversity of citizenship was not affected by the reason that one or more of the members of the firm were citizens of the state in which the action was brought.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 858; Dec. Dig. § 311.*]

Citizenship as affecting the jurisdiction of the federal courts, see note to *Shipp v. Williams*, 10 C. C. A. 253.]

Pritchard, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton and John C. Rose, Judges.

Action by Peter W. Reherd, as receiver of the late firm of Walton, Purcell, Moorman & Co., against the Coal & Iron Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

This action was commenced by service of summons on the 21st of March, 1904, and the declaration was filed on the 4th of April, 1904. The Coal & Iron Railroad Company of West Virginia is a corporation organized under the laws of the state of West Virginia, and Walton, Purcell, Moorman & Co. is a partnership composed of S. Walton, E. Purcell, Jr., M. N. Moorman, Jr., W. H. Rickard, D. C. Reherd, and P. W. Reherd. The said railroad company set about in the year 1900 to construct a railway line, to be called the Coal & Iron Railway of West Virginia, from the town of Elkins to the forks of the Greenbrier, in the county of Pocahontas, in the said state of West Virginia, and in order to facilitate the construction of the said railway it was divided into three divisions, as follows: The first division extending from the main track in South Elkins to the north end of tunnel, section No. 1, a distance of about $4\frac{1}{2}$ miles, including the Valley River Bridge. The second section extended from the south end of tunnel No. 1 to the north end of tunnel, section No. 2, about 19 miles in length, and including the bridge across Shavers fork of Cheat river. The third division extended from the south end of tunnel, section No. 2, to the forks of the Greenbrier, a distance of about 19 miles. Altogether about $42\frac{1}{2}$ miles.

On the 1st day of May, 1900, the said railway company entered into a contract with the firm of Walton, Purcell, Moorman & Co., as follows:

"Articles of agreement, made and completed this 1st day of May, in the year 1900, A. D., between the Coal & Iron Railroad Company of West Virginia, of the first part, and S. Walton, E. Purcell, Jr., M. N. Moorman, Jr., W. H. Rickard, D. C. Reherd, and P. W. Reherd, trading under the name of Walton, Purcell, Moorman & Co., of the second part, witnesseth, that for and in consideration of the payments hereinafter named, to be made by the party of the first part, the said party of the second part hereby agrees to perform all the work hereinafter described, in a thorough and workmanlike manner, on or before December 15, 1900, as to division No. 1, and March 1, 1901, as to divisions No. 2 and No. 3, which time shall be of the essence of this agreement.

"And it is understood that these articles of agreement cover the following described work involved in the construction of the Coal & Iron Railway of West Virginia, and which is illustrated in the profiles and approximate quantities, on file in the office of the engineer in charge, at Elkins, W. Va., viz.: All the graduation, masonry, etc., between the junction with the main track of the West Virginia Central Railway, in South Elkins, and the north end of tunnel No. 1, known as 'Division No. 1'; all graduation, masonry, etc., between the south end of tunnel, section No. 1 and the north end of tunnel section No. 2, known as 'Division No. 2'; and all the graduation, masonry, etc., between the south end of tunnel, section No. 2, and the forks of the Greenbrier river, it being understood that the southern terminus of the line may vary within a limit of three or four miles in its extent, known as 'Division No. 3,' complete to subgrade, viz.: All grubbing, clearing, excavation, embankment, masonry of all kinds, including foundations to same; all necessary removal and reconstruction of county roads and diversion of streams; also all tunnel work which may be needed, excepting the two tunnels known as No. 1 and No. 2, which are already provided for under a separate contract. All work to be done in accordance with the following specifications and such drawings as may be furnished, from time to time, explanatory of the work, and to the satisfaction of the engineer in charge and of the consulting engineer.

"Specification.

"Graduation.—Under this head will be included all cuts, fills, ditches, water courses, changing of county roads, clearing, grubbing, etc., connected with and incident to the construction of the Coal & Iron Railway.

"First, Clearing and Grubbing.—Shall extend to a point at least fifteen feet beyond the slope stakes, measured horizontally, on both sides of the line. In embankment under three (3) feet deep the stumps shall be grubbed.

from 3 to 5 feet, cut close to the ground, and above 5 feet cut off, to stand not over two (2) feet high above the ground. All these materials, including trees, brush, and vegetable growth of all kinds, must either be removed beyond the fifteen feet line or burned on the spot.

"Second, Excavations.—The roadbed shall be eighteen (18) feet wide, with ditches, in cuts, and fourteen (14) in fills, and the slopes shall be such as the nature of the material may require, in the judgment of the engineer in charge. The embankments shall be made from the cuts, but should the normal cuts furnish an insufficient amount of material for the construction of the fills, they, the cuts, may be either widened or outside borrow pits may be provided, as seems best to the engineer in charge. These same methods shall apply in the case of the construction of county roads, in water courses, ditches, etc. In case the normal cuts are more than sufficient to make the normal fills, the surplus shall be consumed either in widening the regular fills or placed in spoil banks, as the engineer in charge may direct. For all this work under the head of 'Graduation,' inclusive of cleaning and grubbing, there shall be no classification, and but one price per cubic yard shall be paid for all material actually excavated, under the above heads, said price to cover its transportation or haul to the point of final deposit. As stated, all material shall be measured and paid for in excavation before disturbance. Cases may, however, arise when it may be necessary to measure material (in embankment); this would, however, be exceptional.

"It must be understood that the embankment between the Tygart Valley river bridge and South Elkins must be made of material brought across the river from the south side, with the bridge masonry in place. This would require a light trestle 220 feet long. Should it, however, be desired by any one bidding on this work so to do, a classified bid will be accepted as follows:

"Excavation—Earth—	Per cubic yard.
" —Loose rock—	"
" —Solid rock—	"

"Prices to be on an average haul of not over 800 feet in the limits of the contract. Should the average haul exceed 800 feet, then add for each 100 feet additional so much per cubic yard, but nothing less than 100 feet increase shall count.

"Grubbing and clearing per acre, so much.

"Earth—Shall Cover.—All clay, sand, gravel, loam, and all earthy material containing loose stones and boulders of not over three cubic feet.

"Loose Rock—Shall Cover.—All stones in adjoining, but detached, masses over three cubic feet, but not over one cubic yard in size; also all slate and other rock which can be quarried without blasting, although blasting may be resorted to; also cemented gravel, which must be blasted.

"Solid Rock—Shall Cover.—All rock in masses of over one cubic yard, which cannot be removed without blasting.

"The above prices, as in the case of the unclassified bid, shall apply to all material actually excavated in connection with the construction of the railway; it being understood that the party of the first part shall decide whether to accept the classified or unclassified bid, the said decision to be embodied in this contract as shown in the price list further on.

"Masonry.

"Materials.—The quality of the stone, cement and sand used must be satisfactory to the engineer in charge and to the consulting engineer, and if under any circumstances bricks should be used, they must in like manner be approved of. All materials are subject to actual test, and if condemned must be removed from the work.

"Workmanship.

"First-Class Masonry.—This shall be the best quality of cut and coursed work. No course shall be less than twelve inches nor more than thirty inches thick. No stone shall have less than fifteen inches bed, and shall always have at least as much bed as rise. No stretcher should be less than three nor more than six feet long; the headers shall run through and through any wall not over four (4) feet thick, and in the case of channel piers shall

run through and through when the said piers are not over five (5) feet thick, and shall then be double headers; when the headers do not run through, they shall lap at least one foot in the heart of the wall and shall hold their size well back; the headers shall constitute one-fourth of the face of the wall, and each header shall be at least as wide as high. All stone shall be cut accurately to size with parallel beds and out of wind; a pitched draft shall be run around the face of all ashlar, with a rock face of not over three (3) inch projection beyond the draft line where line is above ground. All joints shall be cut squarely in, from the pitched line, at least eight inches. All stone must break joint at least twelve (12) inches either in the face or heart of the wall. Wherever backing is used, the beds must be cut as carefully as with ashlar, but the sides and ends may be shaped up to fit the spaces with the hammer. All stone must be laid on their natural or quarry beds, as close together as possible, and always with the broadest bed down. All vacancies between stone must be tightly packed with small stuff set in cement, or with three-quarter inch broken stone or gravel concrete, as may be decided by the engineer in charge. (Rules for mixing, see below.)

"The wall must be absolutely solid and without vacancies. Coping shall not be less than fifteen (15) nor more than eighteen (18) inches thick, and in as large blocks as possible—nothing less than 3x4. In the case of channel piers the coping must run clear across with three (3) inch projection on each side. In the case of bearing blocks for iron bridges the blocks must be carefully cut all over and bush hammered (ten cut on the upper bed) to receive the iron bed plate. Iron clamps set in lead may be used in the coping of channel piers, if thought necessary by the engineer in charge. Cement mortar used shall be made of some approved brand of domestic cement and clean sharp sand, cement 1, sand 2, by volume, mixed dry, then water added, as needed only, so as to get the advantage of the first set. Should concrete be used it will be made: cement 1, sand 2, two inch broken stone 4, stone to be spread on a plank floor in a six inch layer, then the mortar made and spread over the stone, and the whole turned by hand three times. Wet the stone before putting on the mortar. In placing the concrete it must be laid in eight (8) inch layers and rammed with twenty pound rammers until the contained water floats on the surface. In this class of work the joints shall be as thin as possible, and shall never exceed one-half ($\frac{1}{2}$) inch in thickness. They shall be raked out one (1) inch deep the day they are made, and on the completion of the work shall be pointed flat with Portland cement mortar of approved brand, mixed half and half. The above class of work shall apply in general to all river bridges, and wherever else it may be ordered by the engineer in charge or the consulting engineer. The price bid shall be per cubic yard of twenty-seven cubic feet, and shall be based upon the actual cubical contents. No conventional method of measurement will be allowed. The price shall cover the entire work, including foundations to a depth of five (5) feet below the average bottom of the stream, within the area of the pier or abutment, the body of the masonry, the coping and pedestal blocks where used.

"Second-Class Masonry.—This may be either coursed or uncoursed work, laid in cement. Stone may vary from six (6) inches to two (2) feet in thickness; stretchers not less than eighteen (18) inches in length nor more than four (4) feet; headers to be not less than two and one-half ($2\frac{1}{2}$) feet long, and to hold their size well back, and shall be as wide as high at the face of wall; no stone to have less than twelve inches depth of bed and never less than its own rise. The headers must make one-fourth of the face area of the wall. All ashlar shall be rock-faced, cut with parallel beds, out of wind, and a pitched draft run around the face of each stone, from which the joints shall be cut squarely back at least six inches—the backing may be shaped up with hammer only; all stone shall break joint at least eight (8) inches, whether in the face or heart of the wall, and all stone shall be laid on the quarry bed. All vacancies shall be tightly filled with spraws in cement or concrete, as may be ordered. This class shall be laid in cement and pointed up as in first-class work, and the same rules shall govern the making of mortar and concrete as in first-class work.

"Second-Class Masonry shall be applicable to important culverts, box or arched, and wherever else ordered by the engineer in charge. In the case of box or gothic culverts, the top course of the side walls must be selected stone, not less than two and a half ($2\frac{1}{2}$) feet by three (3) and not less than nine (9) inches thick, the corbel stone, when used, selected of the same size from 9 to 12 inches thick, and the cover stone 12 to 15 inches thick and large enough to lap the main walls 12 inches, or where corbel stones are used 6 inches. The coping of head walls shall be from nine to twelve inches thick and the stone shall be cut all over and pitch drafted with a rock face. In all culverts the foundations of the head walls shall be carried across the waterway to their full depth, and the waterway shall be paved with good heavy stone on edge from head wall to head wall. The price per cubic yard for second-class masonry shall cover the cost of all foundations to a point five (5) feet below the average level of the bottom of the stream crossed, and the various kinds of work involved, such as the rise of the wall, the cover and corbel stone, the coping, the paving, etc.

"In the case of arched culverts the side walls, head walls, spandrels, etc., shall be as described above, of second-class masonry, the ringstone and sheeting must be cut as per plan given. Hence, a special price per cubic yard will be named for springing course, ringstone and sheeting alone, when used in arched culverts, the balance of the masonry being estimated at second-class prices.

"Third-Class Masonry.—This shall be coursed or uncoursed masonry, shaped with the hammer and laid *dry*. All the rules governing size of stone, bond, proportion of headers, manner of laying and depth of foundation, which are specified under the head of second-class work shall hold good here, mortar excepted. This class may be used in small culverts, support walls, etc., when ordered by the engineer in charge. The price per cubic yard shall cover the work in place and completed.

"Riprap.

"As in special cases it may be necessary to protect an earthen embankment from wash by a covering of stone, a price per cubic yard will be given for such material in place, said protection to consist of rough stone carefully laid close together, well bonded and of such size as the engineer in charge may direct, not exceeding what two men can handle with bars, down to one-half a cubic foot in size.

"Foundations.

"Where required to be excavated below the five (5) feet line mentioned above, shall come under the following heads and be paid for per *cubic yard* of actual material excavated, which price shall cover all timbering, pumping, bailing, etc., connected with the work, as well as the transportation of the material excavated to some designated place of deposit.

"First. Earth, gravel, sand, clay, hard pan, boulders, and anything which can be handled without explosives.

"Second. All solid rock 'in situ' *requiring* explosives.

"If permanent timbering is required in foundations for grillages, 'etc.,' it shall be the best quality of dimensioned white oak, subject to inspection, and a price per thousand feet B. M. shall be named for it, furnished, framed, pinned, or bolted in place as required.

"If piles are to be used they shall be of such size as may be called for by the engineer in charge, not exceeding eighteen inches at the butt, of white oak, straight, sound, and subject to inspection. A price shall be named per lineal foot driven and cut off, and, should iron shoes be used, a price per pound for cast shoes shall be given. In rendering estimates the neat lengths of piles when cut off shall be used.

"General.

"Embankments may be made in layers or entirely by end dumping as the engineer in charge may direct, but in filling over culverts and against bridge abutments great care must be taken not to *dislocate* the masonry, the material must be put on in layers, and as ordered by the engineer in charge.

"Passing places for all public and private roads must be provided and kept

in good condition by the contractor, who shall also open a horse track along the entire length of his contract at his own expense. He shall also keep up any fences necessary to the protection of crops which may be endangered by the work.

"All cuts and fills shall be neatly finished to the slopes and subgrades given by the engineer in charge, and the subgrade shall slope 1 inch in 4 foot from center to sides for drainage.

"The alignment, grades, and disposition of material may be changed from the plans at present existing, without prejudice to this agreement. If it can be shown to the satisfaction of the engineer in charge and the consulting engineer that such changes will add to the cost per cubic yard of excavation handled, then such an extra allowance may be made by the consulting engineer as will reimburse the contractor; but, should the said change decrease the cost of the work to the contractor, he shall be charged with the difference. Any such changes shall be embodied in a supplementary agreement.

"Any one bidding on this work is expected to visit the line and examine it thoroughly, and a statement to that effect must be made in the proposal. It is also understood that any estimate of quantities submitted to bidders by the railway company is only approximate.

"Discipline.

"Good order must be maintained among the men employed in the work by the contractor, whether off or on the line, and the contractor shall discharge any man in his employ at the request of the engineer in charge, and shall be responsible for any damages inflicted by his employes upon persons or property, and the consulting engineer is authorized to withhold his estimates until satisfaction is made.

"Transfer.

"The contractor shall not transfer or sublet any part of his contract without the written consent of the consulting engineer, and shall give his personal attention to the work.

"The work shall be prosecuted entirely under the direction of the engineer in charge, who, with the approval of the consulting engineer, shall have the power to direct the increase or diminution of the force and the points of its application.

"And it is expressly agreed that the times herein named for the completion of this contract, viz., December 15, 1900, and March 1, 1901, are of the essence of this agreement, and if at any time it should be the opinion of the engineer in charge that the work is not being prosecuted with sufficient force or energy to secure its completion in the time named, he shall notify in writing the party of the second part (the contractor) to increase the force and facilities in ten days, at the end of which period, and in case of non-compliance with said instructions, it shall be the duty of the engineer in charge to employ such laborers, teams, and foremen as he may deem necessary to complete the work within the time named, at such wages as he may find it necessary to pay all men and teams so employed, and charge the amount so paid against the party of the second part, as a payment on account of work done under the agreement. Or in case the engineer in charge should deem it best, he may, with the consent of the consulting engineer, declare the agreement, in part or whole, forfeited, which declaration and forfeiture shall exonerate the said party of the first part from any and all obligations and liabilities arising under this agreement, as though it had never been made, and the reserved percentage, if any, on work previously done, may be retained forever by the party of the first part, and used for the completion of the contract. And in case the party of the second part is bonded, then the bondsmen or bonding company shall be liable to the extent of the amount of the bond for the execution and completion of the work.

"And it is further agreed that the party of the second part shall provide and put in practice all necessary safeguards and precaution against accidents and damages to any person or property during the prosecution of the work, and shall indemnify and save harmless the said party of the first part and

its engineers from the payment of all sums of money by reason of any such accidents and damages.

"It shall be the duty of the engineer in charge to give all needed stakes, heights, lines, and dimensions necessary to the prosecution of the work, and it shall be the duty of the contractor to preserve the same.

"This contract shall not be affected by any verbal agreements or inferences drawn from conversation had upon the subject.

"The contractor agrees to do all the work described to the satisfaction of the engineer in charge and consulting engineer, and to accept their decision as to quantities, classification, 'etc.,' as final, and from which no appeal shall be taken. When the term 'engineer in charge' is used, it means the railway company's engineer in charge of the work of the entire line for the time being, and who will personally direct its execution with the advice and under the supervision of the consulting engineer.

"And it is understood that the party of the second part shall give bond for the faithful execution and completion of the work in some acceptable bonding company, to the extent of the estimated value of the contract, and which in this case calls for a bond of fifty thousand dollars.

"And it is further understood that for each and every day required in excess of the date named for the completion of this contract the sum of fifty dollars shall be paid by the party of the second part to the party of the first part, which shall be considered as liquidated damages. Or should the party of the second part anticipate the date of the completion, then the party of the first part shall pay the party of the second part fifty dollars for every day so saved.

"In consideration of the above, the party of the first part shall pay the party of the second part, for work done under this agreement, the following prices:

For first-class masonry, per cubic yard.....	\$ 9 00
For second-class masonry, per cubic yard.....	6 75
For third-class masonry, per cubic yard.....	3 50
For spring course, ringstone, and sheeting of arched culverts, per cubic yard.....	11 00
For riprap.....	1 00
For concrete in mass.....	5 00
" " in arches.....	7 50
For tunneling.....	2 80
For permanent timber trestle work, per 1,000 B. M. of white oak....	27 00

"Foundation Work Below the 5 Foot Line.

Earth, gravel, sand, clay, hard pan, boulders, etc., per cubic yard....	1 00
Solid rock requiring explosives, per cubic yard.....	1 30
Permanent timber work, grillages, platform, etc., per 1,000 B. M....	26 00
Piles driven and cut off, finished lengths, per lineal foot.....	37¢
If cast or wrought iron shoes are used, per pound.....	05¼¢

"Classified Work.

Excavation, earth, per cubic yard.....	20¢
Excavation, loose rock, per cubic yard.....	35¢
Excavation, solid rock, per cubic yard.....	68¢
With average haul not over 800 feet.	

"Average Haul Over 800 Feet.

Not applicable until 100 feet in excess is reached, per 100 feet per cubic yard.....	01½¢
Clearing and grubbing per acre.....	30 00

"Payments to be made in the following manner: On the last day of each month during the progress of the work an estimate shall be made of the value of all work done, by the engineer in charge, to date. Of this amount ninety per cent. shall be paid to the party of the second part, less any previous monthly estimates which might have been paid on the same work; said

payments shall be made on or about the 15th of the following month. And when all the work embraced under this agreement shall be completed, according to this specification and to the satisfaction of the engineer in charge and the consulting engineer, a final estimate shall be made, and any balance appearing to be due to the party of the second part shall be paid to it within thirty days thereafter, provided the party of the second part shall give a release under seal to the party of the first part from all claims and demands growing out of this agreement, and upon procuring and delivering to the party of the first part full releases, properly executed, from all materialmen and the exhibit of receipted pay-rolls, of mechanics and laborers connected with or employed on the work. It is hereby understood that the work will be accepted as completed by divisions only, nothing less, and in order 1, 2, 3, and that each division must be dressed up throughout before acceptance.

"Extra Work.

"All claims for extra work must be filed before the end of the month during which the work was done, and shall at once be adjusted.

"And it is mutually agreed that the decision of the consulting engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement, and each and every one of said parties do hereby waive any right of action, suit or suits, or other remedy in law or otherwise, by virtue of said covenants, so that the decision of the said consulting engineer shall, in the nature of an award, be final and conclusive on the right and claim of said parties.

"In witness whereof, the parties herein named have hereunto set their hands and seals the day and year herein first above named, and both parties to the agreement testify that they have read and understand all the provisions of the same.

"[Signed]

Coal & Iron Railway Co., [Corporate Seal.]

"By H. G. Davis, Its President.

"Witnesses: C. M. Hendley, Secretary.

"S. Walton. [Seal.]

"E. Purcell, Jr. [Seal.]

"W. N. Moorman, Jr. [Seal.]

"W. H. Rickard. [Seal.]

"D. C. Reherd,

"Per W. H. Rickard. [Seal.]

"T. W. Reherd,

"Per W. H. Rickard. [Seal.]

"Witness: Chas. S. Robb."

Shortly after the contract was consummated the contractors entered upon the work, and completed the first division on the 14th of August, 1901, the second division on the 2d of February, 1903, and the third division on the 20th of November, 1902. During the progress of the work estimates were made by the engineers as provided in the contract, and the amount under the estimates and classifications, less 10 per cent., was paid by the defendant to the contractors, and accepted by the latter. In the course of the work the line as originally contemplated was changed in some respects, but the estimates and prices were made and paid upon the same basis as provided in the contract. On the 12th day of December, 1903, some time after the work had been finished, P. W. Reherd, D. C. Reherd, E. Purcell, Jr., Martin N. Moorman, and Samuel Walton filed a complaint in the circuit court of Rockingham county, state of Virginia, against W. H. Rickard, alleging that the partnership of Walton, Purcell, Moorman & Co. had entered into a contract with the Coal & Iron Railway Company, and had completed the contract, and that there was a considerable sum still due; that there was a suit pending in the said Rockingham county by one of the subcontractors for work done against the said partnership, and that the said partnership had been unable to obtain a satisfactory settlement from the Coal & Iron Railway Company, etc.; and that there were outstanding moneys on account due the said partnership, as well as effects belonging to the said partnership, and that it

was necessary to have a receiver for the said partnership to wind up its affairs; and thereupon P. W. Reherd was appointed receiver for the said partnership of Walton, Purcell, Moorman & Co.

As above stated, the present suit was commenced on the 21st of March, 1904, and thereafter, on the 15th day of January, 1906, these same complainants filed an ancillary bill against the same defendant W. H. Rickard, in the circuit court of Randolph county, W. Va., and on the 25th of January following Peter W. Reherd was appointed receiver of the partnership of Walton, Purcell, Moorman & Co., and in the order of appointment is the following: * * * And with authority to him to intervene and prosecute as party plaintiff, and as receiver, as hereinbefore described, in the action of assumpsit pending in the Circuit Court of the United States for the Northern District of West Virginia, entitled Peter W. Reherd, Receiver, v. Coal & Iron Railroad; and he shall have full authority as receiver, appointed by this court, to intervene as party plaintiff in said action, according to the rules of pleading in the Circuit Court of the United States for the Northern District of West Virginia."

The several items of alleged indebtedness sought to be recovered by the plaintiff from the defendant are as follows:

First Division.

For alleged error in yardage and classification.....	\$31,099 97
For temporary bridge at Elkins.....	2,000 00
For overhaul.....	16,909 28
Making	\$50,009 25

Second Division.

For excavating and removing 300,000 cubic yards of gumbo.....	\$90,000 00
For change in line.....	3,377 00
Making	\$93,377 00

Third Division.

For excavating and removing 32,000 cubic yards of gumbo.....	\$28,201 25
For change in line.....	5,000 00
Retained percentages.....	45,423 00
Making	\$78,624 25

The case was tried in January, 1911, and the jury returned a general verdict for the plaintiff, and assessed damages at \$245,806.81, and further to special interrogatories answered as follows:

First Division. For material excavated over and above that estimated and allowed by the defendant company's engineers \$15,549.98, with interest from March 15, 1903, at 6 per cent., \$7,334.41, making \$22,884.39.

For material excavated on Adams work on the second division over and above what was estimated and allowed by the defendant company's engineers \$90,000, with interest from March 15, 1903, at 6 per cent., \$42,450, making \$132,450.

On the claim under the head of Dennis work the jury found there was due plaintiff \$3,377, with interest from March 15, 1903, at 6 per cent., \$1,592.82, making \$4,469.82.

For material excavated and work done at Summit Cut on third division over and above the amount estimated and allowed by defendant's engineers \$23,445, with interest from March 15, 1903, at 6 per cent., \$11,058.28, making \$34,503.28.

For change of line on the third division the jury allowed the plaintiff \$5,000, with interest from March 15, 1903, at 6 per cent., \$2,358.33, making \$7,358.33.

For overhaul on the first division plaintiff was allowed by the jury \$12,574.26, with interest from March 15, 1903, at 6 per cent., \$5,930.84, making \$18,505.10.

For retained percentages plaintiff was allowed by the jury \$17,079.89, with interest from March 15, 1903, at 6 per cent., \$8,056.00, making \$25,135.89.

The aggregate of these amounts make \$245,806.81, which constitute the damages allowed by the jury.

It will thus be seen that the jury returned their verdict for \$167,026.13, principal money, and \$78,780.68, interest. The items of principal were composed, as above stated, of amounts allowed for material excavated on first division over and above that allowed by defendant's engineers \$15,549.98; for material excavated on the Adams work on the second division over and above that allowed by defendant's engineers \$90,000; for claim under head of Dennis work \$3,377; for material furnished and work done on excavations at Summit Cut \$23,445.00; for change of line on third division, \$5,000.00; for overhaul on first division, \$12,574.26; for retained percentages, \$17,079.89. Judgment was entered for the plaintiff accordingly, and the case comes here by writ of error sued out by the defendant.

Hereafter the plaintiff below will be referred to as the plaintiff, and the defendant below as the defendant.

B. M. Ambler, of Parkersburg, W. Va., and B. A. Richmond, of Cumberland, Md., for plaintiff in error.

Fred. O. Blue, of Charleston, W. Va., and John T. Harris, of Harrisonburg, Va. (Sipe & Harris, of Harrisonburg, Va., and Daugherty & Todd, of Columbus, Ohio, on the briefs), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge (after stating the facts as above). Having outlined the general facts in this case, we do not deem it necessary to go into details in this statement, because we shall take the liberty, in the course of our discussion of the points involved, of referring further to facts found in the record, and which may have a bearing upon the several propositions to be considered. There are many exceptions and assignments of error presented in the record, but the several points to be passed upon may be included under five separate heads.

First, it is alleged that in the course of the work a substance called "gumbo" or "bull-wax" was encountered by the contractors, and which had to be excavated and handled by them in carrying out the terms of the contract. This substance, it is insisted, was not specifically included in the contract, but was unusual and of a character which rendered it very difficult and expensive to excavate and remove, and compensation is demanded for this work. The second question pertains to alleged additional work which it became necessary for the contractors to perform by reason of a change of some part of the line of the railway after the bid of the contractors was accepted and the agreement entered into. The third question concerns what is known as overhauls; that is, overhauls for the removal of the substances excavated beyond the limit of distance set out in the contract. Fourth, the question of retained percentages and forfeitures; and, lastly, the question of jurisdiction of the court, it being insisted by the defendant that this receiver appointed in a foreign jurisdiction had no right to bring his suit in the United States Court for the Northern District of West Virginia, and further that Samuel Walton, a member of the firm of Walton, Purcell, Moorman & Co. was at the

time of the bringing of the suit a citizen and resident of the state of West Virginia.

[1] The question which arises upon the first proposition is by far the more important, because the amount allowed by the jury in the verdict was composed very largely of compensation for excavating and removing this substance at several places in which it was found in the course of the work by the contractors. At the close of the testimony the defendant's counsel requested the court to instruct the jury as follows:

"The court further instructs the jury that by the terms of the contract in evidence the parties agreed upon a definition and a price for the several classes of material named in the contract and classified, among other things, as follows: 'Earth is covered by clay, sand, gravel, loam, and all earthy materials, containing loose stones and boulders of not over three cubic feet.' And the contract further provided that all earth should be excavated at twenty cents per cubic yard.

"And if the jury find from the evidence that there was a material excavated by the contractors, which was tough, plastic, sticky substance and earthy material, which contained no stones or boulders or rock of any kind, then the same was earth, unless the engineers classified it as a higher material and at a higher price; but the fact that the defendant's engineers classified it at such higher price or higher classification would not permit or authorize the jury to deprive the defendant of the benefit of its contract, or to increase the allowance over and above what the engineers fixed in their classification and estimates of such material."

The court declined to give this instruction, but made a ruling in the following language:

"That the question of whether gumbo or bull-wax comes under either of three classifications of earth, loose rock, or solid rock, as defined by the contract, or was wholly outside of either, and without the contemplation of the parties, was a question of fact, and evidence was admissible tending to show what gumbo was, and whether or not embraced in either of the three classifications, or whether or not wholly without contemplation of the parties."

It may be stated that the second paragraph of defendant's request for instructions is based upon the fact that during the progress of the work the contractors sought compensation beyond that specifically set forth in the contract for the work in connection with the excavation and removal of the "gumbo" or "bull-wax," and thereupon the engineers classified in their estimates the said substance, much of it as loose rock and solid rock, and the work in connection with it was paid for by the defendant upon this classification.

Returning to the requested instruction of the defendant, and the ruling made by the court, we think there was error in the action of the court, and that any allowances in respect to the substance under consideration beyond that made by the classification and estimates of the engineers was unwarranted. In the contract the substances to be dealt with in the work to be performed by the contractors are described under three heads, namely, earth, loose rock, and solid rock, *and then the contract goes on and provides that earth shall cover all clay, sand, gravel, loam, and all earthy materials containing loose stones and boulders of not over three cubic feet.* Loose rock covered:

"All stones in adjoining, but detached, masses of over three cubic feet, but not over one cubic yard, in size; also all slate and other rock which

can be quarried without blasting, although blasting may be resorted to; also cemented gravel, which must be blasted."

Solid rock was stipulated to cover:

"All rock in masses of over one cubic yard which cannot be removed without blasting."

The prices contracted to be paid per cubic yard were, for earth 20¼ cents per cubic yard, loose rock 35 cents per cubic yard, solid rock 68 cents per cubic yard, with the stipulation that the average haul should not be over 800 feet.

Webster's definition of "earth":

"The solid materials which make up the globe, in distinction from the air or water: the dry land."

It is very clear to us why the contract stipulated different prices per cubic yard for the substances severally described, for if nothing further had been said, the term "earth" included everything which goes to constitute the globe, except water; and the reason that loose rock and solid rock were separately described under this head was, as is seen by the contract, that for work in respect to these two a greater price should be paid, leaving all other substances to be encountered to be included in the term "earth."

As stated before, however, it is shown by the record that the engineers did take into consideration the character of this substance, and went beyond the price limit in the contract, and classified "gumbo" or "bull-wax," much of it as loose rock, and some of it as solid rock, and the railway company acquiesced in this classification and paid the contractors upon that basis, and for this cause the plaintiff insists that this concession was an admission by the defendant that the substance under consideration was not included in the contract; but we cannot see that the action of the engineers, and of the defendant, in this respect ought to result in detriment to the defendant, for although the engineers may have concluded that the bargain made by the contractors was in some respects a hard one, and the defendant, realizing such to be the case, dealt generously with the contractors, this does not, in our opinion, abrogate the specific terms of the contract itself. In our view of the case the defendant was entitled to the first paragraph of the instructions as hereinbefore set out, and that it was error in the court to refuse it.

[2] It is insisted, however, by the plaintiff, and testimony was admitted by the court to the effect, that the engineers verbally promised or agreed that the excavations of "gumbo" should be paid for at a better price than that provided by the contract; but when we examine the contract we see a specific stipulation as follows:

"This contract shall not be affected by any verbal agreement or inferences drawn from conversations had upon the subject."

Under the express terms of the contract the defendant could not be bound by any such promise or agreement, if the same was made. The defendant, therefore, was entitled to the second request above, and the action of the court in refusing it we think was error. Bearing on the question raised by the last position of the plaintiff, that

there was a verbal agreement respecting the excavation of the "gumbo," the defendant requested the court to instruct the jury as follows:

"The court instructs the jury that by the terms of the contract in evidence the contract shall not be affected by any verbal agreement or inference drawn from conversations had upon the subject; and if the jury find from the evidence that the consulting engineer, or any other engineer of the defendant, stated or promised orally to J. T. Adams, one of the subcontractors engaged on this work, that he should have an extra allowance over and above what was allowed by the engineers upon the classification or estimates made by them, on account of any work or excavation done by him, the defendant cannot be charged or made liable in this action by reason of any such promise or agreement, if any was made to said Adams."

This request was also refused by the court, and an assignment of error is based upon such refusal. Plaintiff's counsel insist that the case of *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 10 Sup. Ct. 730, 33 L. Ed. 934, is authority sustaining the court in this action. We do not see that the case is in point. In that case there was no formal written contract executed between the parties; but the original agreement was based on specifications and profile of the work to be done on the part of the company, and proposals on the part of the contractor, which were accepted by the company. There was afterwards a modification of the original specifications and profile, and the question presented for decision was whether the modified specifications and profile came within the original contract, or created a feature in the work done so differently from that originally contracted for as to constitute a new contract. The court decided that this question was properly referred to the jury to determine, and the further question was whether under the circumstances of this case the local engineers of the company, who made the change in the specifications and profile, and agreed with the contractors that they should be paid for the work under the new arrangement, had the power to bind the company. The court held that they did, and held, further, that as there was no agreement to pay a fixed price that the contractors were entitled to recover what the work was reasonably worth.

The other case relied upon by plaintiff as a ground for the refusal of the court to give the instruction is *Salt Lake City v. Smith*, 104 Fed. 457, 43 C. C. A. 637. This case is also, in our opinion, based upon entirely different conditions from those existing in that under consideration. The case was a contract entered into by contractors with Salt Lake City to furnish materials and perform the necessary work, except that required to make the excavations, to construct a covered conduit for the purpose of leading the waters of Parley's creek to Salt Lake City, a distance of about six miles. There was an approximate estimate of the quantities made in the instructions to the bidders, which included tunneling in earth, tunneling in solid rock, concrete masonry, brick masonry, cut stone masonry, etc. There was nothing in the specifications to indicate that the bidders were required to build a dam across Parley's creek, or to construct any wells or cisterns. After the contractors commenced to construct the conduit beginning at Salt Lake City and advanced towards Parley's Canon, the line of conduit for the last mile was materially changed by the city engineer from comparatively level ground to a course over deep ra-

vinces and through hills, which required expensive tunnels, the lining of such tunnels at great expense with concrete masonry, the laying of heavy iron pipes therein, and the construction of large and expensive cut stone culverts, which would not have been necessary if the line and plan of the work had not been changed. The court held in this case very properly that the contractors were entitled to recover upon a quantum meruit, because of the fact that there had been such a material change in the line of the work, and character and cost of the work, as to create a new contract. No such conditions have been disclosed in the case before us, and we think this last-named case, instead of being authority for the plaintiff, sustains our view, when it says:

"The great desideratum and the real end to be attained by the construction of a contract is to ascertain the terms upon which the minds of the parties met, and the sense in which they were used when the parties made the agreement."

It is our view that the minds of the parties to the contract involved in this case met upon the terms set forth in the written instrument, which are sufficiently explicit and unambiguous to fully warrant the conclusion that all classes of material to be encountered by the contractors in the construction of the work were included, and at the specific prices named.

Whilst we think we have disposed of this question, yet we may say that, even if it had been an issue of fact as to whether or not this substance called "gumbo" or "bull-wax" was included within the terms of the contract, the testimony which we gather from the record is overwhelmingly to the effect that it was a species of clay. William A. Hall, who was examined as a witness for the defendant, and who was shown to have been a graduate of the United States Military Academy, and who had been engaged in the work of civil engineering for 25 years, testified that he had examined this substance, and that it was earth and clay, and at some places there was earth and small stones intermixed with clay; that it had a soapy and sticky feeling to it; was undoubtedly tough; that it was hard to pull apart, and would not fracture easily; that he had discovered similar materials in excavations on the Clinch Valley Division of the Norfolk & Western Railway. I. C. White, official state geologist of West Virginia, was examined. This witness, who was the author of a book on clays, cements, and limestones, testified that he had examined the substance in controversy. He said it was a kind of clay, and, like all clays, more or less sticky and tough; but, as we have before stated, we do not think it was a question for the jury, but that the court should have construed the contract and declared what it meant, for as we see it there was nothing indefinite or uncertain about the terms, especially as respects the several kinds of matter and substances to be dealt with by the contractors, and the prices severally to be paid therefor.

[3] Authority is plentiful that unexpected difficulties which a contractor encounters in the performance of a particular piece of work at a stated price does not excuse him from the obligation of his contract. In support of this proposition may be cited the authorities referred to

by the defendant's counsel in his brief, namely, *United States v. Gleason*, 175 U. S. 588, 20 Sup. Ct. 228, 44 L. Ed. 284, *Simpson v. United States*, 172 U. S. 372, 19 Sup. Ct. 212, 43 L. Ed. 482, and *McCormick v. Jordon*, 65 W. Va. 86, 63 S. E. 778. The contract under which the bid of the contractors was accepted contained the following provision:

"Any one bidding on this work is expected to visit the line and examine it thoroughly, and a statement to that effect must be made in the proposal. It is also understood that any estimate of quantities submitted to bidders by the railway company is only approximate."

We have, therefore, the right to assume that the contractors, at the time they entered into the agreement with the defendant, fully understood the nature and character of the work they were to perform. They no doubt had knowledge of the country which was to be traversed by the line of railway contemplated, and they made the bid which was accepted by the defendant at the price named, intending to include all such work as was necessary to carry out the contract. As we have said, the contract is plain and unambiguous in its terms, and should be permitted to speak for itself. We think it was error, therefore, for the court at the instance of one of the parties, in the absence of allegations of fraud or mutual mistake of facts, to admit parol testimony which tended to alter or contradict the terms of the contract itself, or to submit to the jury an issue to determine what the contract meant.

[4] The second question—that is, the claim for compensation for additional work made necessary by reason of a change in some part of the line of the railway—will now be considered and disposed of. The contract provides as follows:

"The alignment, grades, and disposition of material may be changed from the plans at present existing, without prejudice to this agreement. If it can be shown to the satisfaction of the engineer in charge and the consulting engineer that such changes will add to the cost per cubic yard of excavation handled, then such extra allowance may be made by the consulting engineer as will reimburse the contractor; but should the said change decrease the cost of the work to the contractor, he shall be charged with the difference. Any such changes shall be embodied in a supplementary agreement."

There was no supplementary agreement made between the parties to the contract, and so far as the record shows no claim for extra work was ever filed by the contractors. Of course, technically speaking, the contractors should bring themselves within the terms of the contract before they are entitled to recover under it; but we do not deem it necessary under the circumstances of this case to rely upon that principle, for the undisputed facts show that the alleged extra work done by the contractors upon the changed line, which was made by the engineers, was carried on, conducted, estimated, classified, and paid for by the defendant precisely as was work done upon other parts of the line, and such payment was accepted at the time by the contractors.

The work on the first division was completed and certified by the consulting engineer and the engineer in charge on the 8th of August, 1901, the work upon the second division was completed and accepted February 2, 1903, and the work upon the third division on November

30, 1902. As appears from the record, the contractors sublet much of the work on the line, and divided the line into sections to suit the subcontractors. At the instance of the contractors themselves, the engineers, instead of estimating the entire work, classified and estimated the several subdivisions as the work progressed and was finished, and thereupon the payments were made by the defendant to the contractors in accordance with the classification made by the engineers, and at the price named in the contract, except as to the gumbo, which, as is before stated, was much of it classified at a higher rate than earth as defined in the contract, namely, as loose rock and solid rock, as has hereinbefore been set out. It is true that during the progress of the work the contractors were contending for higher prices for some classes of it, particularly for the gumbo or bull-wax which was excavated, and the record of testimony shows that there was considerable chaffering between the contractors and the subcontractors and the engineers relative to the work and the prices to be paid; but the engineers made their estimates and classified the work, and thereupon the defendant paid according to these classifications and estimates, and, as we have said, the payments were accepted by the contractors.

In support of the position that the plaintiff is entitled to go behind the estimates and classification made by the engineers, and to recover from the defendant additional compensation for the work, the two cases of *Jefferson Hotel Co. v. Brumbaugh et al.*, 168 Fed. 867, 94 C. C. A. 279, and *City of Greensboro v. Southern Paving Construction Co.*, 168 Fed. 880, 94 C. C. A. 292, are relied upon. Both of these cases were decided by this court. In the first-named case it was held that:

"Where a building contract constituted the architect the owner's supervising agents, but did not in terms authorize the architects to issue a conclusive final certificate, an architect's final certificate was only prima facie evidence that the work had been performed according to the contract, and placed the burden of proof on the owner to impeach the same for error, mistake, omission, or concealment."

And in the second case that:

"A contract for street paving required the work to be done as a whole, and not in sections, according to specifications under the direction of the city's engineer. The notice to bidders and specifications alone provided for payment on semimonthly estimates as the work progressed, with a retention of 10 per cent. on each 'approximate estimate.' The contract also provided that the contractor should be responsible for any work until its completion and final acceptance, and that the acceptance should not relieve the contractor of any obligations to do reliable work previously described. Held, that the word 'approximate' was tautologically used to accentuate the word 'estimate,' which was not to be construed as a final mathematical ascertainment of what was set forth; and hence the acceptance of sections of the work by the city engineer and issuance of approximate estimates thereon to the contractor did not bar the city's right to defend, when sued for the balance due under the contract, on the ground that the work in the section estimated did not constitute a compliance with the specifications."

But the contract in the case here contains provisions which are much more emphatic with respect to the effect of the estimates and classifications made by the engineers than are to be found in the cases re-

ferred to. We copy from the contract in this case the following stipulations:

"On the last day of each month during the progress of the work an estimate shall be made of the value of all work done, by the engineer in charge, to date."

"All claims for extra work must be filed before the end of the month during which the work was done, and shall at once be adjusted."

"And it is mutually agreed that the decision of the consulting engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement, and each and every one of the said parties do hereby waive any right of action, suit or suits, or other remedy in law or otherwise, by virtue of said covenants, so that the decision of the said consulting engineer shall, in the nature of an award, be final and conclusive on the right and claim of said parties."

And we find also in the contract the following provision:

"The contractor agrees to do all the work described to the satisfaction of the engineer in charge and consulting engineer, and to accept their decision as to quantities, classification, 'etc.,' as final, and from which no appeal shall be taken."

We think the case of *Martinsburg & Potomac Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255, has clearly drawn the distinction between the class of contracts involved in the *Greensboro Case*, and the *Jefferson Case*, and the contract now under consideration. In that case the Supreme Court of the United States holds that:

"A contract for the construction of a railroad provided that the company's engineer should in all cases determine questions relating to its execution, including the quantity of the several kinds of work to be done, and the compensation earned by the contractor at the rates specified; that his estimate should be final and conclusive; and that 'whenever the contract shall be completely performed on the part of the contractor, and the said engineer shall certify the same in writing under his hand, together with his estimate aforesaid, the company shall, within thirty days after the receipt of said certificate, pay to the said contractor, in current notes, the sum which according to his contract shall be due.' Held, that in the absence of fraud, or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, the action of the engineer in the premises was conclusive upon the parties."

In view of the provisions of the contract it seems to us that unless it was shown that there was fraud, or such gross mistake on the part of the engineers as would necessarily imply bad faith, or a failure on their part to exercise an honest judgment, their action was conclusive and binding upon the parties. Upon examination of the entire record we are unable to find any evidence that the action of the engineers in connection with the work under the contract between the contractors and the defendant was other than that prompted by fairness, good faith, and a desire to deal justly with both parties. There is no allegation made by the plaintiff of fraud or bad faith on the part of the engineers in estimating and classifying any part of the work, either that performed by the contractors themselves, or by those to whom portions of the work were sublet. In *Cook v. Foley*, 152 Fed. 41, 81 C. C. A. 237, it is held that final measurements and classification of work made by engineers under a contract providing that they shall

be conclusive are in legal effect an award made by arbiters, in the absence of fraud or of such gross mistakes as imply bad faith or a failure to exercise an honest judgment. A number of cases might be cited to sustain this principle, but we do not deem it necessary to refer to them specifically. The testimony introduced by the plaintiff on the trial to undo the estimates made by the engineers during the progress of the work was that of engineers who had examined the work long after it was completed, and on such examinations based their estimates. It is well said by the Court of Appeals of Virginia in the case of *Baltimore & Ohio Railroad Co. v. Polly, Woods & Co.*, 55 Va. 447:

"Contracts for railroads usually contain provisions with regard to monthly and final estimates to be made by the *engineer having charge of the work*. They are dictated by convenience, if not by necessity. It is the duty, and to the interest of the proprietors to employ honest and competent engineers. An honest engineer in charge is certainly a most suitable person to estimate. * * * He can do it with almost perfect accuracy. He superintends the entire progress. He cannot classify and accurately measure the varied material after the work is done and the excavated material or most of it covered up. It is impossible for *any other person*, even the most competent engineer, to estimate the quantity, character, and value with anything like accuracy."

From our line of discussion it will be readily observed that we are of the opinion that under the facts and circumstances of this case it was error to go behind the action of the engineers with reference to the classification and estimates of the work done by the contractors on the defendant's railway, and thereby open the way for a jury, by its verdict, to practically annul the contract between the contractors and the defendant.

[5] The third question, which has reference to the claim of the plaintiff for what are called overhauls made by the contractors in the course of the work, will be disposed of upon the grounds which we have already assigned relative to the other part of the work. We will say, however, that the contract provided for a haul of 800 feet, and it should be remembered that, although the work covered by the contract was divided into three divisions, yet the defendant was dealing with the contractors for the entire line, and undoubtedly the provision as to the haul and overhaul was to maintain an average within the limit provided for the entire line. Any other method of estimating this part of the work would, therefore, be contrary to the terms of the contract. It is shown by the record that the work in connection with the overhauls was also estimated and certified by the engineers, as was the other work, and the payment therefor, according to the estimates, made by the defendant to the contractors.

[6] The defendant's counsel requested an instruction by the court to the jury based upon this view of the contract; but the court refused the instruction so requested, and gave the following instead:

"The court instructs the jury, in determining the amount, if any, to be allowed the plaintiff for overhaul, they may consider the evidence offered in aid of the interpretation of the contract between the parties; and if they believe from a preponderance of all the evidence that under the contract the defendant agreed to pay the plaintiff for overhaul, they may allow therefor such amount as they believe the plaintiff entitled to as shown by the evidence."

We are unable to see how evidence in aid of the *interpretation* of the contract between the parties was relevant in respect to this matter, for upon an examination of the contract it will be seen that the provision concerning the haul and overhaul is altogether plain and definite. It was error, therefore, as we conclude, to admit testimony tending to explain or vary the terms of the contract, or to submit to the jury such testimony. We take the liberty of citing in this connection two other cases in support of the views we have expressed, to wit: The case of Vanderwerker et al. v. Vermont Central Railroad Co., 27 Vt. 130, in which it is announced that:

"After an estimate by the engineer, no recovery could be had beyond that sum, unless upon the most irrefragable proof of mistake of fact or positive fraud in opposite parties in procuring an underestimate or corruption in the engineer."

And in Choctaw Railroad Co. v. Newton, 71 C. C. A. 655, 140 Fed. 225, it is held that:

"A railroad contractor cannot impeach the decision of such engineer and recover an amount in excess of that shown in his decision, except on a clear showing of fraud, * * * and that a direction to a master that, to warrant a finding of fraud in such decision, the evidence must be *reasonably convincing*, does not come up to the measure of proof required."

[7] Coming to the question of retained percentages, the contract provides that:

"On the last day of each month during the progress of the work an estimate shall be made of the value of all work done, by the engineer in charge, to date. Of this amount ninety per cent. shall be paid to the party of the second part, less any previous monthly estimates which might have been paid on the same work; said payments shall be made on or about the 15th of the following month. And when all the work embraced under this agreement shall be completed, according to this specification and to the satisfaction of the engineer in charge and the consulting engineer, a final estimate shall be made, and any balance appearing to be due to the party of the second part shall be paid within thirty days thereafter," etc.

It is admitted that the sum retained by the defendant under this part of the contract amounted at the close of the work to \$17,-079.89. The defendant contests plaintiff's right to recover this sum, and sets up a right of recoupment for a much larger amount under this paragraph of the contract:

"And it is further understood that for each day and every day required in excess of the date named for the completion of this contract the sum of fifty dollars shall be paid by the party of the second part to the party of the first part, which shall be considered as liquidated damages. Or should the party of the second part anticipate the date of the completion, then the party of the first part shall pay to the party of the second part fifty dollars for every day so saved."

The contract required that the work on the first division should be performed in a thorough and workmanlike manner on or before the 15th of December, 1900, and on divisions 2 and 3 on or before the 1st of March, 1901. As has been stated before in the course of this opinion, the work on the first division was completed on the 8th of August, 1901, on the third division on the 30th of November, 1902, and on the second division not until February 2, 1903. To hold the con-

tractors liable for the penalty provided in the contract for all of the time in excess of that limited for the performance of the work would make a much larger sum than the retained percentages amount to. If the defendant, through its engineers, exercised the authority conferred upon them by the contract, and by changing the line of railway, or otherwise required additional work of the contractors, which would take an enlargement of the time, then it would necessarily follow that the law would give the latter a reasonable extension in which to perform such additional work, and there would be no forfeiture if only such reasonable time was occupied. We do not think, however, that the mere fact that there was additional work required would warrant the contractors in making unnecessary delay in the completion of the contract. We find some valuable learning on this subject in the opinion of the Circuit Court of the Eastern District of Arkansas in the case of *Texas & St. Louis Railway Co. v. Rust et al.*, reported in 19 Fed. 239. From the syllabus of the case we copy the following:

"A provision in a contract to build a railroad bridge that, in case of non-completion of the bridge or providing a crossing for trains by a given date, the sum of \$1,000 per week should be deducted from the contract price of the bridge for the time its completion or provision for crossing trains is delayed beyond that date, is a stipulation for liquidated damages."

"In such cases, if the contractors act in good faith, and the delay results from causes beyond their control, they will not be liable for damages in excess of the stipulated amount."

"The fact that the contractors were retarded in the work by high water, sickness of hands, and sunken logs encountered in sinking piers, does not excuse them from performance of their contract. They assumed their risks when they executed the contract, without a provision exempting them from the consequences of such casualties."

In the course of the opinion the court expresses itself in this language, which is in accord with our views upon the subject:

"If the plaintiffs directed the defendants to make additions or changes, or do work on the bridge not covered by the contract, and which would require longer time to complete the bridge, and this fact was known to both parties, then it must be implied that both parties consented to such an extension of time as was necessary or reasonable for making such additions or changes, but no more. *Manufg. Co. v. U. S.*, 17 Wall. 592 [21 L. Ed. 715]. If such orders for additions or changes in the bridge were given by the plaintiff, and the defendants with good faith and with reasonable diligence and adequate force and appliances, performed such extra work, then the time required to do the same must be added to the contract time allowed for completion of the bridge."

The case of *Manufacturing Co. v. United States*, 17 Wall, 592, 21 L. Ed. 715, noted in the foregoing involves also the same principle. The case of *American Bridge Co. v. Camden Interstate Railway Co.*, 135 Fed. 323, 68 C. C. A. 131, decided by this court, treats more particularly of the rule of damages in cases where a contract has not been completed by the contractors within the time limited, or where the contractors unnecessarily delayed in finishing the work they had agreed to perform. The principle, however, that such damages are recoverable where the default of the contractor causes the delay, is fully recognized in that case. Upon this subject the learned trial

judge instructed the jury that, in order to hold the contractors liable for the forfeiture under the provisions of the contract, it must appear that the delay in the completion of the work was wholly due to their fault. Thus far we think the court announced the true principle, but the court added the following paragraph:

"And the court further instructs the jury if they believe the preponderance of the evidence shows that the delay, if any, was caused by the defendant company materially changing the line, after the time of the execution of the contract, and that such change in the line, either by materially increasing the amount and quantity of material to be excavated and removed, or by materially increasing the difficulty of removing said material encountered on said changed line, increased the length of time necessarily required for the contractors to complete said work, then the defendant is not entitled to recover under its said notice of recoupment."

We think it was due the defendant after this delivery that the court should have proceeded and instructed the jury on the line we have above indicated; otherwise, the jury was left to conclude from the language of this last instruction that the fact that the defendant had enlarged the scope of the work absolved the contractors from further obligation to be diligent in its performance. The proposition as we state it is the law as we understand it, and it was error prejudicial to the rights of the defendant for the jury to take the case without being advised that although the defendant by realignment or otherwise had increased the work which would necessarily require more time, yet when a reasonable time had elapsed for the contractors to complete the increased work, and they had, by want of diligence, proper preparation, the use of a competent force, or by other default, failed to do so, then they would be liable for the forfeiture for delays beyond the reasonable limit of time. The right of the defendant in case forfeiture was found against the contractors to avail of it by way of recoupment for the reduction or extinguishment of the retained percentages is undisputed.

As to the questions we have so far considered we think the theories adopted by the trial court as portrayed by the rulings made and the instructions given to the jury were at variance with the specific agreements of the parties as set out in the written contract and were to this extent, as we have expressed ourselves, erroneous as propositions of law. Defendant's requested instructions, which were refused, and exceptions to the instructions given are numerous, and cover every point which arises in the case. We do not think it necessary, however, to deal with these matters further in detail. We deem it sufficient to say that aside from the claim for retained percentages the plaintiff was not entitled to recover, and as to these the issue should be submitted and tried upon the principles we have above announced.

[8] Finally, we are called upon to consider the question of jurisdiction, which is raised by the defendant below, and is based upon the ground that Reherd, the plaintiff, having been appointed receiver by a court of the state of Virginia, had no right to come into the state of West Virginia and bring his suit in the Circuit Court of the United States as it then existed.

In his last work on Receivers (fourth edition, published in 1910), Mr. High, on page 271, says:

"Upon the question of the territorial extent of a receiver's jurisdiction and powers, for the purpose of instituting actions connected with his receivership, the prevailing doctrine, established by the Supreme Court of the United States and sustained by the weight of authority in various states, is that the receiver has no extraterritorial jurisdiction or power of official action, and cannot, as a matter of right, go into a foreign state or jurisdiction and there institute a suit for the recovery of demands due to the person or estate subject to his receivership. His functions and powers, for the purpose of litigation, are held to be limited to the courts of the state within which he was appointed, and the principles of comity between nations and states, which recognize the judicial decisions of one tribunal as conclusive in another, do not apply to such a case, and will not warrant a receiver in bringing an action in a foreign court or jurisdiction."

Among the authorities cited by the author to sustain the above principle we note the following: *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164; *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; *Great Western Mining & M. Co. v. Harris*, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163.

[9] It seems to be settled, therefore, that this receiver, who was appointed in a Virginia court, was not authorized in the outset to institute his action in the United States Court in the Northern District of West Virginia; but the plaintiff undoubtedly, from his subsequent action, undertook to cure this defect by going into Randolph county, W. Va., after the suit had been begun, and filing an ancillary bill, under which an order ratifying his appointment as receiver was made, in which said order are the following provisions:

"* * * And with authority to him to intervene and prosecute as party plaintiff, and as receiver, as hereinbefore described, in the action of assumption pending in the Circuit Court of the United States for the Northern District of West Virginia, entitled *Peter W. Reherd, Receiver, v. Coal & Iron Railroad*; and he shall have full authority as receiver, appointed by this court, to intervene as party plaintiff in said action, according to the rules of pleading in the Circuit Court of the United States for the Northern District of West Virginia."

The question then presented is as to whether this proceeding, taken after the suit had been actually instituted, would have the effect for which it was intended. It occurs to us that in this situation the position of the defendant becomes one of extreme technicality. Undoubtedly, if the plaintiff had filed his ancillary bill in the state court of Randolph county, W. Va., and his appointment as receiver had been ratified, and authority given to bring the suit, the proceeding herein would have been regular and the question of jurisdiction eliminated.

Our conclusion is that although the proceeding was irregular, yet when the plaintiff came into the United States court, under the order of the West Virginia state court, and constituted himself a party, and the pleadings and subsequent proceedings made to conform, that in effect was a commencement of this suit *de novo*.

Under the circumstances of this case, after all the facts have been fully considered by a court and a jury, consuming no doubt much

time and a large expenditure of money, we are not inclined, and it would in our opinion be unwarranted, to respond to the defendant's position, which involves, as we have said, a mere technicality based upon an irregular proceeding, and such action on our part would not only greatly militate against the interests of the parties to this action, but would also tend to unnecessarily retard the administration of justice.

[10] The defendant then suggests that Samuel Walton, one of the members of the firm of Walton, Purcell, Moorman & Co., is and was a resident of the state of West Virginia, and that upon this ground the jurisdiction of the federal court is ousted. The residence of the several individual members of the partnership does not in our opinion enter into the determination of the question of jurisdiction. When the plaintiff was made the arm of the Virginia court as its receiver to collect and take in hand the assets of the partnership, he was by the law constituted the sole actor in such litigation as pertained to the partnership assets, although, as we have stated, his right to sue was confined primarily to the territorial limits of the jurisdiction in which he was appointed. Walton is not a party to the suit, nor indeed is he a necessary or proper party, to the end that a complete determination of the controversy between the plaintiff and the defendant may be had.

In the case of *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179, Mr. Justice Field, in delivering the opinion of the court treats of this subject, and in speaking of executors and trustees says:

"If they are personally qualified by their citizenship to bring suit in the federal courts, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified."

We think this rule applies also to receivers, and therefore there is no force in this last position of defendant's counsel.

The judgment of the District Court will therefore be reversed, and the case remanded, to the end that a new trial may be had, to be proceeded with in accordance with this opinion.

Reversed.

PRITCHARD, Circuit Judge (dissenting). A careful consideration of the facts and circumstances surrounding this case impels me to dissent from the conclusion reached by the majority of the court in this instance.

It is fundamental that, in all cases where contracts are entered into, there must be a meeting of the minds of the parties thereto. It is evident that, at the time these contracts were made the material known as "gumbo" or "bull-wax" was not supposed to exist in the state of West Virginia; hence it could not have been anticipated by the parties that such material would be encountered in the performance of this work. Therefore it cannot be reasonably insisted that that portion of the contract which refers to sand, clay, and gravel was intended by the parties to include an extraordinary material of this character, the removal of which, as shown by the evidence, cost far in excess of the removal of even solid rock, to say nothing of the

other material referred to in the contract. The evidence shows that the removal of this substance involved an expenditure of over \$100,000 in excess of the amount that would have been required for the performance of the work in question, dealing with ordinary material, without even considering the cost incident to the purchase and transportation of additional machinery necessary to be used in excavation where material of this character is encountered. The engineer representing the company recognized this fact, and gave assurances to the contractor that a fair adjustment would be made if he continued the work to its completion.

In view of the facts, I am of the opinion that the rulings of the lower court were correct, and that the questions of fact which I think are pertinent to the correct determination of the matters involved in this controversy were fairly and impartially submitted to and passed upon by the jury. Under the circumstances, I feel that substantial justice has been done, and that the judgment of the lower court should not be disturbed.

EBERHART et al. v. UNITED STATES, for Use of FIRST NAT. BANK OF BELLE FOURCHE, S. D.

UNITED STATES v. EBERHART et al.

(Circuit Court of Appeals, Eighth Circuit. March 13, 1913. Supplemental Opinion, May 1, 1913.)

Nos. 3,770, 3,829.

1. UNITED STATES (§ 67*)—CONTRACTORS' BONDS—LIABILITY OF SURETIES.

Where a bond was given by a contractor for government work under Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), the bond containing the additional condition required by the act that the contractor should promptly make payments to all persons supplying him with labor and materials in the prosecution of the work, the liability of the sureties under such special obligation is measured by the terms of the act, which is an indispensable part of their contract.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

2. UNITED STATES (§ 67*)—CONTRACTORS' BONDS—LIABILITY OF SURETIES TO LABOR AND MATERIAL CREDITORS—LIMITATION.

Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), which amended and superseded Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), provides that bonds given by contractors for public work shall contain the additional obligation that the contractor shall promptly make payments to all persons supplying him with labor and materials in the prosecution of the work. It further provides that any person or persons supplying the contractor with labor or materials, payment for which has not been made, may intervene in any action brought by the United States on the bond, and that if no such action shall be brought within six months from the completion and final settlement of the contract they may bring a single suit in the name of the United States in the district in which the contract was to be performed, and not elsewhere, provided that such suit "shall be commenced within one year after the performance and final settlement of said contract and not later." *Held*, that such limitation was a condition of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

liability of the sureties to labor and material creditors; that where a bond was executed under such statute, on the expiration of one year from the time the contract was completed and final settlement made, no suit having been commenced by either the United States or by labor and material creditors, the sureties were discharged from any liability to such creditors; and that Congress could not revive such liability by a special act, passed thereafter, authorizing the creditors to bring suit under the terms of the original act before amendment, which contained no such limitation.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

In Error to the District Court of the United States for the District of Minnesota; Chas. A. Willard, Judge.

Action at law by the United States, for the use and benefit of the First National Bank of Belle Fourche, S. D., against Adolph O. Eberhart and others. Judgment for the use plaintiff, and defendants bring error. Reversed.

Action by the United States against the same defendants. Judgment for defendants, and the United States brings error. Affirmed.

On April 26, 1905, the United States entered into a contract with the Widell-Finley Company, a corporation created by and existing under the laws of the state of Minnesota, for the construction by the Widell-Finley Company of a dam and canal in the state of South Dakota according to plans and specifications furnished. The defendant in the court below, Adolph O. Eberhart, and his codefendants, became sureties for the contractor in the sum of \$21,500, conditioned, as required by law, that "it shall in all things well and truly observe, perform," etc., "the covenants, conditions and agreements," etc., "mentioned in certain articles of agreement bearing date the 26th day of April, 1905, * * * concerning the construction and completion of the work provided in schedule 2, main supply canal, Belle Fourche project, South Dakota," etc., "and shall promptly make payment to all persons supplying labor and materials for the prosecution of the work provided for."

The contract for the faithful performance of which this bond was executed contained, among other provisions, the following: Eighth: "Engineer.—Where the word 'engineer' is used in the general conditions or detailed specifications, or in the contract, it shall be and is mutually understood to refer to the Chief Engineer of the Reclamation Service, or any of his authorized assistants or inspectors, limited by the particular duties intrusted to them. * * * Upon all questions concerning the execution of the work and the classification of the material, in accordance with the specifications, the decision of the engineer shall be binding on both parties. All materials furnished and all work done shall be subject to rigid inspection, and if not in accordance with the specifications, in the opinion of the engineer, shall be made to conform thereto. Unsatisfactory material will be rejected and shall be immediately removed from the premises, at the cost of the contractor, if so ordered by the engineer."

Paragraph 21 provides: "Suspension of Contract.—Should the contractor fail to begin the work within the time required, or fail to begin the delivery of material as provided in the contract, * * * then and in either case the Secretary of the Interior shall have the power to suspend the operation of the contract, and he may take possession of all machinery, tools, appliances, and animals employed on any of the works to be constructed under the contract and of all materials belonging to the contractor delivered on the ground, and may use the same to complete the work, or he may employ other parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for in such manner as he may deem proper, or hire such force and buy such machinery, tools, appliances, materials, and animals at the contractor's expense as may be necessary for the proper con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

duct of the work and for finishing it in the time agreed upon. Any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor."

Paragraph 24: Changes.—By this paragraph the Secretary of the Interior reserved the right to make changes in the specification of work or material as may be deemed advisable without notice to the sureties on the bond. This right to make material changes in the quantities listed in the proposal is made an essential part of the contract. It then provides: "Should any change be made in a particular piece of work after it has been commenced, so that the contractor is put to extra expense, the engineer shall make reasonable allowance therefor, which action shall be binding on both parties."

Paragraph 25 provides: "Structural Difficulties.—Should structural difficulties prevent the execution of the work as described in the plans and specifications, necessary deviations therefrom may be permitted by the engineer, but must be without additional cost to the United States."

The contractor having been adjudicated a bankrupt in February, 1906, after he had performed a part of the contract, the receivers of the estate continued the work by authority of the bankruptcy court until March 8, 1906, when the United States took charge of it under the provisions of paragraph 21 of the contract, and completed it by November 30, 1908. On June 16, 1908, a final statement of the account was made by the United States, and demand for payment made of the contractor; on December 28, 1908, demand for the penalty of the bond was made on the sureties.

On April 26, 1910, the government instituted suit in the Circuit Court of the United States for the District of Minnesota, where the defendants all resided. This suit is No. 3,829 in this court. On March 18, 1911, the First National Bank of Belle Fourche instituted its suit in the same court, as assignee of the laborers whose time checks it had purchased. Although the two suits were separately instituted, and at different times, they were by direction of the court tried together to a jury. The jury returned a verdict in No. 3,770 in favor of the First National Bank for the full amount claimed, with interest thereon, amounting in the aggregate to the sum of \$23,693.44, and in the action by the government, No. 3,829, returned a verdict for the defendants.

Charles C. Houpt, U. S. Atty., of St. Paul, Minn., and S. S. Ashbaugh, Sp. Asst. Atty. Department of Justice, of Washington, D. C., for plaintiff in error in No. 3,829.

H. L. Schmitt, of Mankato, Minn. (John W. Schmitt and Lorin Cray, both of Mankato, Minn., on the brief), for plaintiffs in error in No. 3,770, and defendants in error in No. 3,829.

Rollo F. Hunt, of Devils Lake, N. D., C. E. Phillips, of Mankato, Minn., and James A. George, of Deadwood, S. D., for defendant in error in No. 3,770.

Before SANBORN, Circuit Judge, and W. H. MUNGER and TRIEBER, District Judges.

TRIEBER, District Judge (after stating the facts as above). [1] We will first deal with the action of the First National Bank, No. 3,770. By an act of Congress approved August 13, 1894 (28 Stat. 278, c. 280 [U. S. Comp. St. 1901, p. 2523]), every person entering into a formal contract with the United States for the construction of any public buildings, or the prosecution and completion of any public work, was required, before commencing such work, to execute the usual penal bond, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided

for in such contract. And such person to whom the contractor was indebted for labor and materials was given a right of action in the name of the United States for his use and benefit against the contractor and his sureties, provided that the United States was to be involved in no expense thereby.

By Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), the act of 1894 was amended so as to read as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: Provided further, that in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

This latter act was in force at the time this contract was entered into and the bond sued on executed, and therefore became a part of the contract. *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; *Edwards v. Kearzey*, 96 U. S. 597, 607, 24 L. Ed. 793; *United States Fidelity, etc., Co. v. United States, for Use of Struthers Wells Co.*, 209 U. S. 306, 315, 28 Sup. Ct. 537, 52 L. Ed. 804.

[2] It will be noticed that the act of 1905, which takes up the entire subject covered by the act of 1894 and therefore is to be treated as a substitute act, repealing the former, materially changes the former act of 1894. Under the last-mentioned act, a suit on the bond could only be maintained against the sureties on the bond in the district where the defendants resided. *Davidson Marble Co. v. Gibson*, 213 U. S. 10, 29 Sup. Ct. 324, 53 L. Ed. 675. The first act gave no priority to the government of the United States, while the later act provides for such priority. There was nothing in the act of 1894 requiring all claims to be determined in one action, nor is there any limitation as to when the action is to be commenced, except such as may be prescribed by the laws of the state where the suit may be instituted. By the act of 1905 no suit can be instituted by a creditor on the bond of the contractor until after the complete performance of said contract and final settlement thereof, and it limits the time within which the suit is to be brought to one year, and then only if the government has failed to institute a suit within six months from the completion and final settlement of said contract. The action is to be brought by creditors in a court of the United States in the district in which the contract was to be performed and executed, irrespective of the amount in controversy, and not elsewhere. The act further provides that only one action shall be instituted by a creditor or creditors, but any other creditor may file his claim in such action and be made a party thereto within one year from the completion of the work under said contract, and not later. It also provides that the government shall have priority for any sum found to be due it, and the residue shall go to the other creditors, and if this balance recovered on the bond shall be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety was also permitted by that act to pay into court for distribution among said claimants and creditors the full amount of his liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States, and thereupon the surety was to be relieved from all further liability. Upon the institution of a suit by a creditor under that act, personal notice of the pendency of such suit is required to be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor. *Hill v. American Surety Co.*, 200 U. S. 197, 201, 26 Sup. Ct. 168, 50 L. Ed. 437; *Mankin v. Ludowici-Celadon Co.*, 215 U. S. 533, 538, 30 Sup. Ct. 174, 54 L. Ed. 315; *United States Fidelity, etc., Co. v. United States, for Use of Struthers Wells Co.*, *supra*.

The contractors having failed to comply with the terms of the con-

tract, it was declared forfeited, and the government completed the contract, and a final statement of the account made by the government, and a demand therefor on June 16, 1908. The First National Bank, not having instituted its suit within one year thereafter, applied to Congress for relief, and Congress enacted the following act, which became a law March 4, 1911 (36 Stat. 1170, c. 236):

"That all persons having supplied labor and materials for the prosecution of the work of making the main canal of the Belle Fourche irrigation project under the contract for the construction thereof, entered into by Widell-Finley Company, under date of April twenty-sixth, nineteen hundred and five, pursuant to advertisement for said contract, dated February tenth, nineteen hundred and five, and their assigns and legal representatives, are hereby given the full rights and remedies afforded to persons supplying labor and materials in the prosecution of public works, as set forth in the act of August thirteenth, eighteen hundred and ninety-four, entitled 'An act for the protection of persons furnishing materials and labor for the construction of public works,' to the same force, extent, and effect as if the act had not been amended, modified, or repealed, with full right of action in the name of the United States for his or their use and benefit against said contractors and sureties upon the bond furnished to the United States under the said contract: Provided, that such action and its prosecution shall involve the United States in no expense."

This act granted to all persons having supplied labor and materials for the prosecution of the work of making the main canal of the Belle Fourche irrigation project under the contract entered into by the Widell-Finley Company under date of April 26, 1905, and their assigns and legal representatives, the full rights and remedies which were afforded to such persons by the act of August 13, 1894, to the same extent and effect as if the act had not been amended, modified, or repealed by the act of 1905. After the passage of this act by Congress, the First National Bank on March 18, 1911, instituted its action as assignee of the laborers whose time checks it had purchased, in the Circuit Court for the District of Minnesota. Demurrers were filed by the defendants in each of the cases, and were overruled, and proper exceptions saved thereto. Thereupon answers were filed by both parties; but in view of the conclusions reached by us it is unnecessary to set out the issues raised by the answers.

In our opinion, the court below erred in overruling the demurrer in case No. 3,770. Under the act of 1905, which was in force at the time the sureties signed the bond, and which was a part of the bond obligation, any action on the part of laborers or other creditors of the contractors against the sureties on the bond had been barred by the statute of limitations, more than a year having then expired since the government had settled the accounts of the contractor and made a demand upon it and the sureties for the amount claimed to be due it by reason of the breach of the contract.

While it has been held in *Campbell v. Holt*, 115 U. S. 628, 6 Sup. Ct. 209, 29 L. Ed. 483, that a right to defeat any debt by the statute of limitations is not a vested right, so as to be beyond the legislative power in a proper case, that was in an action against the debtor himself. In this case the action is against the sureties; and, as the law is well settled that sureties are favorites of the law, and all their undertakings are construed strictly in their favor (*Reese v. United States*,

9 Wall. 13, 20, 19 L. Ed. 541; *United States v. Freel*, 186 U. S. 309, 316, 22 Sup. Ct. 875, 46 L. Ed. 1177; *United States v. National Surety Co.*, 92 Fed. 549, 34 C. C. A. 526). Congress had no right to extend the statutory bar after it had once attached. The sureties, when they signed the bond, knew that under this statute, which was a part of their contract of suretyship, their liability to creditors as such sureties would cease 12 months after the work had been completed. If they held any securities to indemnify them, it was their duty to return them; if no suit was brought within that time, they would have a right to feel that they need exercise no further vigilance over their principal, that they had been released of all liability by operation of law. To extend the statute after they had been thus discharged places upon them a burden which they did not assume at the time they signed the bond. *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793; *Pritchard v. Norton*, 106 U. S. 124, 132, 1 Sup. Ct. 102, 108 (27 L. Ed. 104).

In the last case, in which this question was involved, Mr. Justice Matthews, who delivered the opinion of the court, said:

"The principle that what is apparently mere matter of remedy in some circumstances, in others, where it touches the substance of the controversy, becomes matter of right, is familiar in our constitutional jurisprudence in the application of that provision of the Constitution which prohibits the passing by a state of any law impairing the obligation of contracts; for it has been uniformly held that 'any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.' * * * Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. * * * A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice."

In *United States Fidelity, etc., Co. v. United States, for Use of Struthers Wells Co.*, 209 U. S. 306, 315, 28 Sup. Ct. 537, 52 L. Ed. 804, these acts were similarly construed.

The demurrer to the complaint of the First National Bank should have been sustained, and the action dismissed.

In the action by the government, No. 3,829, the bill of exceptions, as it appears in the printed record, fails to set out any evidence by either party, except some exhibits, which fail to show any right of recovery by the government. Hence there is nothing before us that enables us to determine whether the court below committed any error.

The judgment in No. 3,829 is affirmed, and that in No. 3,770 reversed, with directions to set aside the judgment and sustain the motion of the defendants for a judgment notwithstanding the verdict, which is permissible under section 4362 of the Revised Laws of Minnesota of 1905.

SANBORN, Circuit Judge (concurring). An act of Congress, which at the same time and in itself authorizes or creates a new liability and prescribes the limitations thereof and of its enforcement, makes those limitations conditions of the liability itself. Such an

act is not a statute of limitations, and a compliance with the conditions which it prescribes is indispensable to the enforcement of the liability it authorizes or creates (*The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140, 30 L. Ed. 358; *Pollard v. Bailey*, 20 Wall. 520, 526, 527, 22 L. Ed. 376; *Bank v. Francklyn*, 120 U. S. 747, 756, 7 Sup. Ct. 757, 30 L. Ed. 825; *Boyd v. Clark* [C. C.] 8 Fed. 849; *Brunswick Terminal Co. v. National Bank of Baltimore*, 99 Fed. 635, 638, 639, 40 C. C. A. 22, 25, 26), because such limitations are conditions of the liability itself and not limitations of the remedy only. They are excepted from the rule announced in *Campbell v. Holt*, 115 U. S. 620, 628, 6 Sup. Ct. 209, 29 L. Ed. 483, to the effect that the right to defeat a just personal debt for a common-law liability, in that case for a conversion of the plaintiff's money, is not a vested right, which the Legislature may not overthrow at pleasure by extending the time for collecting it.

When these sureties made their contract the act of 1894 was no more. The act of 1905 had taken its place, and the provisions of that act were by operation of law written into and made an indispensable part of their contract. The contract for the construction of the canal and the contract of these sureties, their bond, were made on April 26, 1905, and the canal was dug and completed under the act of 1905. Conceding, without deciding, that the bank succeeded to the rights of the laborers whose time checks it bought, bearing in mind the fact that the United States brought no suit on the contract for the construction of the canal, or on the bond, within six months after June 16, 1908, the date of the completion and final settlement of the contract, and having regard to the terms of the act of 1905, which were written into and became an indispensable part of the bond, this was the contract of these sureties: That (1) on condition that some laborer or materialman, or the bank, should bring suit on their bond in the name of the United States for his or its benefit in the District Court of South Dakota where the contract was to be performed, and not elsewhere; (2) on condition that such suit should be brought within one year after June 16, 1908, and not later; (3) on condition that only one suit of this nature should ever be brought against them on this bond, and that all creditors should be notified thereof and should be permitted to intervene within one year after June 16, 1908, and not later; and on no other condition—and not otherwise, these sureties would be liable to the amount of their bond for the claims of the laborers and materialmen employed in the construction of the canal, who either appeared or intervened in accordance with these conditions in such a suit. None of these conditions was ever fulfilled, no suit on the bond of these sureties was ever brought in the District of South Dakota, no suit upon this bond was brought within one year after June 16, 1908, and on June 17, 1909, no liability of these sureties to pay any laborer or materialman anything whatever existed. Because the conditions on which alone they had agreed to be liable to any laborer or materialman, or to the bank, on or after June 16, 1909, had never arisen, they were as free of liability to them after that date as they would have been if they had never signed the bond, and they so remain unto this day.

It is not claimed that they did not so remain for more than one year and eight months after that date, and until the passage of the act of March 4, 1911. It is said that the act of 1911 did not impair the obligation of their contract. Let that proposition be conceded. It did not impair any obligation of the sureties to the laborers, materialmen, or the bank, or any obligation of the latter to the sureties, because subsequent to June 16, 1909, the sureties and these laborers, materialmen, and the bank were free from all obligation of any contract each to the other. The sureties were exempt from the obligation of any contract to the laborers, materialmen, or the bank after June 16, 1909, because they had not accepted the conditions on which alone the sureties agreed to stand liable. They owed them nothing and were under no liability to them, and therefore the act of March, 1911, did not impair any obligation of their contract. The vice of that act, as it seems to me, is not that it impairs the obligation of a contract; it is that it flies in the face of the inhibition of the fifth amendment to the Constitution that no person shall "be deprived of life, liberty or property without due process of law." Its legal effect is by a mere act of a legislative body to deprive the sureties of \$23,693.44, the amount of the judgment against them in this case, of their property, and to transfer it to the bank, to which the sureties were in no way liable. It is familiar law that any change in the contract of a surety, or in the contract for the performance of which the surety agrees to be liable, whereby attempt is made to increase his contractual liability without his consent, releases the surety. *Miller v. Stewart*, 9 Wheat. 680, 6 L. Ed. 189; *Smith v. United States*, 2 Wall. 219, 17 L. Ed. 788; *Reese v. United States*, 9 Wall. 13, 19 L. Ed. 541. How, then, can a new and independent contract and liability be imposed upon sureties by the mere fiat of a legislative body?

The vice of the Act of 1911 is that it makes a new contract for these sureties where they had been for months before its enactment free from all liability to this bank, to the materialmen, and the laborers, a contract of which they had no notice, and to which they never assented, whereby they are made liable to the bank for \$23,693.44. There is no practical or legal difference between an act of Congress which declares parties who are free from liability to a bank to have made a contract which they never made to pay it \$23,693.44, and to be without defense to an action to recover that amount, and an act that declares that \$23,693.44 of the money or property of such parties shall be transferred to the bank. If the act of 1911 has any effect, it has the effect to deprive these sureties, who were free from all liability to the bank, of \$23,693.44, and to transfer that amount of their property to the bank. This was done, if it was done at all, not by any process of law, but by the arbitrary act of a legislative body, without notice, trial, or hearing. An act of Congress which has such an effect not only violates the fifth amendment to the Constitution, but is beyond the powers of the legislative department of a republican government, and void. In *Calder v. Bull*, 3 Dall. 386, at page 388 (1 L. Ed. 648), Mr. Justice Chase said:

"There are acts which the federal or state Legislatures cannot do, without exceeding their authority. There are certain vital principles in our free re-

publican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law, or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the Legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law, in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B.: It is against all reason and justice, for a people to intrust a Legislature with such powers; and therefore, it cannot be presumed that they have done it."

See *Pritchard v. Norton*, 106 U. S. 124, 132, 135, 1 Sup. Ct. 102, 27 L. Ed. 104; *United States Fidelity Co. v. Struthers Wells Co.*, 209 U. S. 306, 312, 28 Sup. Ct. 537, 52 L. Ed. 804; *Tyrell v. Rountree*, 7 Pet. 464, 468, 8 L. Ed. 749; *Gunn v. Barry*, 15 Wall. 610, 622, 21 L. Ed. 212; *Fletcher v. Peck*, 6 Cranch, 87, 135, 3 L. Ed. 162; *Hepburn v. Griswold*, 8 Wall. 603, 623, 19 L. Ed. 513; *Tillotson v. Millard*, 7 Minn. 513 (Gil. 419), 82 Am. Dec. 112; *Grinder v. Nelson*, 9 Gill (Md.) 299, 307, 52 Am. Dec. 694; *Regents v. Williamson* 9 Gill & J. (Md.) 365, 408, 31 Am. Dec. 72; *Bank v. Ballou*, 98 Va. 112, 32 S. E. 481, 483, 44 L. R. A. 306, 81 Am. St. Rep. 715; *Wade*, Retro. Laws, §§ 159, 191; *Gilman v. Tucker*, 128 N. Y. 190, 28 N. E. 1040, 13 L. R. A. 304, 26 Am. St. Rep. 464; *Ratcliffe v. Anderson*, 72 Va. 105, 31 Am. Rep. 716; *Murphy v. Gaskins' Adm'r*, 69 Va. 207, 222; *McCarty v. Hoffman*, 23 Pa. 507; *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *Wap. Attachm.* (2d Ed.) §§ 17, 736; *Bergman v. Sells*, 39 Ark. 97, 101; *Cole v. Cunningham*, 133 U. S. 107, 116, 10 Sup. Ct. 269, 33 L. Ed. 538; *Richardson v. Adler*, 46 Ark. 49; *Wade*, Retro. Laws, §§ 171, 173.

For the reason which has now been stated I concur in the opinion and conclusion that the demurrer to the complaint in this suit for the benefit of the bank should have been sustained. This case, however, has been tried, and the question which has been discussed was raised, not only by demurrer, but also by a request for a directed verdict at the close of the trial, and by a motion for a judgment in favor of the sureties notwithstanding the verdict, pursuant to section 4362 of the Revised Laws of Minnesota of 1905; and as it appears from the entire record that the facts in this case do not constitute a legal cause of action against these sureties, and that no amendment to the complaint may avoid that result, it seems to me that in the interest of the speedy conclusion of this litigation a judgment in favor of the sureties notwithstanding the verdict should now be directed.

There is another reason for my conclusion that the judgment against the sureties should be reversed. It is that over their objection the cashier of the bank was permitted to testify, as against Mr. Eberhart, one of the sureties, that in 1905, before the bank bought the time checks, Eberhart said to the cashier that the bank would be perfectly

safe in buying them, because the effect of section 35 of the contract between the Widell-Finley Company and the United States was to make the sureties liable to the bank for the moneys owing on the checks it bought. This conversation took place long before the contract was completed, so that it could not have had the effect of estopping Eberhart from defending on the ground that the contractual conditions of his liability, which were to be complied with subsequent to the completion of the work, were not fulfilled. His conversation consisted merely of a statement of his opinion of the legal effect of a written provision of the contract between the Widell-Finley Company and the United States for the performance of which he had given his bond. Before his conversation was received in evidence the cashier had testified that he had consulted and obtained the opinion of the bank's attorney upon this very question, so that it did not appear that he relied upon Eberhart's opinion, and it seems to me that the statement of a surety under these circumstances of his opinion upon the question of the legal effect of a clause of a written contract, a question that is plain and fully open to all parties, cannot have the effect to estop him from insisting that his liability as a surety is measured by the true legal effect of that clause. I think the admission of this conversation was for this reason erroneous.

In the case of the United States for its own benefit against these sureties the government alleged in its complaint that in the completion of the contract with the Widell-Finley Company it necessarily expended \$59,009.06 more than the contract price for the work, and it demanded judgment against the sureties for \$21,500, the penalty of their bond, and interest. The sureties answered that the contract of the Widell-Finley Company was conditioned by a plan of the route of the canal, drawings and specifications of the work in reliance upon which the contractor was requested to bid and did bid and subsequently agreed to do the work, and the sureties gave their bond for the contractor's performance, but without their knowledge or consent the United States radically changed the route and location of the canal and the specifications therefor, so that the cost to the contractor in proportion to the contract price and the risk and hazard assumed by the sureties were vastly and wrongfully increased. It is assigned as error that:

"The court erred in holding and deciding that paragraph 24 of the specifications did not authorize changes in the plans of the canal, and that if changes were made as claimed by defendant it was sufficient to release the sureties."

Turning to the charge of the court on this subject, the record discloses the fact that it covers two printed pages. It was, in substance, that the contract was made upon the basis, not only of the specifications, but of a plan which had been offered in evidence and was marked Exhibit 2, that the sureties signed the bond to guarantee the performance of a contract made to do the work in accordance with this plan, that these sureties were entitled to have the canal built substantially upon the route indicated by that plan, that if the jury found that at the Vulcan cut the route, according to the plat referred to in the contract, went around the hill so as to make the construction a side hill

proposition and that it was afterwards changed by the government, without the knowledge or consent of the sureties, so as to make a cut through the hill, with high ground on each side of it, and this change made the contract less profitable to the contractor in the amount of \$10,000 or \$12,000, as testified to by the witnesses for the defendant, or if they found that a like change of the route at the Atlantic cut, as testified to by defendants' witnesses, made the contract less profitable to the contractor in the amount of \$10,000 or more, then the provision of paragraph 24 of the contract that "the Secretary of the Interior reserves the right to make such changes in the specifications of work or material at any time as may be deemed advisable, without notice to the surety or sureties on the bond given to secure compliance with the contract, by adding thereto or deducting therefrom at the unit prices of the contract," constituted no answer to this defense of the sureties, and they were released from liability to the United States on their bond.

What changes did the parties intend to permit by the provision of paragraph 24 cited by the court below without notice to the sureties? The words of the contract answer: Such changes in the specifications of the work and material as might be reasonably and justly paid for by corresponding additions to or reductions of the unit prices therefor. Did they ever intend to agree by this provision that such a radical change in the route, location, or plan of the canal might be made that, although the contractor should be paid the unit prices for the work done and material removed, the profit of his contract would be diminished, or his loss upon it increased, \$10,000 or \$20,000? If the route of the canal designated by the plan had been along ground easily removed between a high and rocky mountain and a deep lake, could the government have changed its route under this provision so as to have required the contractor to make a tunnel through the mountain or an excavation for the canal in the bed of the lake? The provision and the entire contract must receive a reasonable, sensible interpretation, and a construction which would permit an affirmative answer to these questions would be neither rational nor permissible. It never was, it never could have been, the intention of the parties to this contract, that changes in the route and plan of the work which were neither just nor reasonable, which would change the character of the work so that the unit prices became neither remunerative nor fair, and which entailed loss upon the contractor out of all reasonable proportion to the contract price of the undertaking and greatly increased the liability of the sureties, should be made without releasing them. *United States v. Freel*, 186 U. S. 309, 312, 316-319, 22 Sup. Ct. 875, 46 L. Ed. 1177; *United States Fidelity & Guaranty Co. v. United States*, 194 Fed. 611, 616, 617, 116 C. C. A. 187.

The court charged the jury that if they found that the government made a change without the knowledge or consent of the sureties in the location or route of the canal portrayed in Exhibit 2, either at the Atlantic cut or at the Vulcan cut, which made the contract less profitable to the contractor in the sum of \$10,000 or more, as testified by the witnesses for the defendant, the sureties were released from their liability

to the United States upon their bond. There are two reasons why this court may not adjudge this instruction erroneous. The first is that a change of plan or route of the canal which so modified the character of the work to be done that the work under the changed plan and route, when paid for at the unit prices, was \$10,000 less profitable to the contractor than the work required according to the original plan and route, a change which thus increased the risk of the liability of the sureties \$10,000, or almost one-half of the penalty of their bond, which was \$21,500, was neither intended to be nor was it authorized by the contract without their knowledge and consent, and that change necessarily released the sureties. In other words, the charge on its face was right.

The second reason is that this is a court for the correction of the errors of the court below. The legal presumption is that its rulings were just and right, and the burden is on the plaintiff in error to prove by the record presented to this court that any ruling it challenges was erroneous. *Sipes v. Seymour*, 76 Fed. 116, 118, 22 C. C. A. 90; *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.*, 114 Fed. 133, 143, 52 C. C. A. 95. The charge was that if the government, without the consent of the sureties changed the plan and route of the canal from that shown on Exhibit 2, either at Atlantic cut or at Vulcan cut, so as to make the contract less profitable to the contractor in the amount of \$10,000 or more, as testified by the defendants' witnesses, the sureties were released. The correctness of this charge is conditioned by the character of the change from the route portrayed by Exhibit 2 to which the defendants' witnesses testified. But the plaintiff in error has not brought to this court, by bill of exceptions or otherwise, either the plan shown by Exhibit 2 or the testimony of defendants' witnesses, and therefore it has failed to establish any error in the charge of the court, and has failed to present the criterion by which alone the correctness of this charge may be measured. The pleadings inform that the contract price of the work done was in the vicinity of \$200,000 or \$250,000, that the government claimed that the cost of it was \$59,009.06 more than the aggregate of the unit prices, and that the defendants claimed that the changes in the route and plan made by the government without their knowledge or consent greatly increased the cost of the work, and that, instead of the contract's entailing a loss of \$59,009.06, it would have brought a profit of \$10,000 to the contractor if it had been lawfully performed according to the plan and route specified before it was made. Here was a difference of over \$69,000. Whether the witnesses for the defendants testified that all this increased cost was caused by the changes in the route of the canal this court is not informed. What changes in the character of the work done, of the materials removed, and in the cost thereof, the defendants' witnesses testified resulted from these changes, we know not. It was the original plan and route, and the testimony of the defendants' witnesses in reference to the changes of them and their effect, that induced the court below to give this instruction, and this court may not, in ignorance of this plan and this testimony, adjudge this instruction erroneous.

The other specification of error in this case is that the court—

“erred in its charge wherein it instructed the jury that paragraph 8 of the specifications was not effective after the government took over the work to render the engineer's decision on the question of classification final.”

The contract was between the United States and the Widell-Finley Company, which was to do the work. The engineer was the Chief Engineer of the Reclamation Service, or one of his authorized assistants or inspectors, an officer of the United States. The parties to this contract agreed by paragraph 8 that upon all questions concerning the classification of the material in accordance with the specifications the decision of this engineer should be binding on both parties, and by paragraph 21 that upon the failure of the contractor to proceed with reasonable celerity to perform the agreement the Secretary of the Interior might “suspend the operation of the contract, * * * employ other parties to carry the contract to completion,” or complete it himself. The legal effect of paragraph 8 was to choose the engineer as an arbiter or judge of the classification of material to be handled in a work in which each of the parties was engaged, a classification of material the character of which each of the parties necessarily knew as it was handled, so that each could, with full knowledge and great facility, present its claims to the arbiter before he decided. When, however, the Secretary suspended the operation of the contract, the Widell-Finley Company was no longer doing the work, was no longer aware of the character of the material removed, and was no longer in a position to present its claims as to its character and classification before the engineer rendered his decision, so that all his subsequent decisions were necessarily made *ex parte*.

Moreover, the Secretary was given the power to employ other parties to carry the contract to completion or to complete it himself. This authority necessarily included the power to make a contract for its completion for different prices and on different terms from those named in the original contract. In other words, the government was not bound, in making the contract with other parties for the completion of the original undertaking, or in hiring men to finish it, by the provision of the old contract that the engineer should be the final arbiter of the classification of the material, or by any other like term of the original contract, and as the government was not bound, neither was the contractor, the other party to the agreement, bound by any of these stipulations. The engineer ceased to be an arbiter of the classification of the material between the parties to the original contract when the government suspended its operation, and there was no error in the charge of the court upon this subject.

For the reasons which have now been stated, I concur in the affirmation of the judgment below in this case.

Supplemental Opinion.

TRIEBER, District Judge. Since the filing of the opinion in this case the Supreme Court, in an opinion filed April 21, 1913, in *Slocum, Executrix, v. New York Life Insurance Co.*, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. —, which was tried in a Circuit Court of

the United States in the state of Pennsylvania, has held that a statute of a state or rule of practice prevailing in a state court authorizing a court to enter a judgment notwithstanding the verdict cannot be followed in the national courts, being in conflict with the seventh amendment to the Constitution of the United States. The Circuit Court of Appeals for the Third Circuit upon writ of error had decided that upon the undisputed evidence the trial court should have sustained a motion of the defendant to enter a judgment in its favor notwithstanding the verdict of the jury was for the plaintiff, and reversed the case, with directions to enter such judgment. The Supreme Court, by a divided court (four of the justices dissenting), held that the conclusion reached by the Court of Appeals that the trial court should have directed a verdict in favor of the defendant, as the evidence failed to show that the plaintiff had a cause of action, was right, but that it erred in directing the trial court to enter a judgment for the defendant notwithstanding the verdict of the jury, as that is not permissible in the courts of the United States, but that it should have reversed the case, with directions to grant a new trial, in order that the parties may have the case resubmitted to a jury. In view of that decision we are of the opinion that the judgment heretofore entered in this cause, reversing the judgment of the lower court, with directions to enter judgment for the defendants, notwithstanding the verdict of the jury was for the plaintiffs, should be modified, and the cause reversed, with directions to grant a new trial and proceed in conformity with the opinion.

HEMMER et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December Term, 1912.)

No. 3,850.

(Syllabus by the Court.)

1. UNITED STATES (§ 126*)—CLAIMS OF UNITED STATES—EQUITY.

In a suit in equity the claims of the United States appeal to the conscience of the chancellor with the same, but with no greater or less, force than those of a private individual under like circumstances, and they are determinable by the same rules and principles.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 115; Dec. Dig. § 126.*]

2. STATUTES (§ 162*)—CONSTRUCTION—SPECIAL AND GENERAL.

Privileges granted to a certain class by special legislation are not affected by an inconsistent general law unless a contrary intent of the legislative body is clearly expressed, or indubitably inferable from the acts; but the special act and the general law stand together, the one as the law of the specific class and the other as the general rule.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 235-237; Dec. Dig. § 162.*]

3. PUBLIC LANDS (§ 106*)—EQUITABLE TITLES—JURISDICTION OF LAND DEPARTMENT.

Neither the Land Department of the United States nor its officers has any jurisdiction by subsequent rulings and decisions to divest the equitable title to lands which becomes vested in pre-emptors, homesteaders,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and other like claimants by their final proof and their payment therefor in accordance with the acts of Congress.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. § 106.*]

4. PUBLIC LANDS (§ 106*)—RULINGS OF LAND DEPARTMENT—EFFECT.

The construction of statutes intrusted to them to enforce by officers of the Land Department, or of any other executive department, is persuasive and should not be overruled without good reason, but their opinions are not conclusive upon the courts.

It is the function and duty of the officers of the judicial department of a government, which they may not lawfully renounce, to exercise their own independent judgments, guided only by the established principles of law and the recognized canons of interpretation, in the construction of its statutes and to adjudge their just and true meaning, even though the officers of an executive department have construed them otherwise.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. § 106.*]

Decisions of Land Department, their conclusiveness and effect, see notes to *Hartman v. Warren*, 22 C. C. A. 38; *Carson City Gold & S. M. Co. v. North Star Min. Co.*, 28 C. C. A. 344; *Uinta Tunnel M. & T. Co. v. Creede & C. C. M. & M. Co.*, 57 C. C. A. 207.]

5. INDIANS (§ 15*)—HOMESTEADS—RESTRICTIONS ON ALIENATION.

Act March 3, 1875, c. 131, § 15, 18 Stat. 420 (U. S. Comp. St. 1901, p. 1419), granted to nontribal Indians the right to acquire homesteads with the restriction of 5 years on alienation by a compliance with the homestead laws. Act July 4, 1884, c. 180, 23 Stat. 96 (U. S. Comp. St. 1901, p. 1420), granted to Indians, whether tribal or nontribal, the right to acquire homesteads with the restriction of 25 years on alienation without paying the fees or commissions of the land officers, by a compliance with the other requirements of the homestead law.

Held, the later act did not repeal, amend, or modify any of the provisions of the earlier act. It did not extend from 5 years to 25 years the restriction on alienation of the lands acquired by an Indian homesteader under the act of 1875.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37–44; Dec. Dig. § 15.*]

(Additional Syllabus by Editorial Staff.)

6. ESTOPPEL (§ 56*)—RULES.

In equity no one may successfully deny to the damage of another the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 142; Dec. Dig. § 56.*]

7. EQUITY (§ 1*)—JURISDICTION—PRINCIPALS.

A court of equity can act only on the conscience of a party, and hence, if a party has done nothing that taints his conscience, no demand can attach upon it so as to give any jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1, 3, 6; Dec. Dig. § 1.*]

8. STATUTES (§ 225*)—CONSTRUCTION.

All statutes in *pari materia* are to be read and construed together as if they formed part of the same statute and were enacted at the same time.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.*]

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suit in equity by the United States against Louis Hemmer and others. From an adverse decree (195 Fed. 790), defendants appeal. Reversed and remanded, with directions.

George Rice and Frederick A. Warren, both of Flandreau, S. D. (Warren & Shoemaker and Rice & Benson, all of Flandreau, S. D., on the brief), for appellants.

Edward E. Wagner, of Sioux Falls, S. D., for the United States.

Before SANBORN, Circuit Judge, and WILLIAM H. MUNGER and TRIEBER, District Judges.

SANBORN, Circuit Judge. The Act of Congress of March 3, 1875, 18 Stat. 402, 420, c. 131, § 15 (U. S. Comp. St. 1901, p. 1419), provided that any Indian who was the head of a family, or who had arrived at the age of 21 years, and had abandoned, or should thereafter abandon, his tribal relations, should be entitled to the benefits of the homestead law (Revised Statutes, §§ 2289, 2290, 2291 [U. S. Comp. St. 1901, pp. 1388-1390]), but that the title to the lands he should acquire should be inalienable for five years from the date of his patent therefor. Henry Taylor was such an Indian of the Sioux tribe. On October 7, 1878, he entered under this act the 160 acres of land in South Dakota, which is the subject of this suit, as his homestead. On June 10, 1879, he entered upon the actual occupation thereof and resided upon, occupied, and cultivated it with his family from that time until he sold it to J. E. Peart on August 8, 1908. The homestead law provided, section 2291, that any one who for five years after his entry resided on and cultivated his homestead and complied with the terms of the homestead law should be entitled to a patent therefor upon proof of compliance at any time within two years after the expiration of the five years. On June 10, 1884, Taylor had so complied with the terms of this law, and he was entitled to a patent to his land under the act of 1875 upon proof of his compliance made at any time before June 10, 1886. He made his final proof, paid for the land, and obtained his final receiver's receipt on December 11, 1884.

On July 4, 1884, after Taylor had completed his five years of residence and cultivation of his homestead and thus had completely earned it, Congress passed an act which provided that any Indians who then were or should thereafter be located on the public lands might avail themselves of the homestead laws, that \$1,000 was appropriated to aid them in selecting and proving these homesteads, that no fees or commissions should be charged for their entries and proofs, and that their patents should declare that the United States would hold their lands for 25 years in trust for them and at the end of that time would convey the title thereof to them respectively. On June 6, 1890, the United States issued to Taylor a patent to his homestead which, by mistake, declared that his land was inalienable for 20 years as provided by an act of Congress approved January 18, 1891, relating to the Winnebago Indians, which had no relevancy to his case or his title. On June 10, 1909, the government issued another patent to Taylor for this land

which declared that it was issued in lieu of the previous patent which had been canceled, that in accordance with the provisions of the act of July 4, 1884, the government would hold his land in trust for him for 25 years and would convey it to him at the end of that time. On August 8, 1908, Taylor sold this land and delivered the possession of it, and that possession and whatever title Taylor could convey have passed by sufficient deeds to the defendant below Louis Hemmer. On July 28, 1909, the United States brought this suit in equity against the immediate and remote grantees of Taylor for the purpose of setting aside all the conveyances under which they held, against the treasurer and auditor of Moody county, wherein the land was situated, against a claimant under a tax sale, and against a judgment creditor of Taylor, for the purpose of avoiding their liens upon the land, upon the ground that this homestead was inalienable, exempt from taxation and from judgment liens for 25 years after the date of the patent issued under the act of 1884. The court below rendered a decree to that effect, which is challenged by this appeal.

If when the conveyances here in question were made and the liens were placed Taylor's homestead was subject to the restrictions upon alienation and taxation prescribed by the act of July 4, 1884, the decree below was right (*Heckman v. United States*, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820), and the question whether or not it was so subject must be determined by the acts of Congress and not by the terms of the patents issued to Taylor (*United States v. Saunders* [C. C.] 96 Fed. 268; *Frazee v. Spokane County*, 29 Wash. 278, 69 Pac. 779). The patents and their terms are therefore here dismissed, and we turn to the sole question in the case: Did the act of July 4, 1884, which was not passed until after Taylor had completely earned the title to his homestead subject to the restriction of only 5 years upon its alienation imposed by the act of 1875, so amend that act as to extend that restriction to 25 years?

The United States offered this land to Taylor by the act of 1875, free from all restrictions upon alienation after five years from the date of his patent, on the sole condition that he would reside upon and cultivate it and endure the toils and privations of frontier life for five years. That offer he accepted in the only way in which it could be accepted, by five years of actual residence, occupation, and cultivation of the land. He proved his compliance with the offer to the satisfaction of the government, paid the prescribed fees for his final entry, and obtained his final receipt therefor under the act of 1875, and the purchasers from him have bought his land and paid for it in reliance upon this act of Congress and these facts. These purchasers, the grantees under Taylor, stand in his shoes. They have every legal right and every equitable right and title which he held.

[1] This is a suit in equity. In such a suit the claims of the government appeal to the conscience of the chancellor with no greater or less force than those of a private individual under similar circumstances. *United States v. Stinson*, 197 U. S. 200, 201, 202, 205, 25 Sup. Ct. 426, 49 L. Ed. 724; *United States v. Detroit Timber & Lumber Co.*, 131 Fed. 668, 677, 67 C. C. A. 1, 10; *State of Iowa v. Carr*, 191 Fed. 257, 267, 112 C. C. A. 477, 487.

[6] In equity no one may successfully deny to the damage of another the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation. By its offer by the act of 1875 of the title to and the full power of disposition of this land at the end of ten years in consideration of its occupation and cultivation for five years, the United States induced Taylor to earn it and the grantees under him to buy and pay for it, and it ought to be estopped now from repudiating or modifying its offer and representations to their injury. *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 293, 22 C. C. A. 171, 193, 34 L. R. A. 518; *Paxson v. Brown*, 61 Fed. 874, 881, 10 C. C. A. 135, 142; *Union Pacific Railway Co. v. Chicago, R. I. & Pac. Ry. Co.*, 51 Fed. 309, 326, 327, 2 C. C. A. 174, 191, 192.

[7] "A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction." *Boone v. Chiles*, 10 Pet. 177, 209 (9 L. Ed. 388); *United States v. Detroit Timber & Lumber Co.*, 131 Fed. 668, 677, 678, 67 C. C. A. 1, 10, 11; *United States v. Winona & St. Peter R. R. Co.*, 67 Fed. 948; 961, 968, 15 C. C. A. 96, 109, 116.

It is difficult to find anything that the defendants have done in this case to taint their consciences. If A. had offered to convey to B. a tract of 160 acres of land with full power of disposition at the end of ten years in consideration that B. would settle upon, occupy, and cultivate it for five years, and B. had done so and the ten years expired, who would be so bold as to claim that there would be any jurisdiction in equity on a bill by A. to enjoin B. from selling or conveying the land during 20 years more?

Even when equities are equal the defendant prevails. It is only when the case of the complainant appeals to the conscience of the chancellor with the greater force that he will interfere to grant relief. *Town of St. Johnsbury v. Morrill*, 55 Vt. 165, 169; 2 Pomeroy's Equity Juris. § 739. These principles of equity are very persuasive that the question here at issue ought not to be answered in the affirmative unless inexorable rules of law demand such an answer. What then are the arguments in support of an affirmative answer to this question? Counsel cite *Frazee v. Spokane County*, 29 Wash. 278, 69 Pac. 779, 782, and *Frazee v. Piper*, 51 Wash. 278, 98 Pac. 760; but they fail to sustain it.

In the former case nontribal Indians were trying to defeat tax titles. They had entered and taken possession of their land in 1883, but they had cultivated and occupied it until May 31, 1890, before they made their final proof. The court held that inasmuch as they had resided upon and cultivated their homestead more than five years after the passage of the act of 1884 before they made their final proof they had the option to prove up and take their patents under the act of 1884 with a restriction of 25 years on alienation and taxation, and that as they had done so their lands were not taxable within that period. In the latter case the Indian homesteader challenged a contract of sale which he had made, on the ground that his land had been entered and patented under the act of 1884 and was subject to the 25 years' restriction on alienation. He had first entered

and occupied it in 1883 and had resided upon and cultivated it from that time until May 31, 1890, when he made his final proof under the act of 1884, and he subsequently took his title under that act. The court held that inasmuch as he had resided upon and cultivated his land for five years after the passage of the act of 1884 before he made his final proof, and as he had taken his title under that act, his land was subject to the restriction for 25 years specified therein, but that "had Gregorie Frazee's right to the homestead been perfected under the act of 1875, and had he been entitled to make final proof under that act before the act of 1884 was passed" (as Taylor was), "a different condition would be presented, and the five years' restriction on his right of alienation for which the act of 1875 provided, would not have been extended by the act of 1884."

In *United States v. Saunders* (C. C.) 96 Fed. 268, 270, cited by the court below, a nontribal Indian entered in 1878, occupied and cultivated his homestead for the full five years under the act of 1875, and made his final proof before the act of 1884 was passed, and the court held that the act of 1884 imposed no further restriction upon his power of alienation. There is nothing in these cases favorable to an affirmative answer to the question at issue, and the decision in *United States v. Saunders* is a clear adjudication that it should be answered in the negative, for when Taylor had completely earned his land and had secured his final receipt for it under the act of 1875, his equitable title to it was perfected and could not be subsequently modified by any action of the officers of the Land Department.

The case of *Tiger v. Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738, is drawn to our attention; but the decision in that case is inapplicable here. Tiger was an adult heir of an Indian allottee, the alienation of whose land was restrained for five years by section 16 of the Act of June 30, 1902, 32 Stat. 500, c. 1323. On April 26, 1906 (34 Stat. 137, c. 1876), the Congress passed an act which extended the restriction upon alienation of the lands of adult heirs of allottees to 25 years from the date of the approval of that act. That act expressly provided that all acts and parts of acts inconsistent with it were repealed. 221 U. S. 303, 31 Sup. Ct. 578, 55 L. Ed. 738. The Supreme court held that a conveyance by Tiger after the 5 years and within the 25 years was void. But the act of 1884, which conditions the decision of this case, contains no words or terms which either expressly or by reasonable implication extend the restriction prescribed by the act of 1875, and it contains no provision repealing that act, or any acts or parts of acts inconsistent with the act of 1884. This case must therefore be determined by other rules and principles than those applied by the decision in *Tiger's Case*.

Counsel present an argument upon which much reliance seems to be placed, which may be stated in this way: (1) The act of 1884 provides: "That such Indians as may now be located on the public lands, or as may * * * hereafter so locate, may avail themselves" of the homestead laws and acquire lands subject to a restriction upon alienation for 25 years. (2) The nontribal Indians who had entered homesteads under the act of 1875 were the only Indians located on

the public lands when the act of 1884 was passed. (3) Therefore the act of 1884 referred to the homesteaders under the act of 1875 and extended the restriction upon the alienation of their lands from 5 years to 25 years. It may be conceded that if the premises of this syllogism were sound, and if the homesteaders under the act of 1875 had availed themselves of the act of 1884, the restrictions upon their homesteads would have been extended to 25 years. But Taylor never availed himself of the provisions of the act of 1884. He made his final proof, paid for his land, and took his final receipt under the act of 1875. Moreover, the minor premise of the syllogism is without support in the record. There is neither pleading, nor admission, nor proof, that the homesteaders under the act of 1875 were on July 4, 1884, the only Indians located on the public lands. If that were the fact, this court has no judicial knowledge of it and no evidence on which to rely to sustain a finding of it, and with the fall of this premise the conclusion which depends upon it goes down.

The decision in the case of *Shiver v. United States*, 159 U. S. 491, 498, 499, 16 Sup. Ct. 54, 40 L. Ed. 231, to the effect that lands which have ceased to be "public lands" by their segregation therefrom by pre-emption, homestead, mining, and other like claims (*Newhall v. Sanger*, 92 U. S. 761, 763, 23 L. Ed. 769; *Bardon v. Northern Pacific R. R. Co.*, 145 U. S. 535, 539, 12 Sup. Ct. 856, 36 L. Ed. 806; *Hastings & Dakota R. R. Co. v. Whitney*, 132 U. S. 357, 364, 10 Sup. Ct. 112, 33 L. Ed. 363; *James v. Germania Iron Co.*, 107 Fed. 597, 603, 46 C. C. A. 476, 482; *Hartman v. Warren*, 76 Fed. 157, 160, 22 C. C. A. 30, 33; *Neff v. United States*, 165 Fed. 273, 281, 91 C. C. A. 241, 249), but to which the claimants have not perfected their title, are still so far lands of the United States that the government may protect them from waste by the cutting of timber or otherwise, as a remainderman may protect premises from waste by the occupant, is cited, and much is said of the power of the United States to withdraw such lands from disposition and to impose restrictions upon their alienation at any time before it parts with the title. But the extent of that power is not material to a decision of this case if no attempt was made to exercise it. Whatever its extent, it is vested in the Congress and not in the attorneys for the United States, the officers of the Land Department, or the courts. Their power and duty is limited in cases of this character to an administration and enforcement of the acts of Congress, and until it clearly appears that the Congress has attempted to impose a restriction by the act of 1884 upon homesteads acquired under the act of 1875, a consideration and discussion of its power to do so is deferred.

Finally, counsel invoke the rules that the construction of statutes by officers of executive departments charged with the duty of administering them should not be overruled without cogent reasons (*United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588), and that a settled construction of such statutes by the officers of one of the great executive departments of the government should not be overruled unless it is clearly erroneous. But the most settled construction by the Land Department of the law applicable to this case is conceded by all parties to have been wrong. That was the construction evidenced

by the patent issued to Taylor in 1890 to the effect that his land was subject to a restriction on alienation of 20 years under the act of 1881 (Act Jan. 18, 1881, c. 23, 21 Stat. 315), which related to the Winnemagoes and had no relevancy to the rights of Taylor, who was a Sioux Indian. This construction remained settled until 1907, when the department ruled that the decision in *United States v. Saunders* (C. C.) 96 Fed. 268, 270, to the effect that the act of 1884 did not affect the restrictions upon the alienation of the lands of homesteaders under the act of 1875, was right and it was after and doubtless in reliance upon these decisions that the defendant Fletcher bought this land of Taylor in August, 1908. It was not until June, 1909, that the Land Department evidenced by the issue of the patent to Taylor of that date that it construed the act of 1884 to extend the restriction upon the alienation of his land from 5 years to 25 years. This last construction, however, is not as well settled as that of 1900, for it is not 5 years since it was adopted, and the construction of 1900 remained settled for about 7 years. There is not, therefore, any settled construction of these acts of Congress by the officers of the Land Department to prevent their true interpretation.

[3] Moreover, the Land Department and its officers are without jurisdiction by subsequent erroneous rulings and decisions to divest the equitable title to lands which becomes vested in lawful claimants under the pre-emption or homestead laws by their final proof and payment therefor in accordance with the acts of Congress. *Cornelius v. Kessel*, 128 U. S. 456, 461, 9 Sup. Ct. 122, 32 L. Ed. 482; *Love v. Flahive*, 205 U. S. 195, 199, 27 Sup. Ct. 486, 51 L. Ed. 768; *James v. Germania Iron Co.*, 107 Fed. 597, 602, 46 C. C. A. 476, 481; *Howe v. Parker*, 190 Fed. 738, 739, 111 C. C. A. 466, 467.

[4] A decision of a question of law by the officers of the Land Department, or by any officer of any other executive department, is never conclusive upon the courts. *Wisconsin Central R. R. Co. v. Forsythe*, 159 U. S. 46, 61, 15 Sup. Ct. 1020, 40 L. Ed. 71; *United States v. Murphy* (C. C.) 32 Fed. 376, 380, 382; *Northern Pacific Ry. Co. v. Sanders* (C. C.) 47 Fed. 604, 609-612; *United States v. Grand Rapids & I. R. Co.* (C. C.) 154 Fed. 131, 136. And it is the function and duty of the officers of the judicial department of a government, which they may not lawfully renounce, to exercise their own independent judgments, guided only by the established legal principles and the recognized canons of interpretation, in the construction of its statutes and to adjudge their just and true interpretation, even though the officers of an executive department have construed them otherwise. *Deming v. McClaghry*, 113 Fed. 639, 640, 641, 51 C. C. A. 349, 350, 351; *Hartman v. Warren*, 76 Fed. 157, 162, 22 C. C. A. 30, 36; *Webster v. Luther*, 163 U. S. 331, 342, 16 Sup. Ct. 963, 41 L. Ed. 179; *United States v. Tanner*, 147 U. S. 661, 663, 13 Sup. Ct. 436, 37 L. Ed. 321; *Merritt v. Cameron*, 137 U. S. 542, 11 Sup. Ct. 174, 34 L. Ed. 772; *United States v. Graham*, 110 U. S. 219, 3 Sup. Ct. 582, 28 L. Ed. 126; *Swift, C. & B. Mfg. Co. v. United States*, 105 U. S. 691, 26 L. Ed. 1108.

[5] The arguments in support of the contention that the act of 1884 so amended the act of 1875 as to extend the restriction upon the aliena-

tion of homesteads earned under the latter act have now been reviewed, and they seem to present no insuperable legal obstacle to the opposite conclusion. Let us now take the two acts of Congress, apply to them the indubitable rules for the interpretation of statutes upon the same or similar subjects, and ascertain their true legal effect.

The act of 1875 was a special law on the subject of Indian homesteads, limited to a small and specific class of Indians, those who had abandoned or should abandon their tribal relations, and it granted the right to homesteads to members of this class only under the restriction of 5 years upon their alienation. The act of 1884 was a general law on this subject of Indian homesteads, and it granted to Indians, whether they had abandoned their tribal relations or not, rights to homesteads subject to restrictions for 25 years on their alienation. The first and most impressive characteristic of the later act, when it is examined to ascertain its effect upon the earlier one, is that it contains no terms or words whatever that indicate any intent on the part of the legislators to amend, modify, repeal, or affect in any way the act of 1875, the restriction upon alienation there imposed, or any of its other provisions. The act of 1884 contains no reference to the act of 1875, or to any of its provisions, and it does not even contain a clause repealing acts or parts of acts inconsistent with its own provisions.

[2] Privileges granted to a certain class by special act are not affected by inconsistent general legislation, unless a contrary intent of the legislative body is clearly expressed or indubitably inferable therefrom. But the special act and the general law stand together, the one as the law of the particular class and the other as the general rule. *Frost v. Wenie*, 157 U. S. 46, 15 Sup. Ct. 532, 39 L. Ed. 614; *South Carolina ex rel. Wagner v. Stoll*, 17 Wall. 425, 436, 21 L. Ed. 650; *Rosencrans v. United States*, 165 U. S. 257, 262, 17 Sup. Ct. 302, 41 L. Ed. 708; *Townsend v. Little*, 109 U. S. 504, 512, 3 Sup. Ct. 357, 27 L. Ed. 1012; *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 499, 26 Sup. Ct. 133, 50 L. Ed. 281; *Ex parte United States*, 226 U. S. 420, 424, 33 Sup. Ct. 170, 57 L. Ed. —; *Gowen v. Harley*, 56 Fed. 973, 976, 978, 979, 6 C. C. A. 190, 193, 195, 196; *Christie-Street Commission Co. v. United States*, 136 Fed. 326, 332, 333, 69 C. C. A. 464, 470, 471; *Board of Com'rs v. Ætna Life Ins. Co.*, 90 Fed. 222, 227, 32 C. C. A. 585, 590; *Bear v. Chicago, Great Western Ry. Co.*, 141 Fed. 25, 27, 72 C. C. A. 513.

In *Frost v. Wenie*, 157 U. S. 46, 57, 58, 15 Sup. Ct. 532, 536 (39 L. Ed. 614), the act of May 28, 1880, provided that all of the Osage Indian lands unsold and unappropriated, with immaterial exceptions, should be subject to disposal to actual settlers "having the qualifications of pre-emptors on the public lands" only. These Osage lands were within that portion of the Ft. Dodge Military Reservation lying north of the Atchison, Topeka & Santa Fé Railroad. The act of December 15, 1880, provided that all these lands should be offered to actual settlers under the homestead laws only, and the question was whether by the later act the rights of parties specified in the former act were so modified and restricted that they could take lands under

the homestead laws only. The Supreme Court held that they were not affected by the later act and said:

"It is to be observed that although the words of the act of December 15, 1880, are broad enough, if literally interpreted, to embrace *all* the lands within the abandoned Ft. Dodge military reservation north of the Atchison Railroad, there are no words in it of express repeal of any former statute. It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the Legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore to displace the prior statute. *McCool v. Smith*, 1 Black, 459, 468 [17 L. Ed. 218]; *United States v. Tynen*, 11 Wall. 88, 93 [20 L. Ed. 153]; *Red Rock v. Henry*, 106 U. S. 596, 601 [1 Sup. Ct. 434, 27 L. Ed. 251]; *Henderson's Tobacco*, 11 Wall. 652 [20 L. Ed. 235]; *King v. Cornell*, 106 U. S. 395, 396 [1 Sup. Ct. 312, 27 L. Ed. 60]."

This opinion seems directly to rule the case in hand. Again, even when two acts upon the same subject are repugnant in some of their provisions, the later act modifies or repeals the earlier act so far, and only so far, as its provisions are repugnant to the provisions of the earlier one. In *re Henderson's Tobacco*, 11 Wall. 652, 657, 20 L. Ed. 235; *Board of Com'rs v. Ætna Life Ins. Co.*, 90 Fed. 222, 32 C. C. A. 585. No repugnancy is perceived between the imposition of a restriction for 5 years on the homesteads of nontribal Indians by the act of 1875 and the imposition of a restriction on the alienation of homesteads of all Indians who avail themselves of the privilege of the act of 1884 for 25 years, or between any of the other provisions of these two acts.

Taylor had occupied and cultivated his homestead for five years and had thereby accepted the offer of the government and closed its contract with him to grant him the land with a restriction upon its alienation for only five years if he made his final proof within two years before the act of 1884 was passed. A construction which would apply the restriction of that act to the previous offer to and contract with Taylor and change them into an offer and contract for the land subject to a restriction on alienation for 25 years necessarily gives the act of 1884 a retrospective and mandatory effect, while its terms are prospective and permissive only. It provides that any Indians may in the future avail themselves of the homestead laws subject to restrictions on the alienation of their lands for 25 years, not that nontribal Indians who availed themselves of the homestead laws under the act of 1875, or any other Indians, must avail themselves of the act of 1884, or subject themselves to its restrictions. A construction which gives a statute a retrospective effect should never be adopted unless it appears clearly and unequivocally that the legislative body enacted it with the intention to produce that effect. *United States Fidelity & Guar. Co. v. United States*, 209 U. S. 306, 314, 316, 28 Sup. Ct. 537, 52 L. Ed. 804; *Endlich*, *Interpretation of Stat.*, § 271; *Twenty Per Cent. Cases*, 20 Wall. 179, 187, 22 L. Ed. 339; *National Bank of Comm. v. Riethmann*, 79 Fed. 582, 25 C. C. A. 101;

Jaedicke v. United States, 85 Fed. 372, 375, 29 C. C. A. 199; McClellan v. Pyeatt, 66 Fed. 843, 846, 14 C. C. A. 140, 143.

[8] Finally:

"All statutes in pari materia are to be read and construed together as if they formed part of the same statute and were enacted at the same time." Potter, Dwar. St. 145; Board of Com'rs v. Aetna Life Ins. Co., 90 Fed. 222, 227, 32 C. C. A. 585, 590.

If the act of 1875 and the act of 1884 be read as one act passed at the same time, they provide that there is granted to nontribal Indians the right to acquire homesteads upon payment of the officers' fees subject to a restriction on alienation for 5 years, and that there is granted to all Indians the right to acquire homesteads subject to a restriction on alienation for 25 years without the payment of any officers' fees. Every provision of each act has its complete effect, every promise of the government is fulfilled, every right of each homesteader is preserved and protected, and every rule of construction is obeyed. If the act of 1884 be read as an amendment of the act of 1875 and given the effect of an amendment or modification thereof, and of an imposition upon the lands of homesteaders under that act of a restriction upon their alienation for 20 years more than the 5 years fixed by the act of 1875, the offer and promise of the United States contained in that act is broken, the rights of the homesteaders under it are violated, the provision of the act of 1875 which granted to nontribal Indians the right to homesteads with a restriction on alienation of only 5 years, is annulled and the indisputable canons of interpretation which have been cited are disregarded. Our conclusion is that the Act of July 4, 1884, 23 Stat. 96, does not repeal or modify any of the provisions of the Act of March 3, 1875, 18 Stat. 402, 420; that all the provisions of the two acts stand together and remain in force; that the act of 1875 grants to nontribal Indians the right to acquire homesteads with a restriction of only 5 years on their alienation; that the act of 1884 grants to all Indians the right to homesteads with a restriction of 25 years on alienation; and that the latter act did not have the effect to extend the restriction on the alienation of the land of Taylor, a homesteader, under the act of 1875 from 5 years to 25 years, or to affect that restriction in any way. The decree below must accordingly be reversed, and the case must be remanded to the court below, with directions to dismiss the bill.

It is so ordered.

SYKES v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 25, 1913.)

No. 3,860.

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 780*)—EVIDENCE—TESTIMONY OF ACCOMPLICES—CORROBORATION REQUISITE.

"It is unodubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to them."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859–1863; Dec. Dig. § 780.*]

2. CRIMINAL LAW (§ 510*)—ACCOMPLICES—CORROBORATION—EVIDENCE OF IDENTITY AND CONNECTION REQUISITE.

Other evidence than that of an accomplice or perpetrator, identifying and connecting the accused with the crime as one of the perpetrators or instigators thereof, is essential to constitute such a corroboration of the testimony of the accomplice or criminal as renders it safe or prudent to convict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124–1126; Dec. Dig. § 510.*]

3. CRIMINAL LAW (§ 508*)—EVIDENCE OF CRIMINAL INSUFFICIENT.

The uncorroborated, contradictory, contradicted testimony of a confessed criminal, induced by hope of immunity, that the accused, who was not present when the crime was committed, was one of its perpetrators or instigators, does not constitute substantial evidence of that fact, which will sustain a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1099–1123; Dec. Dig. § 508.*]

4. CRIMINAL LAW (§ 1036*)—APPEAL AND ERROR—REVIEW WITHOUT OBJECTIONS OR EXCEPTIONS WHEN ALLOWED.

In criminal cases, in which the life or the personal liberty of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may notice such a grave error as the absence of substantial evidence to sustain the conviction, although the question it presents was not properly raised in the trial court by request, objection, exception, or assignment of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631–1640, 2639–2641; Dec. Dig. § 1036.*]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Charles Sykes was convicted of burglary, and brings error. Reversed and remanded.

Edward Higbee, of Lancaster, Mo. (Higbee & Mills, of Lancaster, Mo., on the brief), for plaintiff in error.

Homer Hall, Asst. U. S. Atty., of St. Louis, Mo. (Charles A. Houts, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

Before SANBORN, Circuit Judge, and WILLIAM H. MUNGER and TRIEBER, District Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SANBORN, Circuit Judge. The writ in this case challenges the trial and conviction of Charles Sykes for breaking into a post office building at Kirksville, in the state of Missouri, on August 23, 1911, and feloniously taking therefrom four mail bags. The question which the record in this case has persuaded us to consider is the existence of any substantial evidence to sustain this conviction. The evidence in the record discloses these facts:

Sykes was a resident and citizen of Knox county, in the state of Missouri and had lived in the vicinity of Hurdland, a few miles from Kirksville, for about three years. He was a dealer in horses, and a man of good reputation for honor and integrity. He was indicted and tried with Bert L. Burnhardt, H. B. Sims, and Mrs. Minnie Callahan. Each of these three defendants testified that he or she had never made the acquaintance of Sykes until after the robbery, and Sykes was not in Kirksville when the robbery was committed. Burnhardt was a young man who had been in Kirksville about three weeks. He was, and had been for some time, an intimate acquaintance of Mrs. Callahan, and she came at his request to the hotel in Kirksville, where he met her the day before the robbery. He was also acquainted with Sims, and neither of the three seems to have had any abiding place. The post office was robbed about 11 o'clock at night on August 23, 1911. Sykes, Burnhardt, and Sims testified that Sykes had nothing to do with it, and his conviction is founded upon the testimony of Mrs. Callahan alone, who pleaded guilty to the charges and was sentenced on May 30, 1912, to confinement in jail for three months, to date from February 28, 1912, and to pay a fine of \$100, so that she was in effect discharged after the verdict, while Sykes was sentenced to pay a fine of \$100 and to be confined in the penitentiary five years, and each of the other defendants to pay a fine of \$100 and to be confined in the penitentiary four years. Three of the stolen mail bags were found near the post office a few hours after the robbery, and, on September 4, 1911, a workman mowing weeds on the side of the railroad embankment about 200 yards from the railroad station in Kirksville, found the fourth bag and many of its contents, and his find was immediately published. Two days after the robbery, on August 25, 1911, Mrs. Callahan made an affidavit before a post office inspector that she, Burnhardt, and Sims took supper together at the hotel in Kirksville on August 23, 1911, that she and Burnhardt spent from 8 p. m. until 10 p. m. that night together talking with a Mrs. Shelton, a keeper of a boarding house on McPherson street, in Kirksville, concerning renting some rooms; that after this conversation they walked around in the vicinity of the post office, and saw in the distance Sims and one Tholman. She said nothing in this affidavit about Sykes. The next day Burnhardt made an affidavit to the same effect.

In October, 1911, Mrs. Callahan was arrested, and was thereafter confined in jail about 35 days on the charge that she had forged the name of Sykes to a check for \$100, a charge which was still pending against her at the time of the trial below. At the expiration of the 35 days she was released from the jail on bail, and two witnesses testified that upon her release she declared she would have revenge on Sykes, and would put him in jail with the others; but she denied

that she made this statement. On November 8, 1911, she made a second affidavit before a post office inspector, in which she testified that she did not see Burnhardt any more the night of the robbery after she returned with him from Mrs. Shelton's and entered the hotel; that the first she knew of the robbery was learned by overhearing a conversation between Burnhardt and Sims concerning it at the hotel the next morning after its commission; that she went to Burnhardt's room that morning after hearing this talk and found the mail bag under the mattress in his room; that between August 22 and October 16, 1911, she was out and took beer with Sykes a number of times; that on September 2, 1911, on his invitation, she took a ride in a buggy with him in the afternoon; that he had a mail bag in a gunny sack in this buggy; that he took it out of the buggy, took the gunny sack off of it, carried the mail bag along the railroad embankment several yards, and hid it in the weeds on the side of the railroad; that they returned to Kirksville from their ride about six in the afternoon; and that afterwards Sykes gave her a check for \$100 to go away. She rested a month, and then on December 7, 1911, made a third affidavit before a post office inspector in which she testified that Burnhardt asked her to go to Kirksville, and she arrived at the hotel there at 4 in the afternoon of August 22, 1911, that Burnhardt came to her in the hotel an hour later, that the plan for the robbery was made that night, that Burnhardt said that he and Sims were to rob the post office for a third party for \$50 each, that their plan was that she was to watch in the alley near the post office while they committed the robbery, that on the next night they executed this plan, that after taking the sacks they cut open three of them and put their contents into the fourth, that Sims brought the fourth bag into her room in the hotel that night through the window, and that he and Burnhardt took it thence to the latter's room.

At the trial she repeated her story of the hiding of the mail bag by Sykes, of the robbery, and of the statement by Burnhardt that he and Sims were hired to commit it, which she had told in her third affidavit, and testified that at Macon, on the 10th of September, 1911, Sykes paid Burnhardt \$25 and told her that he gave Burnhardt and Sims \$50 apiece for going into the post office. She also testified that she reported the robbery to the officials after she found out that she was charged with forging the check by Sykes. Burnhardt, Sims, and Sykes testified that it was not true that Sykes hired or paid Burnhardt or Sims to commit the robbery, that Mrs. Callahan's story about their statements in this regard and about the payment of the money by Sykes to Burnhardt were false, and that Sykes had nothing to do with the crime. Sykes and two other witnesses testified that he was not in Kirksville, but was at Brookfield, and that he there purchased and gave two checks, which were in evidence at the trial, for horses on September 2, 1911, the day when Mrs. Callahan testified that he hid the mail bag in her presence, and Sykes testified that there was no truth in her story about his carrying it and hiding it.

The mail bag had been found on the side of the railroad embankment on September 4, 1911, and that fact was known to her more

than three months before she first testified, in her third affidavit on December 7, 1911, that Sykes put it there. In the same affidavit she testified that he took a gunny sack, which she subsequently testified Burnhardt had procured to cover the mail bag, from the mail bag, and threw it down by the side of the public road at the time when he hid the mail bag. Witnesses testified that after she made this affidavit they went to the place where she testified Sykes threw the gunny sack and found one there, and this testimony is claimed to be corroborative of her evidence. But it is not so, because it does not identify or connect Sykes with the mail bag, or the gunny sack, or the crime as the perpetrator thereof, and that is the only part of her bag-hiding story that was material to the issue tried. She may have placed the gunny sack there herself, some stranger may have done so, and she may have seen it there on some of her rides. Burnhardt, who she says procured the gunny sack, may have hidden the mail bag and thrown the gunny sack where it was found, and he may have told her that he did so, or she may have seen him do it. The fact that the mail bag and the gunny sack were found where she said Sykes placed them, while it tended to show that this confessed criminal knew where the gunny sack was placed, had no more tendency to prove that Sykes put them there than it had to prove that any member of the jury, or any other innocent man did so. Wharton in the ninth addition of his work on Criminal Evidence, in section 442, says:

"The corroboration requisite to validate the testimony of an alleged accomplice should be to the person of the accused. Any other corroboration would be delusive, since, if corroboration in matters not connecting the accused with the offense were enough, a party, who on the case against him would have no hope of an escape, could, by his mere oath, transfer to another the conviction hanging over himself."

A demonstration by reason and authority that this is the just and rational rule may be found in *State v. Chyo Chiagk*, 92 Mo. 415, 417, 4 S. W. 704. To the same effect are *United States v. Ybanez* (C. C.) 53 Fed. 536, 540; *Commonwealth v. Hayes*, 140 Mass. 366, 369;¹ *Commonwealth v. Holmes*, 127 Mass. 424, 34 Am. Rep. 391; *McNeally v. State*, 5 Wyo. 59, 68, 36 Pac. 824. In the case last cited an accomplice stated that he and the defendant, McNeally, killed a cow belonging to another, and hid the brands and the hide at a certain place near McNeally's ranch, and he went with the officers where he testified they were hidden, and they there found them. The Supreme Court of Wyoming held that the finding of the brands and the hide where the accomplice testified they were was not corroborative of the testimony of the accomplice as to the guilt of the defendant. It is the settled law of Missouri that evidence that does not identify and connect the accused with the crime charged is not corroborative of the testimony of an accomplice as to matters material to the issue, and that a charge to the jury on this subject is defective and erroneous which does not so state. *State v. Miller*, 100 Mo. 606, 622, 623, 13 S. W. 832, 1051; *State v. Walker*, 98 Mo. 95, 109, 9 S. W. 646, 11 S. W. 1133. The finding of the mail bag and the gunny sack constituted no corroboration of the testimony of Mrs. Callahan in any

¹ 5 N. E. 264.

matter material to the issue, and the record does not contain an iota of other evidence in corroboration thereof.

Mrs. Callahan's story that on a bright afternoon in September a robber took her and his captured spoils in a buggy to a place in the public road, where she held the horse while he took the spoils from the buggy, uncovered them, threw the covering down near the public road, carried the spoils for many yards along a railroad embankment in plain sight from the public road and from several houses in the vicinity, and then threw them down by the side of the embankment in the weeds, is incredible. All her statements in any way tending to show Sykes' connection with her crime, concerning which three of her accomplices or any other witness testified, are contradicted by them. She contradicted her own testimony. She testified in the second affidavit that she first learned of the robbery by overhearing a conversation between Burnhardt and Sims the morning after its commission. She testified in her third affidavit and on the stand that she participated in the plan which was made to commit the robbery the night before it was perpetrated, that she stood guard when it was done, and that she received the spoils and her confederates into her room at the hotel that night. One of these statements is false. Sykes was not present at the robbery. Strike down Mrs. Callahan's testimony, and there is nothing to connect him with it.

[1] It is only when the evidence is sufficient to convince of the guilt of the accused beyond a reasonable doubt that one may lawfully be convicted of a crime. "It is undoubtedly the better practice," says the Supreme Court, "for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them." *Holmgren v. United States*, 217 U. S. 509, 523, 524, 30 Sup. Ct. 588, 592 (54 L. Ed. 861, 19 Ann. Cas. 778). And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it. *Jahnke v. State*, 68 Neb. 154, 104 N. W. 154, 158.

[2-4] To escape from the effect of this conclusion, counsel challenge our attention to the fact that no request for a peremptory instruction to return a verdict for Sykes was made at the trial, and invoke the conceded rule that the court may not review the existence of evidence to sustain a verdict, in the absence of a request after the close of the evidence for a peremptory instruction. *Rimmerman v. United States*, 186 Fed. 307, 311, 108 C. C. A. 385. But there is an exception to this general rule which has been made to prevent just such gross injustice as would result from the punishment of the defendant Sykes upon the evidence which has been recited. It is that in criminal cases, where the life, or as in this case the liberty, of the defendant is at stake, the courts of the United States, in the exercise

of a sound discretion, may notice such a grave error as his conviction without evidence to support it, although the question it presents was not properly raised in the trial court by request, objection, exception, or assignment of error. *Wiborg v. United States*, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; *Clyatt v. United States*, 197 U. S. 207, 221, 25 Sup. Ct. 429, 49 L. Ed. 726; *Crawford v. United States*, 212 U. S. 183, 194, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; *Weems v. United States*, 217 U. S. 349, 362, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705; *Williams v. United States*, 158 Fed. 30, 36, 88 C. C. A. 296, 302; *Humes v. United States*, 182 Fed. 485, 486, 105 C. C. A. 158, 159; *Pettine v. New Mexico* (C. C. A.) 201 Fed. 489.

The defendant in this case may not be lawfully deprived of his liberty for five years without proof of his guilt beyond a reasonable doubt much less without any substantial evidence of it, and this court cannot disregard his appeal, sit in silence, and permit the perpetration of such an injustice.

The judgment below is accordingly reversed, and the case is remanded to the District Court for a new trial.

TEEL v. CHESAPEAKE & O. RY. CO. OF VIRGINIA.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1913.)

No. 2,286.

1. APPEAL AND ERROR (§ 327*)—NECESSARY PARTIES—JOINT DEFENDANTS.

Where, in an action for the death of a railroad employé, plaintiff sued two corporations as alleged joint tort-feasors and both answered, and an instructed verdict was returned in their favor, both were necessary parties to a writ of error which could not be sustained as against one alone.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1795, 1814–1820, 1822–1835; Dec. Dig. § 327.*]

2. APPEAL AND ERROR (§ 336*)—WRIT OF ERROR—EFFECT OF PARTIES—AMENDMENT OF WRIT.

Where a necessary party defendant was omitted from a writ of error, the Court of Appeals was authorized, by Judiciary Act (Act Sept. 24, 1789, c. 20, § 32, 1 Stat. 91); Rev. St. §§ 954, 1005 (U. S. Comp. St. 1901, pp. 696, 714), and by Court of Appeals Act (Act March 3, 1891, c. 517, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552]), to permit an amendment of the writ inserting the name of the omitted party and bringing it in by new citation, though the time for suing out a new writ had expired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1868–1876; Dec. Dig. § 336.*]

In Error to the Circuit Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, judge.

Action by Etta Teel, as administratrix of the estate of Lake Teel, deceased, against the Chesapeake & Ohio Railway Company of Virginia. Judgment for defendant, and plaintiff brings error. Case held for amendment of writ of error.

Action was commenced in the Kenton circuit court at Covington, Ky., and was subsequently removed on petition of the defendant in error to the

court below, where a directed verdict was rendered in favor of the defense. Plaintiff's intestate died of injuries received while acting as head brakeman of a freight train moving eastwardly on the Chesapeake & Ohio Railroad near Bellevue, Ky., and his widow, as administratrix, brought this suit to recover damages on account of his death. The defendants were the Chesapeake & Ohio Railway Company, a Virginia corporation, the Chesapeake & Ohio Railway Company, a Kentucky corporation, and A. W. Sullivan, who was conductor of the train. All of the parties, including the decedent, at and before his death, were citizens and residents of Kentucky, except the railway company first mentioned. The petition comprised two counts; in the first of which complaint was made only against the two railway companies, and in the second, against those companies, and also Sullivan, as conductor. It was alleged in the first count that the two railway companies, at the time of the injury and death, owned and operated a line of steam railway commencing in Cincinnati, Ohio, and extending into and through the states of Kentucky, West Virginia, Virginia, and other states, and were engaged in transportation of passengers and freight in and through such states; that plaintiff's intestate, Lake Teel, "was in the employ of the said defendants as brakeman, and on said date was engaged by defendants upon a freight train transporting cars and freight from and through the states of Kentucky and Ohio into the states of Virginia and West Virginia"; that when the train reached Bellevue, "an eye of the drawbar or automatic coupler (same being part of the safety appliance) connecting the locomotive engine pulling said train, which was composed of some 50 cars, some loaded and others unloaded, broke and caused said engine to become detached and separated from said train of cars, and caused said train of cars upon which her said decedent was necessarily riding in the discharge of his duties," suddenly to stop, by reason of which the intestate was thrown to the ground, between two of the cars, and met his death as stated; that the train had shortly before left the terminal in Covington, Ky., and the coupler was then "in a dangerous and defective condition owing to a defect therein, to wit, a crack or break in said automatic coupler or the parts of same."

The second count is in substance the same as the first, except that it was alleged that Sullivan was the conductor in charge of the train and that it was his duty as well as that of the other defendants "to know the condition of the safety appliances and equipments of the cars composing same"; that by the exercise of ordinary care they could have discovered the condition of the coupler, but that they negligently "failed to warn said intestate of the danger of going upon said cars in the performance of his duties," etc.

In its petition for removal the Chesapeake & Ohio Railway Company of Virginia alleged, among other things, that there was in the suit a controversy wholly between it, as a resident and citizen of Virginia, and plaintiff, as a resident and citizen of Kentucky, which was "distinct and several from any controversy, or alleged controversy between the said administratrix and the other alleged defendants herein." Further, that Lake Teel and A. W. Sullivan, at the time in question, were both in the employ of petitioner, and that neither was in the employ of the Chesapeake & Ohio Railway Company of Kentucky; that plaintiff "fraudulently" joined such railway company of Kentucky and Sullivan as codefendants for the purpose of defeating removal; that such last-named company did not have or own any interest in the railway in question and was not engaged in transporting freight or passengers at all, having on July 1, 1907, conveyed and transferred by deed its entire interest in the road, absolutely and in fee simple, to the other railway company, and that the deed was duly recorded in each of the counties of Kentucky in which any of the property was situated. The petitioner further alleged that it was a common carrier by railroad engaged in commerce between the states of Ohio, Kentucky, West Virginia, and Virginia; that plaintiff's decedent was in its employ as a brakeman on a train "engaged in interstate commerce"; and that the question of plaintiff's right of action arises under the act of Congress approved April 22, 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), relating to the liability of common carriers by railroad to their employes,

After the removal was effected, the plaintiff filed an answer to the petition for removal, positively denying its allegations, except that its denial of the alleged sale of the Chesapeake & Ohio Railway Company of Kentucky to the other railway company was based on want of "sufficient knowledge or information from which to form a belief." Later, a motion to remand the cause to the state court was made and overruled, to which exception was taken. On defendant's motion to require plaintiff to elect on which of the paragraphs of her petition she would prosecute the suit, she "elected to sue upon the first paragraph." At the same time, a demurrer of defendant Sullivan to plaintiff's petition was sustained by the court below, to which exception was taken. Thereupon, the railway companies filed a joint answer to the first paragraph of the petition, specifically denying the allegations of such paragraph, and introducing a second defense in substance alleging that decedent received the injuries resulting in his death through his own negligence, which directly contributed to the accident; and to this defense a general demurrer was sustained and exception taken. Trial was then had, which resulted as before stated. The petition for writ of error was accompanied by a single assignment of error, complaining of the peremptory instruction at the conclusion of plaintiff's testimony.

In the trial of the cause the Chesapeake & Ohio Railway Company of Virginia seems to have been treated as the only defendant, and in the motion for a new trial the name of that company alone appears. Likewise in the petition for writ of error, the assignment of error, the writ of error, and the citation, the name only of that company is found; and service of the citation was accepted by counsel for the company.

Myers & Howard, of Covington, Ky., for plaintiff in error.

Galvin & Galvin, of Cincinnati, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). The details set out in the statement of facts are deemed necessary because of two questions of jurisdiction that are presented by the record. One relates to this court and the other to the court below. The action upon which issue was ultimately joined in the court below was against both the railway companies; it was a joint action against them as joint tort-feasors.

[1] The defendant Sullivan was eliminated by plaintiff's election to stand on the first count. It was plaintiff's right to sue either of the companies alone, but it is settled (at least in the absence, as here, of proof of the fraudulent and collusive joinder alleged and denied) that "a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint" (*Southern Railway Co. v. Carson*, 194 U. S. 138, 139, 24 Sup. Ct. 609, 610 [48 L. Ed. 907]); and the issue tendered by the petition in the present case was closed in the court below by the joint answer of the companies. The proceedings in error, however, were brought and have been prosecuted against only one of these companies; indeed, as appears in the statement, the absent defendant seems to have been ignored at the trial and ever since. No explanation of this is to be found in the record, nor was the fact mentioned in argument or in the briefs of counsel. It may be that the conveyance of the Chesapeake & Ohio Railway Company of Kentucky, to the company of that name of Virginia, alleged in the peti-

tion for removal and pointed out in the statement, was, in spite of the denial contained in the plaintiff's answer, accepted as true at the trial; yet the effect of the instructed verdict was, under the pleadings, quite as distinctly in favor of both railway companies as it was of either. Upon the record, then, we regard the presence of the Chesapeake & Ohio Railway Company of Kentucky as necessary to vest jurisdiction in this court to dispose of the case properly. *Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339, 340, 6 Sup. Ct. 74, 29 L. Ed. 432; *Estes v. Trabue*, 128 U. S. 225, 229, 9 Sup. Ct. 58, 32 L. Ed. 437.

[2] Such defects as this are generally curable by amendment of the writ of error and the issue of a new citation. Since the enactment of the first Judiciary Act of the United States, liberal statutory provisions have been maintained for curing defects of this character wherever proceedings on error or appeal have been instituted in due time, though defectively, and could be remedied without causing injustice; and numerous illustrations may be found of a tendency in the courts to apply such legislation in the spirit in which it was evidently enacted. See Act of September 24, 1789, c. 20, § 32, 1 Stat. 91, Rev. Stat. §§ 954, 1005 (U. S. Comp. St. 1901, pp. 696, 714); *Walton v. Marietta Chair Co.*, 157 U. S. 344, 346, 15 Sup. Ct. 626, 39 L. Ed. 725; *Knickerbocker Life Ins. Co. v. Pendleton*, *supra*; *Estes v. Trabue*, *supra*; *Thomas v. Green County*, 146 Fed. 970, 971, 77 C. C. A. 487 (C. C. A. 6th Cir.), affirmed in 211 U. S. 598, 601, 29 Sup. Ct. 168, 53 L. Ed. 343. In *Gilbert v. Hopkins*, 198 Fed. 849, 117 C. C. A. 491 (C. C. A. 4th Cir.), a writ of error seasonably sued out was permitted to be amended by inserting the name of an omitted party, although the time fixed for suing out such a writ had then expired, and the new party was required to be brought in by a new citation.

The time for allowing a new writ of error has likewise expired in the instant case; but in view of the statutory provisions before alluded to, and of section 11 of the Court of Appeals Act (Act March 3, 1891, c. 517, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552]), we are disposed to enter a rule on the plaintiff in error to show cause, within ten days after the order is entered, why the Chesapeake & Ohio Railway Company of Kentucky should not be made a party defendant to her proceeding in error, and for defendant in error so to show cause why the writ of error should not be permitted to be amended by inserting the name of that company and a new citation to be issued to it. Meanwhile, the case will be held for further order.

We cannot pass upon the other jurisdictional question, if we can at all, until the matters involved in the rule to show cause are determined.

TEEL v. CHESAPEAKE & O. RY. CO. OF VIRGINIA.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1913.)

No. 2,286.

1. APPEAL AND ERROR (§ 185*)—REVIEW—JURISDICTIONAL QUESTIONS.

It is the duty of a federal appellate court to inquire into the jurisdiction of the trial court, although the question may not be raised by an assignment of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166-1176, 1375; Dec. Dig. § 185.*]

2. REMOVAL OF CAUSES (§ 16*)—NATURE OF RIGHT—CONTROL OF CONGRESS.

The privilege of removal of causes from a state to a federal court is not a vested right, whether based on diversity of citizenship or on the ground that the cause of action was created by federal law, but is wholly within the power of Congress, which may give or take away the right.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 6; Dec. Dig. § 16.*]

3. REMOVAL OF CAUSES (§ 2*) — EMPLOYER'S LIABILITY ACT — CONSTRUCTION AND APPLICATION OF STATUTE.

The provision added to Employer's Liability Act April 22, 1908, c. 149, § 6, 35 Stat. 66, by the amendment of April 5, 1910 (36 Stat. 291, c. 143, § 1 [U. S. Comp. St. Supp. 1911, p. 1324]), that no case arising under the act brought in a state court of competent jurisdiction shall be removable, pertains to the remedy only, is to be liberally construed, and applies to all subsequent actions, whether the cause of action arose after or before it was adopted, and without regard to the grounds for removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 2, 3; Dec. Dig. § 2.*]

In Error to the Circuit Court of the United States for the Eastern District of Kentucky; A. M. J. Cochran, Judge.

Action at law by Etta Teel, administratrix of the estate of Lake Teel, deceased, against the Chesapeake & Ohio Railway Company of Virginia. Judgment for defendant, and plaintiff brings error. Reversed.

See, also, 204 Fed. 914.

Myers & Howard, of Covington, Ky., for plaintiff in error.

John Galvin and Maurice L. Galvin, both of Cincinnati, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. Facts necessary to the consideration now required of this cause are contained in the statement accompanying our opinion in the same case, rendered April 8, 1913. 204 Fed. 914. Under the rules to show cause then entered in the case, return was made in the form of a stipulation, which, by consent, is made part of the transcript heretofore filed in this court. It now appears that, upon the hearing below of the motion to remand the cause to the state court, the Chesapeake & Ohio Railway Company of Virginia introduced evidence showing that, prior to the accident in dispute, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Chesapeake & Ohio Railway Company of Kentucky had transferred and assigned its interest in the line of railway in question to the first-named railway company; that at the trial of the case "no evidence was offered by the plaintiff or at all" respecting the Chesapeake & Ohio Railway Company of Kentucky; and that the other railway company was throughout regarded and treated by the court and the parties as the only defendant below.

[1] One of the questions of jurisdiction of the court below, alluded to in our former opinion, concerns the court's denial of plaintiff's motion to remand the cause to the state court. This question is not presented by any assignment of error, but it is scarcely necessary to say, for it has been so often decided, that it is the duty of the appellate court to inquire into the jurisdiction of the court below. *M., C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 382, 4 Sup. Ct. 510, 28 L. Ed. 462; *Fore River Shipbuilding Co. v. Hagg*, 219 U. S. 175, 177, 31 Sup. Ct. 185, 55 L. Ed. 163; *Chi., B. & Q. Ry. Co. v. Willard*, 220 U. S. 419, 31 Sup. Ct. 460, 55 L. Ed. 521; *In re Martin*, 201 Fed. 33 (C. C. A. 6th Cir.). Should the motion to remand have been allowed? Plaintiff's intestate received his injury and died on September 8, 1909. The suit was commenced in the Kenton county circuit court on September 6, 1910. The removal proceeding was begun in that court on the 21st of the same month, and the transcript was filed in the court below October 17th following. The motion to remand was filed March 21 and overruled April 7, 1911. Meanwhile section 6 of the Employer's Liability Act of April 22, 1908 (35 Stat. 66), which simply limited the time within which actions might be brought, was, to wit, April 5, 1910, amended by adding the following (36 Stat. 291):

"Under this act an action may be brought in a Circuit Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

This provision is purely remedial and is couched in plain language. Congress was clearly acting within its constitutional power when it passed the amendment. While section 2 of article 3 of the Constitution declares that the judicial power shall extend to all cases arising under that instrument and the laws of the United States, as also, among others, to cases "between citizens of different states," yet it was long ago settled that, as to courts inferior to the Supreme Court, their jurisdiction in every case must depend upon some act of Congress. *Case of the Sewing Machine Companies*, 85 U. S. (18 Wall.) 553, 577, 21 L. Ed. 914; *Cary v. Curtis*, 44 U. S. (3 How.) 236, 245, 11 L. Ed. 576; *Turner v. Bank of North America*, 4 Dall. 9 (note A); *Loveland*, App. Jur. § 2. As Justice Harlan said in *Johnson Company v. Wharton*, 152 U. S. 252, 260, 14 Sup. Ct. 608, 611 (38 L. Ed. 429):

"But, except in the cases specially enumerated in the Constitution and of which this court may take cognizance, without an enabling act of Congress,

the distribution of the judicial power of the United States among the courts of the United States is a matter entirely within the control of the legislative branch of the government."

[2] It follows that the privilege of removal is not in any sense a vested right, no matter whether it be based, as here, on diversity of citizenship, or upon a right of action created by federal law, like that given by the Employer's Liability Act. The power in Congress to grant or withhold the right of removal is at last the power to prescribe the jurisdiction of courts as already stated. Such power is continuing in its nature, and of necessity includes authority to take away, as well as to bestow, the right to remove causes. *Stuart v. Laird*, 1 Cranch, 299, 2 L. Ed. 115. Judge Severens forcibly said in *Manley v. Olney* (C. C.) 32 Fed. 709 (and what he there said is in no wise affected by his opinion in *Tiffany v. Wilce* [C. C.] 34 Fed. 230):

"Congress may, therefore, grant or withhold altogether jurisdiction over removal cases. The jurisdiction which it has power to grant it has power to withdraw. If the right of removal was a vested right of property, quite different considerations would apply. But it is not so. It is simply a privilege of having the case tried in some other than the state tribunals. There is no property in it."

The plenary character of this power manifestly includes discretion in Congress to classify remedies, as well as the rights thereby intended to be enforced. The power of Congress to create the rights of action given by the Employer's Liability Act is settled; and since such rights of action are limited to a particular class, there is no perceivable reason why the remedies making them available may not be likewise limited. The insistence, then, that to construe the amendment so as to include and prohibit removal on the ground of diversity of citizenship in this class of cases, while permitting removal on such ground in other cases, would be to deny due process of law and the equal protection of the laws, cannot be sanctioned. *Gaines v. Fuentes*, 92 U. S. 18, 19, 23 L. Ed. 524; *McChesney v. Illinois Cent. R. R. Co.* (D. C.) 197 Fed. 87, 88; *Kelly's Adm'x v. Chesapeake & O. Ry. Co.* (D. C.) 201 Fed. 605, 606.

[3] It is not the right of action, the liability, created by the Employer's Liability Act, but it is the remedy given to enforce such right, with which we are here concerned. Neither Mrs. Teel's right of action nor the railroad company's defense was disturbed; the change made simply affected the remedy. This distinguishes the present case from *Winfree v. Northern Pac. Ry. Co.*, 227 U. S. 296, 301, 33 Sup. Ct. 273, 57 L. Ed. —, and *Ettor v. City of Tacoma*, 228 U. S. 148, 33 Sup. Ct. 428, 57 L. Ed. —, decided by the Supreme Court April 7, 1913. It needs only to be stated that a remedial act should be liberally construed. The jurisdiction conferred upon the courts of the United States is concurrent with that of the courts of the several states; and removal of any case arising under the Employer's Liability Act and brought in any state court of competent jurisdiction is explicitly forbidden.

It is not claimed that the state court was not one of "competent jurisdiction"; but it is urged that since the liability created by the act of April 22, 1908 (Employer's Liability Act), did not exist before, the

intent was simply to deny removal under the act itself, and not to disturb such right when traceable to some other provision of law (reliance being placed on *Van Brimmer v. Texas & P. Ry. Co.* [C. C.] 190 Fed. 394, 399); and so it is insisted that, where diversity of citizenship or local prejudice exists, the right of removal still prevails. No question of local prejudice is raised; and, while the logic of the situation might seem to embrace such a matter, it will be time enough to pass upon it when presented. Upon the amended record, the only grounds of removal presented are diversity of citizenship and the fact that the case arose under the Employer's Liability Act. It is now rightly conceded by learned counsel that the fact that the action arose under the Employer's Liability Act afforded no ground for removal.

We think the remaining ground is equally untenable. The ban placed upon removal is as broad as the Employer's Liability Act itself. The act makes no exception. The manifest purpose was to yield to suitors under it the choice of tribunals as between the courts of the United States and of the several states. *Second Employer's Liability Cases*, 223 U. S. 1, 56, 32 Sup. Ct. 169, 56 L. Ed. 327. We agree with Judge Cochran, who said in *De Atley v. Chesapeake & Ohio Railway Co.* (D. C.) 201 Fed. 591, where the removal had been obtained on the ground of diversity of citizenship:

"Congress said that 'no case arising under this act' should be removed, and it should be taken to have meant what it said."

The learned judge cited a number of cases in support of his conclusion, among which were *Symonds v. St. Louis & S. E. Ry. Co.* (C. C.) 192 Fed. 353, by Judge Youmans; *Ulrich v. New York, N. H. & H. R. Co.* (D. C.) 193 Fed. 768, by Judge Hand, and concurred in by Judges Holt and Hough; *McChesney v. Illinois Central R. Co.*, supra, 197 Fed. 85, 87, by Judge Evans. See, also, *Kelly's Adm'x v. Chesapeake & O. Ry. Co.*, supra, 201 Fed. 605, 606; *Saick v. Pennsylvania R. Co.* (C. C.) 193 Fed. 303.

In view of the decisions in the *De Atley* and *Kelly* Cases, supra, we take it that the attention of the trial judge in the present case was not called to the amendment of April 5, 1910, and presumably counsel were not aware of its passage, at the time the motion to remand was denied.

The judgment below is reversed, with costs, and the cause is remanded, with instruction to grant the plaintiff's motion to remand the cause to the state court.

LYDIARD-PETERSON CO. v. WOODMAN.*

(Circuit Court of Appeals, Eighth Circuit. March 3, 1913.)

No. 3,738.

1. COPYRIGHTS (§ 36*)—EXTENT OF MONOPOLY.

The holder of a copyright has no monopoly by virtue of the issued copyright itself; his rights being measured solely by the statute, provided he has complied therewith.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 37; Dec. Dig. § 36.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† For opinion on rehearing see 205 Fed. 900.

2. COPYRIGHTS (§ 29*)—NOTICE—MAP.

Act June 18, 1874, c. 301, 18 Stat. 78 (U. S. Comp. St. 1901, p. 3411), provides that a copyrighted publication must contain a notice on its face or title page, "Entered according to Act of Congress, in the year, by A. B., in the office of the Librarian of Congress, at Washington;" or at his option the word 'Copyright,' together with the year and the name, thus: 'Copyright, 18—, by A. B.'" *Held* that, where a map of a lake and surrounding property was drawn by J. C. Woodman and published by the Woodman Publishing Company, a copyright notice on the map, "Copyright 1908, Drawn by J. C. Woodman," was insufficient.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 29, 30; Dec. Dig. § 29.*]

3. COPYRIGHTS (§ 29*)—DIRECTORY—MAP.

Complainant published a map of a lake and surrounding territory, called "Woodman's Minnetonka Map-Directory, 1908." On the title page of the book were the words "Copyright 1908 by Prentiss M. Woodman, Woodman Publishing Company, Lumber Exchange, Minneapolis, Minn." The map had on its face "Woodman's Minnetonka Map-Directory, Copyright 1908, Drawn by J. C. Woodman." It also contained red figures referring to the index book or directory by which the particular pieces of property shown on the map were further described and identified. The book contained a pocket for the map, both being referred to as "Map-Directory" and intended to be used together. Five hundred more maps than books were published, and some extra maps were sold alone, but not until after the book was copyrighted. *Held*, that the map was a part of the book, and protected by the valid copyright notice in the book, though the notice on the map was insufficient.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 29, 30; Dec. Dig. § 29.*]

Hook, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Suit by Prentiss M. Woodman against the Lydiard-Peterson Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Milton D. Purdy, of Minneapolis, Minn. (William A. Lancaster and David F. Simpson, both of Minneapolis, Minn., on the brief), for appellant.

Charles J. Traxler and Prentiss M. Woodman, both of Minneapolis, Minn., for appellee.

Before SANBORN and HOOK, Circuit Judges, and McPHERSON, District Judge.

SMITH McPHERSON, District Judge. This is an action in equity for an injunction and damages for infringement of an alleged copyrighted map or chart of Lake Minnetonka, Minnesota. The Lydiard-Peterson Company, the defendant in the court below, pleaded a number of defenses, only one of which will be considered. The lower court adjudged the Lydiard-Peterson Company guilty of infringement, awarded plaintiff damages in the sum of \$75 and costs, including an attorney fee of \$50, and perpetually enjoined the Lydiard Company from reproducing, printing, or selling the map it had been printing and selling. Thereupon this appeal was taken.

To save expense and to limit the controversy, the parties signed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and filed a stipulation, to the effect that the only question for determination by this court is as to the sufficiency of the notice on complainant's alleged copyright. Prentiss M. Woodman had printed a Directory showing the ownerships of all residences and property adjacent to and near by the lake. Inside of the cover is a pocket for a map. There were 500 copies of the book and 1,000 maps printed. In some instances the book with map included sold for \$3, and in other instances the map alone, for \$1. Woodman himself sold them, and a few were sold at book stores. On the map is the following:

"Woodman's Minnetonka Map-Directory. Copyright 1908. Drawn by J. C. Woodman."

On another part of the map is the following:

"Published by Woodman Publishing Co., 841 Lumber Exchange Building, Minneapolis, Minn. Red figures refer to Index Book with ten special books. Price, including book, \$3.00 postpaid."

The bill of complaint refers to the map only. The map has red numerical figures representing each piece or tract of ground. By referring to the corresponding figure in the Directory, the name of the owner or occupant is ascertained. The description of defendant's map need not be stated, because the stipulation recites:

"It being conceded by the appellant, if the notice of copyright is sufficient, the record contains evidence sufficient to support the finding and judgment of the court as to infringement."

It was also stipulated that the outside cover of the book, and the title page, introduction, and contents of the book should be certified to this court—

"for the reason those portions of the exhibit above specified contain all matters in any wise affecting or pertaining to the question raised and to be considered on this appeal, to wit, the sufficiency of the notice contained on Exhibit A (which is the map)."

So that it is necessary to turn to the book (Map-Directory) in so far as it is in the record. On the title page is the following:

"Woodman's Minnetonka
Map-Directory, 1908"

and the following:

"Woodman's Minnetonka Map-Directory,
1908.
Copyright 1908 by Prentiss M. Woodman.
Woodman Publishing Company, Lumber Exchange,
Minneapolis, Minn."

The requisite copies were timely deposited with the Librarian of Congress and on March 25, 1908, the copyright for 28 years was issued.

[1] The holder of a copyright has no monopoly by virtue of the issued copyright itself, but his rights are measured by the statute, provided always he has complied with the statute. *Thompson v. Hubbard*, 131 U. S. 123, 9 Sup. Ct. 710, 33 L. Ed. 76; *Merrell v. Tice*, 104 U. S. 557, 26 L. Ed. 854; *Wheaton v. Peters*, 8 Pet. 591, 8 L.

Ed. 1055. The statute of June 18, 1874 (18 Stat. 78, c. 301 [U. S. Comp. St. 1901, p. 3411]) provided that a publication should show on its face or title page:

"Entered according to Act of Congress, in the year, by A. B., in the office of the Librarian of Congress, at Washington;" or, at his option the word 'Copyright' together with the year * * * and the name * * * thus—'Copyright, 18— by A. B.'"

[2] This was on the book at its appropriate place with greater definiteness than required by statute. And if we were dealing with the book or Directory alone, the case would not require argument to show that the statute had been complied with. And the subsequent statute, enacted after complainant had obtained his copyright, is of less specific requirements. See Act March 4, 1909, c. 320, 35 Stat. 1079 (U. S. Comp. St. Supp. 1911, p. 1472).

[3] Turning to the map, and considering it alone, we find at one place on its face in large print:

"Woodman's Minnetonka Map-Directory. Copyright 1908. Drawn by J. C. Woodman."

In another place the words:

"Published by Woodman Publishing Co., 841 Lumber Exchange, Minneapolis, Minn."

In the light of the fact that the record shows Prentiss M. Woodman to have been the author of the copyright, and that J. C. Woodman was the draftsman of the map, and that they were father and son, of the same city and same business address, that of and by itself, the notice on the map is not sufficient. The cases of Burrow-Giles Lithographic Company v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349, and Bolles v. Outing Company, by the Court of Appeals, Second Circuit, 77 Fed. 966, 23 C. C. A. 594, 46 L. R. A. 712, affirmed in 175 U. S. 262, 20 Sup. Ct. 94, 44 L. Ed. 156, although not passing on the point, have gone far in upholding the sufficiency of a notice. In the Sarony Case the initial of the given name was given. In the Bolles Case no initial of the first name was given, and the surname only was recited. But the subject-matter was a photograph, and there was no other photographer by that name in the city named. To uphold the map alone in the case at bar is to carry the defective notice further than either of the cases cited, and as believed further than any appellate court has yet gone. So that, if the map alone were being considered, it would follow that the notice is insufficient.

But we are of the opinion that in this case the book or Directory and the map are one production, and that the Directory includes the map. We fail to find a material difference whether the map is inclosed in the pocket to the Directory, or whether it is stitched or otherwise fastened to the cover, or elsewhere in the Directory. On the map is the hyphenated word "Map-Directory," showing that it is of itself not complete. To use it, the figures necessarily carry the reader to the book or Directory. And on the title page of the book are the same words "Map-Directory." These carry the reader to the map.

But the argument against the foregoing is that there were but 500 books published and 1,000 of the maps, and that some of the 500 extra maps were alone sold. But the answer to that is: He had the right to print as many extra maps as he desired, provided he did not distribute them. And those separate maps put in circulation were thus distributed after he had a valid copyright. The effect of that may or may not amount to an abandonment, the very question we are precluded under the stipulation from considering. The parties have agreed that we shall only consider the sufficiency of the notice.

Paragraph 8 of the defendant's answer is an affirmative defense to the effect that subsequent to March 28, 1908 (date of complainant's copyright), the complainant sold the map separately and thereby lost his exclusive rights under his copyright. This question was for the District Court to decide, and presumptively was correctly decided. And that holding is not here for review.

Our holding is that the Directory, with the map in the pocket, constitute but one publication, on which, at the appropriate place, is a sufficient notice. What was done with the extra maps with a defective notice at a subsequent time, and the effect thereof, is now not material.

The decree of the lower court should be affirmed; and it is so ordered.

HOOK, Circuit Judge (dissenting). This suit was brought for the infringement of the copyright of a map, not of a book and map. It is conceded in the foregoing opinion, as indeed it must be, that the notice of copyright on the map, taken by itself, is insufficient; therefore the map separately regarded was subject to duplication by any one. The notice required by the act of Congress to be placed upon each copy of the thing copyrighted must be sufficient to advise the public of the name of the author, the existence of the claim of exclusive right, and the date at which the right was obtained. This notice has always been held to be a condition precedent to the perfection of a copyright. To find a sufficient notice in this case my Brothers leave the map and go to the title-page of a book. But the map is not a physical part of the book; it is a part only by reference found in the book. True, there is a pocket in the book in which the map might be placed for convenient keeping; but whether it is kept there and used in connection with the book depends upon the whim or desire of the owner. This is so, because the map as such is complete in itself and has a use independently of the book. To that extent it is a distinct publication. The course of complainant confirms this. He published 500 books and 1,000 maps, and put the extra maps on the market and sold some of them. This is not mentioned to show abandonment of the copyright or forfeiture, but simply to show complainant's course of trade, and that he regarded them as publications, each independently useful and marketable.

Heywood v. Potter, 22 L. J. Q. B. 133, is in point. It arose under the English Copyright of Designs Act, 5 & 6 Vict. c. 100, § 4, which required the proprietor of a design to put upon each article to which

it was applied the letters "Rd," meaning registered. The plaintiff copyrighted a design for wall paper which he made and sold for use in 12-yard lengths. Upon these he placed the required letters. But it was also the practice to sell or otherwise issue patterns or samples 27 inches long cut from the 12-yard lengths. These samples so published and disposed of did not bear the mark of registration; and it was held the plaintiff was not entitled to relief. Regarding the same act, Romilly, Master of the Rolls, said:

"Whatever the original manufacturer who has got a registered design sells, a separate piece it may be, he must give notice upon that piece that it is registered." *Sarazin v. Hamil*, 32 L. J. Ch. 380.

The notice prescribed by the act of Congress is to protect the public from charges of piracy, and it should be placed where it will reasonably accomplish its object, having regard to the character of the article and the customs of trade.

KNOTTS et al. v. VIRGINIA-CAROLINA CHEMICAL CO.

(Circuit Court of Appeals, Fourth Circuit. February 24, 1913.)

No. 1,131.

1. **BILLS AND NOTES (§ 139*)—ACTIONS—DEFENSES—AGREEMENT FOR EXTENSION.**

A promise by the holder of notes after their maturity to extend the time of payment on an agreement by the makers to apply thereon the proceeds of certain securities already pledged for their payment *held* not enforceable for want of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 340-354; Dec. Dig. § 139.*]

2. **BILLS AND NOTES (§ 537*)—ACTIONS—AMOUNT OF RECOVERY—ATTORNEY'S FEES.**

In an action on promissory notes which provide that the makers shall pay the costs of collection and attorney's fees, not liquidated, the amount recoverable is a question of fact, which the defendants are entitled to have submitted to the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1893; Dec. Dig. § 537.*]

3. **JUDGMENT (§ 188*)—JUDGMENT ON MOTION—VALIDITY—TIME OF ENTRY.**

A motion for an order overruling an answer as frivolous may properly be heard and disposed of by a District Court on a rule day or in vacation, and a judgment entered on such order at the next ensuing term of court is valid.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 348; Dec. Dig. § 188.*]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. M. Smith, Judge.

Action at law by the Virginia-Carolina Chemical Company against D. J. Knotts, C. B. Dowling, and C. H. Corbitt, copartners as Knotts, Dowling & Co. Judgment for plaintiff, and defendants bring error. Reversed in part.

Alva C. De Pass, of Columbia, S. C., and H. E. De Pass, of Spartanburg, S. C. (De Pass & De Pass, of Columbia; S. C., on the brief), for plaintiffs in error.

J. Nelson Frierson, of Columbia, S. C. (Barron, Moore, Barron & McKay, of Columbia, S. C., on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and ROSE, District Judges.

PRITCHARD, Circuit Judge. The plaintiff below instituted an action in the District Court for the Eastern District of South Carolina against the defendants upon seven promissory notes, each one being the foundation of a separate cause of action, but all the causes of action were one complaint. A copy of each note is set out in full in the complaint. The defendants answered, admitting the formal allegations of the complaint and the execution of the notes sued on, but denying that the notes were due, and further denying that any attorney's fees were due on said notes. The answer also set up, as a further defense and by way of counterclaim, an alleged agreement between plaintiff and defendants for the extension of time of payment of said notes.

After service of the answer and of plaintiff's reply thereto, the plaintiff, upon notice duly given, moved for an order overruling the answer as frivolous and for judgment thereon. This motion was noticed for and heard upon the rules day in July, 1912, and further on the 22d day of July, 1912, the learned judge who heard this case below handed down an order adjudging the answer of the defendants to be frivolous, and directing that the plaintiff have judgment against the defendants upon the notes set out in the complaint. Pursuant to this order, judgment was entered in favor of plaintiff and against the defendants on the 31st day of July, 1912. Defendant below excepted, and the case comes here on writ of error.

Counsel for the plaintiff below filed a motion in this court, suggesting the diminution of the record, and asked leave to file as a part of the record herein the certificate of Richard W. Hutson, clerk of the District Court for the District of South Carolina, dated October 11, 1912. This motion was granted. The certificate in question is in the following language:

"I, Richard W. Hutson, clerk of the District Court of the United States for the District of South Carolina, do hereby certify that at the regular June term, 1912, of this court, an order for judgment against the defendants was entered in the above-entitled case on the 22d day of July, 1912, the said regular term then being still in session; said order being the same as the order set out upon page seventeen (17) of the transcript of record upon the appeal of the above-entitled case to the United States Circuit Court of Appeals for the Fourth Circuit. I do further certify that, pursuant to said order judgment was duly entered in favor of the plaintiff and against the defendants above named upon the 31st day of July, 1912, and that upon said date and at the time of the entry of said judgment the said regular June term, 1912, of said court was still in session; said judgment being the same as that set forth upon page twenty-one (21) of the transcript of record above referred to.

"Given under my hand and seal of said court at Charleston, S. C., this 11th day of October, 1912."

It is insisted by counsel for the defendants below that the court erred in adjudging that the answer of the defendants was frivolous and directing that the plaintiff should have judgment against the defendants. The court, among other things, in referring to this question, said:

"The complaint alleges the execution of the separate promissory notes duly itemized and set up in the complaint. It also alleges that these notes have matured and have not been paid. This action is against the maker of the notes. The answer admits all the jurisdictional allegations, admits the execution of the notes, and admits their nonpayment, and pleads in defense only that the time of payment of the notes had been extended, and therefore the right to sue had not accrued at the time of the bringing of the action. On this point the answer is in the nature of a plea in abatement to the action as having been prematurely brought. The answer in defense to the complaint does not set up the plea of abatement in proper legal form, but it refers to the subsequent part of the answer in which a counterclaim is endeavored to be interposed."

[1] It appears that the notes sued upon had all become due and payable before the alleged agreement for extension of time was made. Thus it will be seen that the defendants were, at the time that the alleged agreement was made, under obligation to pay the plaintiff, and, the time in which payment was to have been made having expired, the plaintiff's cause of action had accrued, and it was in a position to commence suit at once to enforce the collection of these notes. Under these circumstances the question naturally arises as to whether the agreement in question was such as to relieve the defendants of the obligation to pay these notes at that time. It is well settled that consideration is essential to the validity of an agreement to extend the time of payment of a bill or note. The court below was of the opinion that this agreement was not based on a consideration, and therefore did not avail the defendants as a defense to this action, and in disposing of the matter among other things, said:

"The whole obligation as set up on the part of the defendants is wholly executory, loose, uncertain, and conditional upon the defendants' own performance. If the defendants collected as much as anticipated on the obligations mentioned, and if the defendants applied these collections to the plaintiff's notes, and if the defendants gave additional collateral security, then the plaintiff was to grant the extension. The plaintiff is assumed to be bound, but the defendants in no way more than they were already. If, after procuring the extension that it is alleged was agreed to be given them, the defendants had failed to give any additional security, or failed to make collections mentioned, or failed to apply them to the plaintiff's notes, then all and entirely the consideration upon which said alleged forbearance was given would have failed. That a promise for a promise is a good consideration, as contended by the defendants, is true, but where there is a mutually enforceable obligation, and the promise made by each of the respective parties is for the performance of some act which, save for the promise, the party promising would not be legally bound to perform. In the present case the defendants claimed that the plaintiff promised to forbear enforcing legal rights, which save for the promise (if made) the plaintiff was not bound to do, in return for the defendants' promise to do something which it was already legally bound to do. The counter promise on which the plaintiff's promise is claimed to be based was one for the performance of an act which the defendants without the new promise were already legally bound to perform, and the alleged agreement consequently lacked mutuality and consideration. In the opinion of the court the mere promise of the defendants at a future time

to give additional security for a balance to be thereafter ascertained, after the application to the debt that they owed at the time of the proceeds of the securities which already belonged to the plaintiff, and which they were bound to so apply, constituted no sufficient valuable consideration, and there is set up in the answer in defense no question of fact which, if established, would constitute a defense to this action. So far as the counterclaim sought to be interposed in the answer is concerned, it is based upon the same fact which is here held to be no defense, and thus rests upon no legal basis. The mere fact that a man may bring an action prematurely, and before in law he may be entitled to bring it, constitutes no legal grievance for which a right of action for damages would accrue against him in favor of the person against whom the action was brought. The mere fact that an action is brought prematurely, through a mistaken view of the law, is not a legal wrong. It is therefore adjudged that the answer herein is frivolous and that the plaintiff have judgment against the defendants upon the notes pleaded and set up in the complaint, the same being liquidated, admitted demands, with interest at the rate of 8 per cent. per annum from their respective maturities upon the notes as alleged in the complaint and admitted in the answer, after giving due credit for the amounts admitted to have been paid at the time of payment, together with the sum of 10 per cent. upon the total which may be so due upon the date of judgment to cover all costs of collection and attorney's fees agreed to be paid in said notes; the sum of 10 per cent. being hereby adjudged to be a reasonable fee to cover such costs and the collection of said notes, when collected by litigation in a case such as the present."

A careful consideration of the facts in the light of the authorities leads us to the conclusion that the action of the lower court in striking out the answer of the defendants on the ground that it was frivolous was proper, and we do not deem it necessary to enter into a further discussion of this question.

[2] The eleventh assignment of error is to the effect that the court below erred in holding that, in addition to the principal and interest on the notes, the plaintiff was entitled to recover 10 per cent. for the collection of notes and attorney's fees; that, this claim being unliquidated, judgment upon the same should not have been given by the trial judge. The amount claimed as attorney's fees not being liquidated, the amount which plaintiff was entitled to recover was a question of fact, which should have been submitted to a jury. Therefore we are of the opinion that the lower court erred in not submitting this question to a jury to determine the amount, if any, that plaintiff was entitled to recover on account of such claim.

[3] We will now consider the twelfth assignment of error, to wit, that the court below erred in allowing judgment to be entered in this case on the 31st day of July, 1912, in favor of the plaintiff and against the defendants, upon the ground that the judgment was rendered during vacation, and not at a regular term of the court. It is argued in support of this contention that inasmuch as, under the rules of the District Court of the United States for the District of South Carolina, judgment by default may be entered at rules and during vacation, yet the court was not authorized to enter final judgment during vacation, and only had the power to direct the same to be enrolled on the judgment docket, and that a final judgment could not be entered until the next term of the court.

It appears, as we have stated, that after service of the answer, and of plaintiff's reply thereto, the plaintiff, upon notice duly given, moved

for an order overruling the answer as frivolous, and for judgment thereon. While this motion was noticed for and heard upon the rules day in July, the order of the learned judge who heard the case below was not entered until the 22d day of July, 1912. It further appears from the certificate of the clerk of the District Court that pursuant to said order judgment was entered in favor of the plaintiff and against the defendants on the 31st day of July, 1912, at which time the court was still in session. That the presiding judge, at rules and during vacation, had the power to adjudge that the answer was frivolous, is undoubtedly true; and this is all that the court did during vacation. It further appearing that after this action had been taken by the court, and the case placed upon the docket, a final judgment was entered while the court was in session, we are of the opinion that the action of the lower court was proper.

Being of the opinion that the court below was in error as to the claim for attorney's fees, it follows, from what we have said, that the judgment in favor of the plaintiffs, except the amount claimed to be due as attorney's fees, should be affirmed, and the judgment as to this amount should be reversed.

THE LOYAL.

(Circuit Court of Appeals, Second Circuit. March 24, 1913.)

No. 179.

1. SALVAGE (§ 7*)—RIGHT TO COMPENSATION—NATURE OF SERVICE.

A tug, which on request went to the assistance of a lighter, which had sprung a leak, and by keeping her pumped out, until she was towed to a place of safety, saved her cargo, *held* entitled to compensation for a salvage service.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 13, 16, 26; Dec. Dig. § 7.*]

2. SALVAGE (§ 23*)—SAVING OF CARGO—LIABILITY OF VESSEL—UNSEAWORTHINESS.

A lighter, which, after loading her cargo, and while remaining overnight at the pier where she loaded, sprung a leak, *held* unseaworthy, and her owner, who was under contract with the owner of the cargo to render the lighterage service, liable for salvage expense incurred to save the cargo.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 53, 54; Dec. Dig. § 23.*]

3. SHIPPING (§ 207*)—RIGHT TO LIMITATION OF LIABILITY—PERSONAL CONTRACTS OF SHIPOWNER.

A shipowner is not entitled to a limitation of liability for a breach of his personal contract; and where a lighterage company contracted to do all the lighterage for an importer for a fixed term, which contract carried by implication a warranty that the lighters furnished should be seaworthy, but because of the unseaworthiness of one salvage services were incurred to save the cargo, the company was not entitled to limit its liability for such expense.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 555, 643, 644; Dec. Dig. § 207.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Southern District of New York; George C. Holt, Judge.

Suit in admiralty by O'Brien Bros., owners of the tug O'Brien, against the lighter Loyal and her cargo, Apollinaris Company, Limited, cargo claimant, and J. W. Jarvis Company, impleaded. Decree against the Jarvis Company, and it appeals. Affirmed.

For opinion below, see 198 Fed. 591.

Appeal from a decree of the District Court, Southern District of New York, awarding the libelants as owners of the steam tug "O'Brien" \$318.50 for salvage services rendered the cargo of the lighter "Loyal," providing that the same should be paid by the appellant the F. W. Jarvis Company owner of said lighter, and denying the petition of said owner to limit its liability.

E. L. Baylies, of New York City, for appellant.

F. A. Spencer, Jr., of New York City, for libelant.

J. K. Symmers, of New York City, for the lighter.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. [1] The services rendered by the libelants were meritorious salvage services. Taking into consideration the conditions when the tug arrived, the nature of the services and the value of the property involved, the amount awarded by the District Court was reasonable and we see nothing in the conduct of the libelants after the rendition of the services to preclude them from receiving it.

The libelants looked for the salvage to the cargo, the owner of the cargo impleaded the owner of the lighter upon the ground that its vessel was unseaworthy and it was bound to answer for any salvage awarded; the vessel-owner sought to limit its liability. So the inquiry is three-fold:

(1) Was the lighter seaworthy?

(2) Was the vessel-owner bound to save the cargo-owner harmless from a salvage award?

(3) Was the vessel-owner entitled to limit its liability?

[2] That the lighter "Loyal" was unseaworthy seems established beyond question. She sprang a leak without having been subjected to any sea peril. The only inference in such circumstances is of unseaworthiness. Besides, the history of the vessel leads to the same conclusion.

The owner of the lighter was under obligation to the owner of the cargo to assume any salvage award caused by unseaworthiness of its vessel. The vessel-owner had a written contract with the cargo-owner for lighterage services covering an extended period. This lighterage contract implied an obligation that the lighters to be furnished under it should be seaworthy and if this one were in fact unseaworthy (as we have found she was) and if the unseaworthiness made the salvage services necessary (as it unquestionably did) the salvage award ran properly against the vessel-owner subject to any right to limit its liability.

[3] A vessel-owner is not entitled to limit his liability upon his personal contracts. The distinction between those contractual obligations which the owner of a vessel assumes himself by entering into them and those which are imputed to him for the acts of others on account of his ownership of the vessel, is well settled and is clearly pointed out in the opinion of the Circuit Court of Appeals for the Sixth Circuit in *Great Lakes Towing Company v. Mills Transp. Company*, 155 Fed. 11, 16, 83 C. C. A. 607, 612 (22 L. R. A. [N. S.] 769):

"And by extraordinary risk we mean those risks, arising from the conduct of, and contracts made by those who are beyond the personal supervision and control of the owner and yet have legal authority to bind him to answer for their conduct or contracts; or, to express the thought in another way, that the liabilities intended by this legislation were those peculiar to him as a shipowner and had been imputed to him because of his relation to the ship, and not those liabilities, whether for torts or from contracts, which spring from his own personal conduct or stipulations. It seems to us altogether unlikely that Congress intended to qualify the power of an owner to make contracts in relation to his ship which by the universal law would be valid if made about anything else and would be enforced in the courts in common-law actions. It would be an anomaly that a party competent to do business should be unable to make a valid contract about his own affairs, or be given such an immunity as to make his stipulations of uncertain value."

See, also, *Richardson v. Harmon*, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110; *McPhail v. Williams* (D. C.) 41 Fed. 61; *Gokey v. Fort* (D. C.) 44 Fed. 364; *The Amos D. Carver* (D. C.) 35 Fed. 665.

In the present case the lighterage contract was signed by the owner himself. It was its personal contract. This contract carried with it, as we have seen, an implied contract that the lighters to be furnished under it should be seaworthy. There is an implied warranty of seaworthiness in the case of all vessels unless the contrary be expressly stipulated, and the liability for breach of the warranty sounds in contract. As said by the Supreme Court of the United States in *Work v. Leathers*, 97 U. S. 379, 380 (24 L. Ed. 1012):

"Where the owner of a vessel charters her, or offers her for freight, he is bound to see that she is seaworthy and suitable for the service in which she is to be employed. If there be defects known, or not known, he is not excused. He is obliged to keep her in proper repair, unless prevented by perils of the sea or unavoidable accident. Such is the implied contract where the contrary does not appear. * * * The owner is liable for breach of his contract."

The implied contract that the lighter was seaworthy attached to the express contract was, in our opinion, just as much the personal contract of the vessel-owner as the express contract itself. It was precisely as if written in the contract. The liability which the owner assumed was a liability springing from its own stipulation and not at all one imputed to it by responsibility for the acts of others. It was a contract from which the owner could not obtain immunity by the limitation statute, and this whether the breach of the contract was caused by the owner's acts or those of its agents. We are unable to accept the contention that a vessel-owner may be relieved from responsibility upon his personal contracts provided he does not break

them himself. The making of the contract is enough to place it outside the statute.

The decree of the District Court is affirmed with interest and costs.

WARD, Circuit Judge (concurring in result). I will concur in the conclusion that the petitioner is not entitled to the benefit of the acts limiting the liability of vessel owners, but for a different reason, viz., because it has not shown its want of privity in or knowledge of the unseaworthiness of the lighter. All it has shown is that it has employed a ship's carpenter to repair its lighters from time to time. There is no proof of any regular system of inspection by any one, or that its managing officers relied upon a competent person, to whom the duty of regular inspection was committed. If the carpenter be conceded to have been such a person, it still lay upon the petitioner to prove that its managing officers had not, in point of fact, any knowledge of or privity in the lighter's unseaworthiness. The only testimony on the point is that of the president, who says that he "had no reason to think she was not able to do and perform the service [viz., the carrying of the cargo in question] properly." In view of the age of the boat, the price paid for her, and the small amount which has since been expended upon her, such testimony is quite insufficient.

But I cannot concur in the conclusion that the petitioner is deprived of the benefit of the acts on the ground that it has personally contracted to do the lighterage business of the Apollinaris Company, the owners of the cargo, for a fixed term. The contract contained no engagement on the subject of seaworthiness at all. The law itself imposed the duty. The breach of the implied warranty of seaworthiness is a tort, a breach of duty rather than a breach of a personal contract.

If the implied warranty of seaworthiness is to be regarded as a personal contract, shipowners cannot limit their liability in case of the death of or injury to passengers at all because the law implies in the contract of carriage a duty to carry with care. Nor can they ever limit in the case of loss of or damage caused by unseaworthiness to cargo carried under bills of lading, at least when signed by them as owners, as is the case with all regular steam lines. Such results would, I think, be a great surprise to all interested. As Judge Putnam, speaking for the Circuit Court of Appeals for the First Circuit in *Quinlan v. Pew*, 56 Fed. 111, at 119, 5 C. C. A. 438, at 446, said:

"Neither can the proposition of the appellant be maintained, that the statute does not apply because there was in this case a personal contract on the part of the owners, either express or in the form of an implied warranty, that the vessel was seaworthy. In nearly all the instances which the statute expressly enumerates as those to which the limitation of liability applies, there is necessarily an implied warranty, and frequently an express agreement in the form of a bill of lading; so that, if the contention of the complainant is correct, the wings of the statute would be effectually clipped. That there may be certain contracts, relating not so much to the navigation of the ship as to fitting her for sea, by which the owners charge personally their own credit, and which do not come within the statute, may be well contended, without at all touching the principles here involved."

LACOMBE, Circuit Judge. The Courts of Appeal in the First and Sixth circuits seem not to be in accord as to the interpretation of the

section under consideration. The question is a close one, but I am inclined to concur with Judge NOYES in holding that this case presents a personal contract of the owner, not affected by the statute. It would seem desirable that some effort should be made to secure a construction of the act by the Supreme Court, which will insure future uniformity of decision.

I concur in affirmance.

SHUBERT et al. v. ROSENBERGER.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1913.)

No. 3,635.

1. COMPROMISE AND SETTLEMENT (§ 13*)—CONTRACT—CONSTRUCTION—"Now."

Plaintiff having a claim against defendants for attorney's services, they met in Chicago, where neither lived, and orally agreed on an adjustment. After each had returned home, plaintiff wrote defendants a memorandum of the agreement, reciting that defendants were to pay him "now" for his services a balance of \$5,000, of which \$400 had been received from court costs, etc., leaving a balance due plaintiff of \$4,600; defendants to save plaintiff harmless on account of a claim of another to one-third of the fees, etc. *Held*, that the word "now" ordinarily means at the present point of time, at this juncture, and in a writing means contemporaneously with the execution thereof, but under the circumstances of the parties meant that defendants should remit the balance to plaintiff, on their return home, by due course of mail.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. § 70; Dec. Dig. § 13.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4851-4853.]

2. COMPROMISE AND SETTLEMENT (§ 20*)—PERFORMANCE—EXCESSIVE DEMAND.

Where an agreement compromising an attorney's claim for services had been entered into, but the amount fixed had not been paid, the attorney's subsequent demand for something more than the balance he was entitled to did not justify defendants in refusing to pay what was due.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 83-88; Dec. Dig. § 20.*]

3. COMPROMISE AND SETTLEMENT (§ 5*)—AGREEMENT—CORRESPONDENCE.

Where an agreement liquidating plaintiff's claim for attorney's services did not contemplate that it should be reduced to writing, and no writing was ever prepared and signed by both parties, and plaintiff's letter to defendants, containing his version of the result of their conference, was not replied to, but defendants afterwards wrote insisting on different requirements, there was no contract of settlement in writing.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 10-16; Dec. Dig. § 5.*]

4. TRIAL (§ 136*)—QUESTIONS FOR COURT OR JURY—MEANING OF WORDS.

The meaning of a common word not depending on trade or local usage or intrinsic facts is for the court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 318, 320, 321, 323-327; Dec. Dig. § 136.*]

5. COMPROMISE AND SETTLEMENT (§ 20*)—FAILURE TO PERFORM—ACTION ON ORIGINAL CLAIM—TENDER.

Plaintiff having an unliquidated claim for attorney's fees against defendants, it was agreed that it should be settled by an immediate

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

payment of the balance of \$5,000, amounting to \$4,600. Defendants, after making the agreement, insisted that the amount agreed on was not payable absolutely, but that plaintiff was required to make collections from litigation in which he had been employed and apply the same on his fees. This plaintiff refused to do, and having received \$2,500 of the amount agreed on applied it as a partial payment and sued for the value of his services, without reference to compromise. *Held*, that defendants having broken the compromise agreement, plaintiff was not required to return or tender the amount received thereunder as a condition to his right to sue for the value of his services.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 83-88; Dec. Dig. § 20.*]

In Error to the Circuit Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action by J. C. Rosenberger against Lee Shubert and another. Judgment for plaintiff, and defendants bring error. Affirmed.

See, also, 182 Fed. 411.

Frank Hagerman, of Kansas City, Mo. (Kimbrough Stone, of Kansas City, Mo., on the brief), for plaintiffs in error.

Clyde Taylor, of Kansas City, Mo. (A. N. Gossett, of Kansas City, Mo., on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

HOOK, Circuit Judge. J. C. Rosenberger, an attorney at law, sued Lee and Jacob Shubert for professional services and recovered judgment. By this writ of error the defendants complain only of rulings of the trial court in respect of their defense that a binding compromise and settlement was made before the action was begun.

[1] After the dispute over the amount of the fee arose, the plaintiff and Jacob Shubert, one of the defendants, met in Chicago and agreed upon an adjustment. Shubert left for New York the same day, and plaintiff at once wrote him a letter, June 5, 1909, in which he said:

"Am writing this as a memorandum of our agreement of settlement of to-day. You to pay me now for my services in the Woodward case a balance of \$5,000.00 of which \$400.00 (exact amount \$399.00) has already been received by me in the shape of court costs in Appellate Court and paid by Woodward, leaving net balance due me \$4,600.00. * * * You to save me harmless on account of the claim heretofore asserted by Mr. Klein to 1/3 of my fees. This is, of course, in full of all services in the Woodward case if the litigation is ended in accordance with the releases and stipulations signed by you to-day which seems certain."

The fee of another attorney was also involved, and was referred to in the letter, but it is not of importance in the present litigation. Shubert made no reply to the letter, but plaintiff having wired him, June 14th, that "our understanding at Chicago was based on immediate cash," he wired in reply that he had been out of the city; and on the 16th he wrote, inclosing a check for \$2,500, and said:

"This is a bad time of the year to arrange for this sort of thing, as everything is closed up and all our rents are due. I will send you the balance very shortly. Please make collections of whatever you can from Woodward, and you can credit the amount to your account, also the \$300 tied up in Omaha."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Plaintiff cashed the check and kept the money. On June 21st he wrote Shubert, acknowledging receipt of the \$2,500, but said it was not accepted as in compliance with their agreement. He referred Shubert to his letter of the 5th and said the agreement was to pay "now"; that he would not have agreed to accept \$4,600 on any other condition than immediate payment; that he would extend the time of payment to July 1st, and if by that time defendants sent him the further sum of \$2,100 (making the \$4,600), and would also write him by return mail that he agreed to all the terms of the letter of June 5th, he might consider the matter settled; otherwise he (plaintiff) would look to him for the full value of his services. June 24th Shubert replied, saying plaintiff's letter of the 21st contained a glaring misstatement of the facts; that it was not understood at the interview of June 5th that the money was to be paid at once, but that money was to be collected from the litigation and credited on the account; also that the amount of the fee charged was outrageous and exorbitant, and that he would be more than pleased to let the matter go to the courts. Plaintiff then sued for the value of his services, less payments received, in which he included the \$2,500 sent by Shubert's letter of the 16th of June. The verdict and judgment were for about \$1,300 more than the amount agreed upon in Chicago, of which excess about \$500 was for interest. As already indicated, the only defense with which we are concerned was that the claim had been settled, released, and discharged.

[2] It became necessary at the trial to determine whether the Chicago agreement was still in force or, on the other hand, had been broken or repudiated by defendants, and to do that it was necessary to know its terms. Counsel for defendants say the agreement was in a writing which spoke for itself, meaning plaintiff's letter of June 5th, and they complain that the court erred in instructing the jury that they might consider the conversations at the Chicago conference, of which evidence had been admitted. If the letter of June 5th were the agreed repository of the contract terms, then it is clear that defendants promised to pay the \$4,600 "*now*." Ordinarily "*now*" means at the present point of time; at the present time; at this juncture. Century Dictionary; Chapman v. Holmes, 10 N. J. Law, 24, 31. In a writing it means contemporaneously with the making or execution. Chouteau v. Barlow, 110 U. S. 238, 262, 3 Sup. Ct. 620, 28 L. Ed. 132; Pike v. Kennedy, 15 Or. 420, 15 Pac. 637. In the present circumstances, both parties being away from home, turning time or grace was doubtless intended so Shubert might, upon his return to New York, remit by due course of mail. Counsel for defendants contend the word meant "upon demand" at the most. But even that would not help them, because plaintiff's telegram and letter of June 14th and 21st were each equivalent to a demand, and Jacob Shubert's reply of the 24th was a refusal and repudiation. True the plaintiff demanded by his letter of June 21st something more than payment of the balance by the 1st of July, but if he was not entitled to it the excess did not justify defendants in refusing to pay what was due. Colby v. Reed, 99 U. S. 560, 25 L. Ed. 484. The letter was not in tem-

perate, respectful terms, and standing alone may possibly, for that reason, have failed as a demand (*Boyden v. Burke*, 14 How. 575, 582, 14 L. Ed. 548); but we are not prepared to say it was out of harmony with their prior mutual attitude. It is also to be noted that by Jacob Shubert's letter of June 24th the position was taken that plaintiff must collect from the litigation in which he had been employed and apply on his fees. This was not consistent with a duty to pay now or on demand.

[3] In truth, however, the contract was not in writing, and the court properly admitted evidence of what was said and done at Chicago. At no time was it mutually understood that their agreement should be reduced to writing, and no writing was ever prepared and signed by both. Had defendants replied to plaintiff's letter of June 5th accepting his version of the result of the conference, it might be said the two letters made a contract; but they did not do so, and as they did not commit themselves they were not in a position to claim at the trial that plaintiff's letter had that effect. It was, as part of the correspondence, evidential and nothing more. Again, defendants did not at the trial accept the letter as an accurate recital, but, on the contrary, contended that payment "now" was not a part of the agreement. Both parties admitted the other terms, but that one was the point of controversy, and for the jury upon the evidence of what occurred.

[4] The trial court also allowed the jury to determine what the word "now" meant. As its controlling meaning did not depend upon a trade or local usage or extrinsic facts and circumstances, that question was for the court, not the jury (*West v. Smith*, 101 U. S. 263, 270, 25 L. Ed. 809); but as the decision was what the court's should have been no prejudice resulted. *Randon v. Toby*, 11 How. 493, 13 L. Ed. 784. In the case last cited it appeared that the decision of the jury upon the construction of a written instrument was right, and also that the submission to the jury was at the request of the party who afterwards complained; but each reason for denying his complaint was independently sufficient.

[5] We therefore have an agreement that a disputed, unliquidated claim in contract shall be fully extinguished by payment at a fixed time of a sum less than plaintiff, and more than defendants, held as owing, a partial payment thereon by defendants, a failure to pay the balance as agreed, and an action upon the original claim by plaintiff, who did not return or tender, but gave credit for, the partial payment. The plaintiff contends the agreement was an accord; the defendants contend that it was a compromise and governed by different principles with respect to the right to rescind and the duty to tender back what had been received. It is claimed for defendants that an accord applies only to liquidated claims where the liability and amount are not in substantial dispute. But from a very early day the use of the term has been much broader. *Adams v. Tapling*, 4 Mod. 88, decided in 1691, was an action on covenant; the breaches assigned being that the houses were not in repair, the locks were taken away, the hedges

were broken down, and the ditches were unscoured. Obviously the damages were unliquidated. The court said:

"In covenant where the damages are uncertain and to be recovered as in this case, a lesser thing may be done in satisfaction, and there 'accord and satisfaction' is a good plea."

There has generally been an interchangeable use of the terms "accord and satisfaction" and "compromise and settlement" as to controversies over liquidated and unliquidated claims arising from contracts express and implied. Both terms were applied to the same situation in *City of San Juan v. Gas Co.*, 195 U. S. 510, 521, 523, 25 Sup. Ct. 108, 49 L. Ed. 299, 1 Ann. Cas. 796. But if there is a distinction in the application of the terms it is not important here, for the general rule is that to be a defense to the original claim an accord must be followed by satisfaction and a compromise by settlement. *First Nat. Bank v. Leech*, 36 C. C. A. 262, 94 Fed. 310; *Brown v. Spofford*, 95 U. S. 474, 24 L. Ed. 508; *Barkley v. Clark*, 43 Kan. 43, 22 Pac. 1025. In the first of these cases this court said:

"It is not enough that there be a clear agreement or accord and a sufficient consideration; but the agreement or accord must be executed before it can be pleaded as an accord and satisfaction. If part of the consideration agreed on be not performed, the whole accord fails."

The breach may be by failure to pay on a day fixed. *Early v. Rogers*, 16 How. 599, 14 L. Ed. 1074. There are cases in which it appears that the parties intended the new agreement should per se extinguish the old one, where the promise embodied in the accord or compromise was accepted regardless of its fulfillment. There a novation occurs, and the action must be upon the substituted agreement. The case at bar, however, is not of that character.

To maintain his action the plaintiff was not required to tender defendants the money they paid on the new agreement. He did not sue to rescind the agreement, nor had he broken its terms. Had he been trying to escape it, a return of what he received might have been necessary; but his action was on his original demand, and the agreement of accord or compromise was by way of defense. It was plaintiff's right to regard it as having been repudiated by defendants, and to credit their payment. The defendants alone being in default were in no position to ask relief from their wrong by restoration of the status quo.

The judgment is affirmed.

GOLDEN CYCLE MINING CO. v. CHRISTMAS GOLD MINING CO.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1913.)

No. 3,757.

1. QUIETING TITLE (§ 12*)—RIGHT TO RELIEF—POSSESSION.

Plaintiff, in order to maintain a suit in the courts of the United States to quiet title to real property, must in general have possession of the land, except where by state statute the remedy has been enlarged so as to authorize the maintenance of a suit in equity to quiet title to vacant land.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 44, 45; Dec. Dig. § 12.*]

2. MINES AND MINERALS (§ 38*)—QUIETING TITLE—POSSESSION.

The rule that the owner of a mining claim can maintain a suit in equity to quiet title only in case he is in possession is subject to the qualification that, if he is in possession of the surface claiming title to the entire claim, his possession in legal contemplation extends to everything which is part of the claim, whether vertically beneath its surface or within the extralateral right granted by Congress, which is not in the actual possession of one holding adversely.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

3. MINES AND MINERALS (§ 38*)—QUIETING TITLE—EXTRALATERAL RIGHTS—ADVERSE HOLDING.

Complainant sued to quiet title to extralateral rights, claiming a part of the vein within the surface lines of defendant's claim extended vertically downward. Defendant for many years had asserted that the part of the vein in controversy pertained to its part of the apex which was within its boundaries, and had mined the vein openly and notoriously under claim of ownership, extending its workings to the vertical boundary between its claim and complainant's and to a depth of about 1,400 feet, from which it had largely extracted the ore. *Held* that defendant's possession of the vein in controversy being adverse, complainant was not entitled to maintain a suit in equity to quiet title, nor to an injunction restraining defendant's further workings of the vein as incidental relief.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

Sanborn, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Colorado; Walter J. Smith, Judge.

Suit by the Christmas Gold Mining Company to quiet title as against the Golden Cycle Mining Company to a vein of ore extending on its dip into the mining claims of defendant to recover the value of extracted mineral and damages, and to enjoin defendant from further operations. From an order granting a temporary injunction, defendant appeals. Order vacated.

Tyson S. Dines, of Denver, Colo. (H. McGarry, of Colorado Springs, Colo., on the brief), for appellant.

Charles S. Thomas, of Denver, Colo. (Arthur B. West, W. H. Bryant, George L. Nye, and W. P. Malburn, all of Denver, Colo., on the brief), for appellee.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

HOOK, Circuit Judge. This is an appeal from an order granting a temporary injunction. The suit was by the Christmas Gold Mining Company to quiet its title as against the Golden Cycle Mining Company to a vein of ore extending on its dip into the mining claims of defendant, to recover the value of extracted mineral and damages, and to enjoin defendant from further operations. The defendant's objection to the equitable jurisdiction of the trial court was denied. It renews the objection here.

[1, 2] The right of complainant to maintain the suit to quiet title depends upon its possession of the vein of ore in controversy. If it is not in possession, its remedy is in ejectment at law. Under the bill of complaint, injunction was incidental to the main relief, not independent, and should not have been granted if there was no jurisdiction in equity to quiet title. And so of the claim for value of ore and damages which, by itself, is cognizable at law. In ejectment and damages defendant has a right to trial by jury of which it cannot be deprived by hitching them to a suit in equity not maintainable as such. The general rule in the courts of the United States is that to maintain a suit to quiet title complainant must have possession of the property. The remedy is given by statute in some states if neither party is in possession; the land being vacant. Where this is so the enlarged equitable remedy is available in the courts of the United States. In Colorado, where this case arose, the old rule prevails and possession in complainant is essential. Mills' Code, § 255. Owing to the peculiar characteristics of mining claims, what might be said to be a qualification of the rule is recognized. It was aptly expressed for this court by Circuit Judge now Mr. Justice Van Devanter in *United States Mining Co. v. Lawson*, 67 C. C. A. 587, 134 Fed. 769, as follows:

"Where the true owner of a mining claim is in possession of its surface, claiming title to the entire claim, his possession in legal contemplation extends to everything which is part of the claim, whether vertically beneath its surface or within the extralateral right granted by Congress, which is not in the actual possession of another holding adversely."

[3] Since the part of the ore vein in controversy here is not within the lines of complainant's claim extended downward vertically, but is under the surface of defendant's, the former was forced to rely upon the doctrine of the *Lawson* Case. The question therefore arose, "Was the property in dispute in the actual possession of defendant holding adversely?" If it was, complainant could not maintain a suit to quiet title. The following may fairly be gathered from the proofs. The mining claims of complainant and defendant adjoin. Those of defendant are senior in location and patent. A part of the apex of the vein is within the surface lines of defendant's claims and the part of the vein which is in controversy is wholly within those lines extended downward vertically. For many years defendant asserted that the part of the vein in controversy pertained to its part of the apex and

for many years it mined it openly and notoriously under claim of ownership and right, not secretly or clandestinely. Its workings on the vein extended to the vertical boundary between its claim and complainant's and to a depth of about 1,400 feet from which it had largely extracted the ore. On its side and within its own vertical bounds complainant also mined. At times as might naturally occur in such work it crossed the line into the ground now in dispute, but when advised of the fact it withdrew. In effect, therefore, this suit is to quiet title to the mineral which still remains and for the value of that removed by defendant. If it is possible to conceive of a case of extralateral claims in which a vein of ore is in the possession of a defendant holding adversely within the doctrine of the *Lawson Case*, we think this is one. Defendant's seniority in location and patent and other details are referred to, not for the purpose of deciding the merits, but for their relation to a real adverse holding under a substantial claim of right rather than a pretense to defeat jurisdiction. The possession by the owner of the surface of a mining claim of extralateral rights is constructive, and it must give way to actual adverse conditions disclosed by clear proofs. A mere averment of possession in a bill of complaint is not sufficient for continued jurisdiction in equity when seasonably and successfully challenged. We do not think the injunction that was granted should be retained in aid of a future action at law, as is suggested.

The order of injunction is vacated.

SANBORN, Circuit Judge, dissents on the grounds that neither a suit to quiet title nor possession by the owner of ore beneath the surface of another's claim in a lode whose apex is within the complainant's claim, is essential to the maintenance of an injunction against the extraction of it by the owner of the surface above it, and that the possession by the complainant of the apex of the lode, of which the ore in controversy within the extralateral lines of the defendant's claim is a part, is sufficient as against the intermittent trespasses upon that lode by the defendant to sustain a suit to quiet title regardless of the injunction.

Regarding the first ground of this dissent, this court has held that in a suit to quiet title and without possession of the property the owner of ore may maintain a suit for an injunction against its extraction in these words:

"Threatened and continued injuries to mines, quarries, timber growing upon lands, buildings located thereon, or other improvements of a permanent character, are enjoined, because, as has been said, such acts 'alter the character of the property, and also tend to destroy it, and occasion irreparable loss and damage.' *Courthope v. Mapplesden*, 10 Ves. 290; *Scully v. Rose*, 61 Md. 408; *Erhardt v. Boaro*, 113 U. S. 537 [5 Sup. Ct. 565, 28 L. Ed. 1116]; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315 [11 Am. Dec. 484]; *Hammond v. Winchester*, 82 Ala. 470, 2 South. 892; *Snyder v. Hopkins*, 31 Kan. 557, 3 Pac. 367. In such cases the threatened injuries are to the res, and diminish the value of the property itself, and an injunction will be granted to prevent the continuing waste or continuing trespass, although the plaintiff is not in possession, and although the legal title has not been settled or questioned by an action at law. *Story's Eq. Jur.* § 860; *Union Pac. Ry. Co. v. Kansas Elevator Co.* (C. C.) 17 Fed. 200; *Earl Cupper v. Baker*, 17 Ves. 128; *Iron Co. v. Reymert*, 45

N. Y. 703; *Snyder v. Hopkins*, 31 Kan. 559, 3 Pac. 367; *Lacustrine Fer. Co. v. L. G. & Fer. Co. et al.*, 82 N. Y. 486; *Oolagah Co. v. McCaleb*, 68 Fed. 87, 15 C. C. A. 270; *High on Inj.* 736; *Alleghany Oil Co. v. Snyder*, 106 Fed. 764, 45 C. C. A. 604; *Peck v. Ayres & Lord Tie Co.*, 116 Fed. 273, 53 C. C. A. 551; *Logan Nat'l Gas Co. v. Great So. Gas & Oil Co.*, 126 Fed. 623, 61 C. C. A. 359. If the only relief sought by the bill in this case was to remove the cloud upon plaintiff's title, it may well be doubted whether the bill could be sustained. *Orton v. Smith*, 18 How. 263 [15 L. Ed. 393]; *Frost v. Spitley*, 121 U. S. 552 [7 Sup. Ct. 1129, 30 L. Ed. 1010]. But the bill goes further, and seeks to enjoin the defendant from committing waste, and destroying the property as a mining property. In such a case jurisdiction in equity attaches, even where the plaintiff is not in possession. And, having obtained jurisdiction for that purpose, the court may, for the purpose of preventing a multiplicity of suits, retain it for further relief, and may remove a cloud upon the title, quiet the title, and determine the right of possession." *Big Six Development Co. v. Mitchell*, 138 Fed. 279, 283, 70 C. C. A. 569, 573 (1 L. R. A. [N. S.] 332).

To this decision and conclusion I adhere. It is worthy of note also that Judge Thayer, delivering the unanimous opinion of this court in 1895 in *Oolagah Coal Co v. McCaleb*, 68 Fed. 86, 88, 15 C. C. A. 270, 272, said:

"It is now well settled by many adjudications, beginning with the case of *Mitchell v. Dors*, 6 Ves. 147, that an injunction may be granted to restrain a trespasser from entering into a mine and removing the minerals therefrom. Trespasses of that kind, as well as those which consist in cutting down and removing timber, or in removing buildings or other improvements of a permanent character, standing upon lands, are readily enjoined, because, as has sometimes been said, such acts alter the character of the property, and also tend to destroy it, and to occasion irreparable loss and damage. *Courthope v. Mapplesden*, 10 Ves. 290; *Scully v. Rose*, 61 Md. 408; *Erhardt v. Boaro*, 113 U. S. 537 [5 Sup. Ct. 565, 28 L. Ed. 1116]; *Jerome v. Ross*, 7 Johns. Ch. [N. Y.] 315 [11 Am. Dec. 484]; *Hammond v. Winchester*, 82 Ala. 470, 2 South. 892; *Snyder v. Hopkins*, 31 Kan. 557, 3 Pac. 367; *Iron Co. v. Reymert*, 45 N. Y. 703; *Beach, Inj.* § 1155; *High, Inj.* (1st Ed.) § 469. It is also held that, even when the title to the property on which the trespass is committed is in dispute, a court of equity will at least award a temporary injunction against the commission of such acts as tend to permanently alter its character or destroy its value, until the title thereto is determined in an appropriate proceeding inaugurated for that purpose. *Clayton v. Shoemaker*, 67 Md. 216, 9 Atl. 635; *Smith v. Jameson*, 91 Mo. 13, 3 S. W. 212; *Beach, Inj.* § 1140, and cases there cited."

It is true that in the latter case the complainant was alleged to be in possession of the property, but the decision in that case sustains the proposition that the wrongful extraction of ore from a mine gives jurisdiction in equity to enjoin it at the suit of the owner, and the former case sustains the proposition that possession is not requisite to the maintenance of such a suit or the issue of an injunction.

AARON et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 25, 1913.)

No. 3,844.

*(Syllabus by the Court.)***1. INDIANS (§ 15*)—RIGHT TO ALIENATE ALLOTMENT—HEIRS OF ALLOTTEES.**

Lands of full-blood Osage Indian allottees selected by and allotted to them before their decease were inalienable by their full-blood heirs in March, 1909, under the act of June 28, 1906, c. 3572, 34 Stat. 539, 541, 542, where none of them had obtained certificates of competency.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

2. INDIANS (§ 15*)—RIGHT TO ALIENATE HOMESTEAD—HEIRS OF ALLOTTEES.

The homestead lands of such allottees were likewise inalienable by such heirs.

The fourth paragraph of section 2 of the act of June 28, 1906, c. 3572, 34 Stat. 541, provided that the homestead lands of Osage Indian allottees "shall be inalienable and nontaxable until otherwise provided by act of Congress." The seventh paragraph of the same section declared that the Secretary might issue to any member of the Osage tribe a certificate of competency, authorizing him to deed his lands, "except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the allottee."

Held: (1) Restrictions upon alienation of this character attach to and run with the land, and the inability to convey disqualifies the heir as well as the immediate allottee.

(2) The exception in paragraph 7 does not affect the restrictions upon the alienation and taxation of homesteads of Osage allottees and their heirs who obtain no certificates of competency, but is limited in its effect to the homesteads of those who procure such certificates.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

3. STATUTES (§§ 205, 206, 228*)—CONSTRUCTION—EXCEPTION OR PROVISIO—GENERAL AND SPECIAL PROVISIONS.

An exception or proviso in a statute affects and relates to the paragraph or clause in which it is found, or to which it is annexed, only, and not to the entire statute, or to other sections, paragraphs, or clauses in it, unless a different intention or purpose on the part of the legislative body is clearly disclosed by the enactment.

General and special provisions of a statute must stand together, if possible, the former as the general law, and the latter as the law of the particular class or case.

"All the words of a law must have effect, rather than that part should perish by construction."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 282, 283, 310; Dec. Dig. §§ 205, 206, 228.*]

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cottler, Judge.

Action by the United States against W. H. Aaron and another. From judgment for plaintiff, defendants appeal. Affirmed.

See, also, 183 Fed. 347.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John H. Burford, of Guthrie, Okl. (George B. Denison, of Vinita, Okl., and Frank B. Burford, of Guthrie, Okl., on the brief), for appellants.

Isaac D. Taylor, Asst. U. S. Atty., of Guthrie, Okl. (Homer N. Boardman, U. S. Atty., of Oklahoma City, Okl., on the brief).

Before SANBORN, Circuit Judge, and WILLIAM H. MUNGER and TRIEBER, District Judges.

SANBORN, Circuit Judge. The decree of which the appellants complain avoided two deeds made on March 5, 1909, by Howard Buffalo, the sole heir of Cena June, of certain lands allotted to her, prior to her decease, under the act for the division of the lands and funds of the Osage Indians, approved June 28, 1906, 34 Stat. 539, 541, 542, c. 3572, § 2, pars. 4 and 7, on the ground that these lands were then inalienable. Cena June and Howard Buffalo were full-blood Osage Indians, neither of whom had ever procured a certificate of competency. The question in the case is: Were the lands selected by a full-blood Osage Indian, divided by her into a homestead and surplus land and allotted to her before her decease, alienable by her full-blood Osage heir on March 5, 1909, when neither of them had obtained a certificate of competency? The answer is found in the act of June 28, 1906. The second section of that act provides that the lands of the Osage tribe shall be divided as follows: First, that each member of the tribe shall be permitted to select 160 acres of land as a first selection; third, that after each member has made his or her first selection he or she shall be permitted to make a second selection of another 160 acres of land; fourth, that after each member has made his second selection he or she shall be permitted to make a third selection of 160 acres, and that—

"each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land and shall be inalienable for twenty-five years, except as hereinafter provided."

[1, 2] Restrictions upon alienation of this character attach to and run with the land, and the inability to convey disqualifies the heir as well as the immediate allottee. *Goodrum v. Buffalo*, 162 Fed. 817, 823, 827, 89 C. C. A. 525, 531, 535; *Bowling v. United States*, 191 Fed. 19, 21, 111 C. C. A. 561, 563. But counsel for the appellants contend that no restriction upon alienation was ever imposed upon the lands here in question, because they were not selected by Cena June, nor did she designate her homestead therein and thus divide them into homestead lands and surplus lands, nor were they allotted to her before her decease, but they were selected and allotted to her heir after her decease, so that they constitute a different class of lands from either the homestead lands or the surplus lands, and are thus exempt from all restrictions upon their alienation under the decisions in *Mullen v. United States*, 224 U. S. 448, 452, 457, 32 Sup. Ct. 494, 56 L. Ed. 834, and *Hancock v. Mutual Trust Company*, 24

Okl. 391, 103 Pac. 566. A careful examination of the record, however, has satisfied that the defendants are conclusively estopped from making this claim. The complainant alleged in its bill that a described part of the lands here in controversy was allotted to Cena June "as the homestead of said Cena June, duly selected as and for such homestead," and that a described portion of them was allotted to the said Cena June "as her surplus lands." The agreed statement of facts, upon which the case was heard and the decree was founded, contained a stipulation that under the act of June 28, 1906, "Cena June, who was a duly enrolled member of the Osage tribe of Indians in Oklahoma, received as her homestead allotment the lands described and set forth as her homestead allotment in paragraph two of the amended bill," and " * * * that said Cena June was duly allotted as a member of said tribe as the lands set forth as her surplus selection in the amended bill herein." Consequently it is too late now for the appellants to claim that the selections, the designation of the homestead, and the allotments were not made until after the death of Cena June. The court below could not and did not hear or decide this case upon that theory, and this court may not. The fact that the deeds of these allotments were subsequently made to the heirs of Cena June after her decease is immaterial. When the allotments had been made, the equitable title, the right to the legal title, and the entire beneficial interest in these lands, subject to the restrictions upon alienation imposed upon them by the act of Congress at the time they were allotted, vested in the allottee, and the titles to these allotments under the subsequent deeds to her heirs related back to and took effect at the time of the allotments. There is therefore no escape from the conclusion that the titles of the heir to the homestead lands and the surplus lands of this allottee were subject to the respective restrictions imposed upon those classes of lands by the act of June 28, 1906. And this concludes the controversy about the surplus lands; for it is not claimed that the restriction imposed upon their alienation by the fourth paragraph of section 2 had been removed on March 5, 1909, when Buffalo made his deeds.

[3] It is insisted, however, that the homestead lands were relieved of the restriction upon them by the seventh paragraph of section 2 of the act and by the death of Cena June. The fourth paragraph of that section provides that the homestead lands "shall be inalienable and nontaxable until otherwise provided by act of Congress." The seventh paragraph, reads:

"That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee: * * * Provided, that upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: Provided, that the surplus lands shall be nontaxable for the period of three years from the

approval of this act, except when certificates of competency are issued, or in case of the death of the allottee, unless otherwise provided by Congress."

Neither Cena June nor Howard Buffalo, as has been stated, ever obtained a certificate of competency. The chief subject of the seventh paragraph of section 2 is the permissible alienation and taxation of the lands of that class of Osage allottees who obtain certificates of competency from the Secretary of the Interior. The subject of paragraph 4 is the permissible alienation and taxation of the lands of Osage Indians generally, regardless of the question whether they have certificates of competency or not. Under familiar rules these provisions of the two paragraphs must be read together, the former as the special law of the particular class of lands there treated, and the latter as the general law applicable to all classes of lands of the Osage Indians. Counsel for the appellants argue, however, that the exception in the paragraph which treats of the lands of that class of Osage Indians who obtain certificates of competency, paragraph 7, to the effect that the homestead lands shall remain inalienable for the period of 25 years, or during the lifetime of the allottee, so amends and modifies the provision of the fourth paragraph that all the lands of Osage Indians shall be inalienable and nontaxable until otherwise provided by act of Congress, that the lands of those allottees who obtain no certificates of competency are also rendered alienable at the end of 25 years, or upon the death of the respective allottees. In support of this position they cite the second proviso of paragraph 7, urge that it has the effect to render the surplus lands of Osage allottees who obtain no certificates of competency taxable upon the death of the respective allottees, and argue by analogy that the exception under consideration in the first part of paragraph 7 renders the homesteads of such allottees alienable upon their death, or at the end of 25 years. This argument is not persuasive. Paragraph 4 does not declare that the surplus lands shall be nontaxable, so that the second proviso of paragraph 7 does not treat of a subject treated in paragraph 4, and it presents no question of amendment or modification of or conflict with any of the provisions of that paragraph; while counsels' construction of the exception in the body of paragraph 7, that it renders the homestead lands of that class of Osage allottees who obtain no certificates of competency taxable and alienable at the end of 25 years, or on the death of the respective allottees, modifies the declaration of paragraph 4 that they "shall be inalienable and nontaxable until otherwise provided by act of Congress." Again, the construction that the exception in paragraph 7 renders all the homestead lands of Osage allottees alienable and taxable at the end of 25 years, or on the death of the respective allottees, renders the provision of the fourth paragraph, that they shall be nontaxable and inalienable until otherwise provided by act of Congress, ineffective and idle and flies in the face of the rule that "all the words of a law must have effect, rather than that part should perish by construction." And, finally, this interpretation violates the cardinal canon of construction that an exception or proviso in a statute affects and relates to the paragraph or clause in which it is found, or to which it is annexed, only, and not to the en-

tire statute, or to other sections, paragraphs, or clauses in it, unless a different intention and purpose on the part of the legislative body is clearly disclosed by the enactment. *Thomas v. Woods*, 173 Fed. 585, 595, 97 C. C. A. 535, 545, 26 L. R. A. (N. S.) 1180, 19 Ann. Cas. 1080; *Leader Printing Co. v. Nicholas*, 6 Okl. 302, 50 Pac. 1001, 1003; 26 Amer. & Eng. Encyc. of Law, page 679. No other intention or purpose is deducible from this act of Congress. The true construction of the exception in the seventh paragraph is that it is limited in its effect to the homesteads of the class of Osage allottees who obtain certificates of competency—the class that is the subject of the sentence in which the exception is found. This construction is rational; it harmonizes and gives effect to all the words and terms of the act, to the provision of the fourth paragraph that the homesteads of Osage allottees are nontaxable and inalienable until otherwise provided by Congress as the general law of the subject, and to the exception in paragraph 7 as the special law applicable to the homesteads of that class of Osage allottees who obtain certificates of competency. And as neither Cena June nor her heir, Howard Buffalo, were of this class, the restrictions upon the alienation of their homestead lands were not affected by that exception, those lands were inalienable on March 5, 1909, Buffalo's deed of them was void, and the decree below must be affirmed.

It is so ordered.

HOLTON v. JOB IRON & STEEL CO.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1913.)

No. 2,293.

BROKERS (§ 63*)—CONTRACT—RIGHT TO COMMISSION—"PUT THROUGH."

Defendant, a corporation, desiring to move its plant to West Virginia, plaintiff endeavored to procure a bonus to be given by West Virginia parties to induce the change, contemplating a conveyance of 15 acres of ground, the erection of a structural building of a specified size, with certain switches, and the payment of \$25,000 cash. Defendant agreed to pay plaintiff a specified commission "if this deal is put through." A tentative contract was drafted, but not executed, between persons representing the land, etc., to be contributed and defendant's officers. This contract provided for a transfer of the land and a payment of \$25,000 toward the cost of erecting a building and installing a plant estimated to cost \$180,000. The transaction was never completed. *Held*, that the term "put through" meant to carry or conduct to a successful termination; and plaintiff's engagement being not merely to obtain a party able and willing to enter into a given contract, but to bring the transaction about, and not having done so, he was not entitled to recover.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.*

For other definitions, see *Words and Phrases*, vol. 8, p. 7776.]

In Error to the Circuit Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Dan H. Holton against the Job Iron & Steel Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Plaintiff sued to recover a commission claimed to have been earned under a contract for procuring a bonus in aid of the building and installation of a manufacturing plant. Upon the trial verdict was directed for defendant. The propriety of this direction is the principal question presented here.

Defendant was engaged in operating, at Ashland, Ky., a plant for the manufacture of metal sheets. The defendant corporation (or, as it claims, its principal stockholders and owners) desired to locate a plant at Kenova, W. Va. The Kenova-Huntington Land Company owned considerable land at Kenova, and so was interested in promoting the location of manufacturing corporations there. Plaintiff undertook to open negotiations with the Land Company upon the subject of bonus. On July 6, 1909, Job, who was apparently acting as defendant's president, gave plaintiff a letter stating that, if the parties owning the land at Kenova "are willing to deed to us fifteen (15) acres of ground and erect thereon a steel structural building" of a certain size and suitable to the needs of the projected plant, also to put in necessary switches, "we will cause to be incorporated a company for profit," with a capitalization between certain maximum and minimum limits, and to employ a number of men, whose maximum and minimum was also stated. Four days later, and on July 10, 1909, Job wrote plaintiff as follows: "Referring to our several conversations regarding the proposed bonus you are endeavoring to secure for us at Kenova, W. Va., from the Huntington & Kenova Land Company and other parties, will say that *if this deal is put through* we will be pleased to pay you in cash five (5) per cent. of the cost of buildings erected for us, or five (5) per cent. of the cash given us, in lieu of buildings, and also give you in stock of the company that operates in Kenova, five (5) per cent. of the cost of the buildings given us, or such cash bonus as we may receive. We reserving, however, the privilege of paying this commission all in cash, if we so desire." (All italics wherever found in this statement are ours.) On July 23d Job wrote plaintiff that: "We have decided, after a conference with our stockholders, to close up with the Huntington & Kenova Land Company for the location and operation of a plant at Kenova, W. Va., under the following conditions: Twenty-five thousand dollars (\$25,000) in cash to be paid us *when a satisfactory bond is executed*. Fifteen (15) acres of land for a suitable site. Free switches to our site. An option on ten (10) additional acres at one dollar (\$1.00) per acre, said ground to be held by the land company for us until our plant is put in operation."

The next day the Land Company wrote defendant, declining the proposition contained in the letter to plaintiff last referred to, but proposing to give \$20,000 in cash "to be paid along during the construction of your buildings," to give 15 acres of land for a suitable site, and also land equal to 32 building lots of a certain size and in a certain location, together with free switches from a belt line to the proposed site; the donations of land and money to be made upon condition that defendant "*enter into a satisfactory contract with the Land Company* along the lines discussed when your representatives were here as to the installation of your plant, the number of employes, the length of time which the plant should be operated and *all further agreements made by your representatives which induced the donations above given.*" August 4th the Land Company advised defendant by letter that the former's board of directors had appointed a committee with power to close negotiations for the location of the plant, the Land Company to give a cash bonus of \$25,000, together with the site, building lots, and free switching provisions above referred to, "*provided a satisfactory contract is entered into by you with this company. The selection of the site for the plant and the lots and the terms of the contract to be left to the committee appointed and your representatives.*" At some date (probably between August 4th and August 6th) the acting president, the secretary-treasurer, and the superintendent of defendant met with the authorized representatives of the Land Company. At this afternoon meeting a draft of a proposed contract between defendant and the Land Company was prepared by the latter's attorney.

Plaintiff's evidence tended to show that the representatives of both parties were present during the actual dictation of the contract to a stenographer, and that as questions from time to time arose they were discussed and the dictation made to cover the agreements from time to time reached, and that the contract as dictated embodied the agreements and concessions of the parties as then and there made; that the contract was to be written up, and that in the evening the parties "were to come back and go over it; it was agreed upon, and they were to come back and sign it"; that in the evening all the parties present at the afternoon meeting appeared, except defendant's secretary-treasurer, who had been called home; that the parties present went over the contract and agreed to it; that the two other representatives of defendant agreed that the secretary would return the next day with the corporate seal and that the contract would then be executed. The parties claimed to represent defendant did not appear the next day, and the draft of contract was never executed, and nothing further was done in the way of carrying out the proposed deal.

Upon the trial Job assigned, as reasons why the contract was not signed at the time: (a) That it was to have been the individual contract of four principal owners of the corporation, and not that of the corporation itself; (b) that the contract was to be submitted to the attorney of those parties; and (c) that the freight rates at Kenova were to be made the same as at Ashland. The secretary testified that the provisions for forfeitures and for bond (at another place in the record printed as "bonus") were unsatisfactory, saying: "No sane man would sign such a contract. It could not be complied with." Plaintiff testified that Job told him on August 6th that he expected to carry out the contract, but a little later announced that it could not be executed because of inability to finance the enterprise, especially (it would appear) in taking care of loans at the Ashland bank, which Job thought would be called if the location at Kenova was made. Such, in substance, we construe to have been the reason given by Job to the Land Company on August 13th for the Iron Company's declination of the Land Company's "proposition." All the correspondence and negotiations referred to were had in 1909.

The draft of proposed contract provided that the Land Company should (a) give \$25,000 towards the cost of erecting the building and installing the plant (estimated to cost \$180,000), to be paid from time to time as the work of erection and installation progressed and in the same proportion that the remaining \$155,000 should be paid by defendant; (b) convey 15 acres of land and 32 lots described; (c) procure certain switching privileges—the lots and the 15 acres to be conveyed only on defendant's furnishing bond with a good and solvent surety company as surety, *to be approved by the Land Company*, in the penalty of \$36,000, conditioned for the performance "of every condition of this contract," and to remain in force "until each and every condition to be performed by the party of the second part has been fully and completely performed." The draft of contract provided that defendant should erect and install a building and plant "estimated to cost not less than \$180,000," the building to be not less than 680 feet long by 130 feet wide; that the 15 acres should be used only for manufacturing purposes; that the operation of the plant should begin by April 1, 1910; that operation should continue for 12 months thereafter (with not less than a certain number of men "regularly employed for a period of 12 months"), except as interrupted by strikes or other named contingencies, the operation to cover the period of such interruptions in addition to the 12 months; and that in case of defendant's failure to carry out all of its proposed agreements it should, at the option of the Land Company, pay to the latter \$300 per acre for the 15 acres and \$200 for each of the 32 lots, plus the \$25,000 cash bonus, with interest thereon, "as liquidated damages for and in lieu of its failure to so fully and completely carry out the premises and conditions of this contract."

Williams, Scott & Lovett, of Huntington, W. Va., and Hager & Stewart, of Ashland, Ky., for plaintiff in error.

S. S. Willis, of Ashland, Ky., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge (after stating the facts as above). We pass by all questions except the single one whether, as matter of law, the evidence tended to show that plaintiff had "put through" a deal between defendant and the Land Company within the meaning of the contract, assuming, for the purposes of this opinion (but not deciding), that the defendant corporation was, in the negotiation of the contract, effectively represented by Job and his associates.

Plaintiff relies upon the letter of July 10th as containing the contract sued upon. The promise contained in that letter is to pay the commission only in case the "deal is put through." The District Judge was of opinion that, as matter of law, the required condition had not been performed. We think this the correct view. The Century Dictionary defines the term "put through" as "to carry or conduct to a successful termination." The question thus is: Did the evidence tend to show that the proposed deal was carried to a successful termination? An affirmative answer to this question requires, first, the existence of a "deal" or contract between defendant and the Land Company; and, second, the carrying into effect of such deal.

It is readily apparent that defendant did not promise to pay plaintiff a commission for merely obtaining a party able and willing to enter into a given contract. The agreement does not so provide. On the contrary, it provides only for payment if the deal is "put through." The rule applicable to ordinary cases of brokerage contract to furnish a purchaser (as recognized in cases such as *Kock v. Emmerling*, 22 How. 69, 16 L. Ed. 292) has thus no application. Moreover, not only does the contract relied upon fail to state the terms of a deal which would be satisfactory to defendant, but reference to the letter of July 6th (which it is claimed formed the basis for the alleged contract of July 10th) shows that the deal then in mind was never carried out, for that contemplated deal embraced the entire furnishing of a building, while the performance relied upon, so far as the building is concerned, embraces only a contribution of \$25,000 toward the erection of a building and installation of a plant, estimated to cost \$180,000. It is also evident that, until the parties met at the time the draft of contract was prepared, the details of a deal between them had never been agreed upon, for there remained open for negotiation and agreement the making of a "satisfactory contract," the terms of which (and of the proposed bond), as well (it would appear) as the selection of the acreage site and the lots, were still left "to the committee appointed and your representatives." Nor was there in existence any prior contract between plaintiff and defendant for the payment of commission on the procuring, or even on the putting through, of a deal embodying all the terms contained in such draft of contract. It follows that no generosity of proposal made by the Land Company would entitle plaintiff to a commission, unless, at least, such proposal ripened into an actually accomplished deal. *Hale v. Kumler*, 85 Fed. 161, 29 C. C. A. 67.

The question then is: Did what took place in connection with the preparation of draft of contract amount to a "putting through" of

a deal? It seems clear it did not. We think the District Judge correctly interpreted the contract as meaning:

"If you make a deal between us and the Kenova-Huntington Land Company, and the deal is put through, and the buildings are erected, or the cash given, then we will pay you this commission."

It would seem true that if the parties had executed the contract as drafted, and defendant had thereafter, to prevent its performance, refused to carry it out (whether in respect to giving of bond, or otherwise), plaintiff would be entitled to commission by virtue of an implied agreement not to prevent performance. But the contract was never executed, and we think the "deal" was never effectively made. It cannot be maintained that the effect of the approval by defendant's representatives of the various terms of the proposed contract, as the same was being dictated, was tantamount, in legal effect, to an actual execution of the contract; for the parties plainly understood and intended that the contract was not effective until actually executed and delivered, and such was the legal situation. And until so executed and delivered we think it was subject to withdrawal by either party. Surely the expression of approval of the completed draft by two of defendant's representatives, in the absence of the third, in connection with the postponement of the time of execution, did not amount to a contract. Moreover, the contract as drafted was, at the most, merely executory. No bonus was to be paid or conveyance made under it until the execution by defendant of a bond for \$36,000, with surety approved by the Land Company, the actual form and language of which bond were not agreed upon, except in general terms.

Still further, the bonus was not to be paid on the signing of the contract, or even on the execution of the bond, but only as the erection and installation progressed, and in connection with defendant's contributions toward the same. Were it to be conceded, for the purposes of argument, that an arbitrary and capricious refusal on the part of the defendant to execute the draft of contract would entitle plaintiff to commission, such concession would be of no value, for the evidence does not indicate that defendant's refusal (so far as concerns the objection of financial inability) was arbitrary or capricious. On the other hand, there is no attempt to show the falsity of the representations of financial inability; and it might well be that the requirement of surety bond in the amount provided, to continue in effect at least until April 1, 1911 (a period of one year and eight months), and perhaps longer, securing not only the repayment of the bonus paid, but a substantial amount in addition (on account of the price of the site and lots), as liquidated damages for defendant's failure to carry out the conditions of the contract (including the practically continuous operation of the plant), might well prove so onerous as to be impracticable, and even prohibitive.

It results from these views that the judgment of the Circuit Court should be affirmed, with costs.

THE SARATOGA.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 160.

1. MARITIME LIENS (§ 1*)—EXISTENCE—STATUTES.

Prior to Act Cong. June 23, 1910, c. 373, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1191), giving a maritime lien on domestic vessels for repairs, and superseding all state laws on the subject, there was no lien in the United States for repairs made or supplies furnished to domestic vessels, unless given by a statute of the state where the repairs were made and the supplies furnished.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. MARITIME LIENS (§ 17*)—REPAIRS—STATUTES.

Act Cong. June 23, 1910, c. 373, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1191), giving a maritime lien for repairs furnished to domestic vessels, does not apply to a claim for repairs furnished in July, 1907.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 22; Dec. Dig. § 17.*]

3. MARITIME LIENS (§ 28*)—REPAIRS—AUTHORITY OF CAPTAIN.

The owner of a domestic vessel could not by agreement create a maritime lien in favor of libellant for repairs furnished to the ship, good as against subsequent owners.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 46, 47; Dec. Dig. § 28.*]

4. MARITIME LIENS (§ 17*)—REPAIRS—STATE STATUTES—CONSTRUCTION.

Code Va. 1904, § 2963, provides that a person having a claim against the master or owner of a steamboat found within the jurisdiction of the state for materials or supplies may in a pending suit sue out an attachment against the vessel, etc. *Held* not to create a maritime lien for repairs furnished on vessels within the state, so as to create a jus in re and authorize a proceeding in rem against a vessel, but to confer a mere right of attachment on vessels found within the jurisdiction of the state in an action for debt.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 22; Dec. Dig. § 17.*]

Maritime liens created by state laws, see note to *The Electron*, 21 C. C. A. 21.]

Appeal from the District Court of the United States for the Southern District of New York.

Libel in admiralty by the Newport News Shipbuilding & Dry Dock Company against the *Saratoga* to enforce an alleged lien for repairs. From a judgment for libellant, the New York, Albany & Troy Transportation Company, claimant, appeals. Reversed.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Roscoe H. Hupper, both of New York City, of counsel), for appellant.

Carpenter & Park, of New York City (Samuel Park, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. March 24, 1911, the Newport News Shipbuilding & Dry Dock Company filed this libel in the United States

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

District Court for the Southern District of New York against the steamer Saratoga. The libel alleged that July 8, 1907, one Hudson, a resident of Norfolk, Va., and owner of the steamer, employed the libellant to do repairs on her, the vessel being pledged as security for payment; that repairs costing \$19,914.86 were completed September 12th, and there remained due and unpaid at the time of the filing of the libel a balance of \$4,500, with interest. The only evidence of an agreement that the repairs were to be made upon the credit of the vessel was the following written order, signed by Hudson, supplemented by his testimony that he knew it to be the custom at all shipyards to look to the vessel and owners:

"Newport News, Va., July 8, '07.

"Newport News Shipbuilding & Dry Dock Co.:

"Please furnish labor and material for performing the following work on Str. Saratoga for account of vessel and owners: Install boilers, repair engine, paddle wheels, and get machinery in shape to run boat as directed by Capt. Hudson. Do by day's work. Rush work. Geo. P. Hudson."

November 1, 1907, Hudson sold the steamer to the New York & Albany Transportation Company. August 3, 1909, that company having gone into the hands of a receiver, she was sold at public auction to the Manhattan Navigation Company, which sale having been set aside, she was November 25, 1910, sold again to one Fentriss, who on December 9, 1910, sold her to the claimant.

[1-4] It was settled in the case of *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609, that there is in this country no lien for repairs made or supplies furnished to domestic vessels, unless it be given by a statute of the state where the repairs are made or the supplies are furnished. This continued to be the law until Congress enacted Act June 23, 1910, c. 373, 36 Stat. at L. 604 (U. S. Comp. St. Supp. 1911, p. 1191), giving such a lien and superseding all state laws on the subject. This act does not apply to the claim sued on, which arose in 1907. Obviously Hudson could not by agreement create a maritime lien in favor of the libellant good against subsequent owners of the vessel. Therefore the libellant could not recover on the claim as stated in the libel. The answer, however, set up that the repairs were made on the personal credit of Hudson and that the libellant was barred by laches from setting up any lien it may have had. The parties subsequently stipulated that section 2963 of the Code of Virginia should be considered as evidence in the case. It reads as follows:

Section 2963 of the Code of Virginia:

"If any person has any claim against the master or owner of any steamboat or other vessel, raft, or river craft, or against any steamboat or other vessel, raft, or river craft, found within the jurisdiction of the state, for materials or supplies furnished or provided, or for work done for, in, or upon the same, or for wharfage, salvage, pilotage, or for any contract for transportation of, or any injury done to, any person or property by such steamboat or other vessel, raft, or river craft, or by any person having charge of her, or in her employment, such person shall have a lien upon such steamboat or other vessel, raft, or river craft, for such materials or supplies furnished, work done, or services rendered, wharfage, salvage, pilotage, and for such contract or injury as aforesaid; and may, in a pending suit, sue out of the clerk's office of the circuit court of the county, or in the circuit or corporation court of the corporation in which such steamboat or other vessel, raft, or river craft,

may be found, an attachment against such steamboat or other vessel, raft, or river craft, with all her tackle, apparel, furniture, and appurtenances, or against the estate of such master or owner. Any attachment may be sued out under this section for a cause of action that may have arisen without the jurisdiction of this state, as well as within it, if the steamboat or other vessel, raft, or river craft, be within the jurisdiction of this state at the time the attachment is sued out or executed."

Thus we are required to determine whether the law of Virginia did impose a lien upon the steamer. Although the statute does state that there shall be a lien upon every vessel for materials or supplies furnished and work done, the question is whether a *jus in re*—that is, a property right in the vessel continuing through all changes in ownership—is intended, or only a lien resulting from judicial seizure. We think the latter is meant. The act does not authorize any proceeding in *rem* against the vessel. It provides that in a *pending suit* an attachment may issue against the vessel or the estate of the master or owner. This may issue even when the materials have been supplied and the work done without the state. No distinction is made between vessels owned in Virginia and those owned in other states. Surely the state of Virginia cannot have intended to create a lien upon domestic vessels of other states for materials supplied or work done there. Moreover, the lien is given and the right to attach conferred upon vessels "found within the jurisdiction of the state." If a *jus in re* had been intended, it could have been enforced in the admiralty wherever the vessel was found. It is also noteworthy that the section is contained in chapter 141, entitled "Of Attachment and of Bail." Section 2971 of that chapter provides that the plaintiff shall have a lien "from the time of the levying of such attachment." This seems to plainly imply that he shall not have it before. All of which goes, we think, to show that the statute only provides a provisional remedy or *mesne process* quite familiar at common law.

We have not overlooked the fact that Judge Hughes has come to a contrary conclusion as the result of his opinion that the act gives a right against the vessel in *rem*. *Stewart v. Potomac Ferry Co.* (C. C.) 12 Fed. 296; *Aitcheson v. Endless Dredge* (D. C.) 40 Fed. 253. We think these decisions inconsistent with *Garcia y Leon v. Galceran*, 11 Wall. 185, 20 L. Ed. 74. In it the law of Louisiana giving a lien or privilege for seamen's wages was under consideration. The seamen proceeded at common law against the owner in *personam* and by virtue of the privilege seized the vessel. From a judgment in their favor the owner took a writ of error to the Supreme Court, contending that the action was one in *rem*, and therefore not within the jurisdiction of the state court. *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397; *The Hine v. Trevor*, 4 Wall. 555, 18 L. Ed. 451. The judgment, however, was affirmed; Mr. Justice Clifford saying at pages 188, 189 of 11 Wall. (20 L. Ed. 74):

"Services, as mariners on board the schooner *Gallego*, were rendered by each of the appellees in these cases, and their claims for wages remaining unpaid, on the 8th of August, 1868, they severally brought suit in *personam* against Joseph Maristany, the sole owner of the schooner, to recover the respective amounts due to them as wages for their services as such mariners.

"Claims of this kind create a lien upon the vessel under the laws of that

state quite similar to the lien which arises in such cases under the maritime law. They accordingly applied to the court where the suits were returnable for writs of sequestration, and the same, having been granted and placed in the hands of the sheriff for service, were levied upon the schooner as a security to respond to the judgments which the plaintiffs in the respective suits might recover against the owner of the vessel, as the defendant in the several suits.

"Such a writ when duly issued and served in such a case has substantially the same effect in the practice of the courts of that state as an attachment on mesne process in jurisdictions where a creditor is authorized to employ such a process to create a lien upon the property of his debtor as a security to respond to his judgment. Neither the writ of sequestration nor the process of attachment is a proceeding in rem, as known and practiced in the admiralty, nor do they bear any analogy whatever to such a proceeding, as the suit in all such cases is a suit against the owner of the property, and not against the property as an offending thing, as in case where the libel is in rem in the admiralty court to enforce a maritime lien in the property."

The decree is reversed, with costs.

PRIDDY v. THOMPSON.

(Circuit Court of Appeals, Eighth Circuit. April 25, 1913.)

No. 3,830.

(*Syllabus by the Court.*)

1. INDIANS (§ 15*)—ALLOTMENT TO MINOR—RESTRICTIONS ON ALIENATION—REMOVAL.

The restrictions on the alienation of their allotments by Creek minors imposed by the Creek agreements and acts of Congress were not subject to removal or modification, either in duration or effect, in March, 1908, by decrees of the district courts of Oklahoma, pursuant to section 4955a, Snyder's Comp. Laws of Oklahoma, 1909, that such minors might transact general or specific business, or make general or specific contracts or conveyances with the same effect as if they were of age. That law of the state of Oklahoma was inapplicable to such restrictions and to the rights of such minors and of their grantees.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

2. STATUTES (§ 162*)—CONSTRUCTION—GENERAL AND SPECIAL.

Specific legislation upon a particular subject is not affected by a general law upon the same subject unless it clearly appears that the provisions of the two laws are so repugnant that the legislators must have intended by the later to modify or repeal the earlier legislation. The special act and the general law must stand together, the one as the law of the particular subject and the other as the general law of the land.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 235-237; Dec. Dig. § 162.*]

3. MINES AND MINERALS (§ 81*)—EJECTMENT (§ 9*)—RIGHT TO MAINTAIN—OIL AND GAS LEASE.

A grantee who has never been in possession, under a lease of the oil and gas in a specific tract of land, of the right to prospect for, extract, and appropriate them and of the right to occupy and use so much of the surface of the land only as may be necessary to find and remove the oil

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and gas, may not maintain ejectment thereon, because the lease grants no corporeal interest or hereditament.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 211; Dec. Dig. § 81; * Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.*]

4. MINES AND MINERALS (§ 73*)—OIL AND GAS LEASE—OWNERSHIP—NATURE OF GRANT.

Oil and gas in the earth are, unlike ore and coal, fugacious and incapable of ownership distinct from the land, and a grant of the oil and gas in a tract of land is a grant of that part of the oil and gas therein which the grantee may find and capture, no title vests until the oil or gas is reduced to possession by extracting the same from the earth, and hence the lease is a grant of an incorporeal hereditament.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 201, 210; Dec. Dig. § 73.*]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action by Emerson Priddy against W. A. Thompson. Judgment for defendant, and plaintiff brings error. Affirmed.

Haskell B. Talley, of Tulsa, Okl., for plaintiff in error.

C. L. Thomas and George S. Ramsey, both of Muskogee, Okl., for defendant in error.

Before SANBORN, Circuit Judge, and Wm. H. MUNGER and TRIEBER, District Judges.

SANBORN, Circuit Judge. This writ presents two questions: Had a district court of the state of Oklahoma on March 2, 1908, jurisdiction to avoid, or to change in effect or duration, the restriction upon the alienation of the allotted homestead of a Creek minor, by means of a decree pursuant to section 4955a of Snyder's Compiled Laws of Oklahoma 1909, that the rights of majority concerning contracts and the leasing of his allotment were conferred upon him; and may a lessee of the oil and gas deposits of a certain tract of land, of the right to prospect for, extract, and use them, and of the right to occupy so much only of the surface of the land as may be reasonably necessary to carry on the work of finding, extracting and removing the oil and natural gas therefrom, who has never been in possession of the land, sustain an action of ejectment therefor against a defendant in possession of the property? The court below answered both these questions in the negative and dismissed the action of ejectment which had been brought by the plaintiff, an assignee of an oil and gas lease of his homestead allotment made by Fred Saulsbury, a Creek freedman, on March 2, 1908, when he was only 19 years of age.

[1] There was a statute of the territory of Oklahoma enacted in 1895 (Laws 1895, c. 37, art. 2) to the effect that the district courts of its counties might, by decree, empower any resident of the territory under the age of 21 years to transact business in general and to transact any business specified with the same effect as if the business were done by a person above the age of 21 years. Snyder's Compiled Laws of Oklahoma, 1909, § 4955a. Saulsbury was a citizen of the Indian Territory prior to November 16, 1907, when that territory became a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

part of the state of Oklahoma upon its admission to the Union. The enabling act of that state approved June 16, 1906 (34 Stat. c. 3335, § 13, p. 275), and section 2 of the schedule to the Constitution of Oklahoma (Snyder's Laws of Oklahoma 1909, p. 137), provided that all laws in force in the territory of Oklahoma should be extended, as far as applicable, over the state of Oklahoma upon its admission into the Union, and therefore over what was theretofore the Indian Territory. Saulsbury made the lease under which the plaintiff claims on March 2, 1908, by authority of a decree of one of the district courts of the state of Oklahoma rendered under the law of 1895, to the effect that although he was only 19 years of age he was empowered to make it with the same effect as if it were made by a person more than 21 years of age. The defendant contends that this law of 1895 was inapplicable to the restriction upon the alienation of the homestead allotment of this minor which was imposed by the United States and the Creek Nation, that the district court of Oklahoma was without jurisdiction to annul that restriction, or to diminish the term of its duration, and that its decree and the lease thereunder were ineffective, while the plaintiff insists that the Oklahoma law was extended over the former Indian Territory on November 16, 1907, and thereafter applied to and governed all minors in the state of Oklahoma and all their property rights including the restrictions upon the alienation of their allotments.

Saulsbury derived the title to his homestead from the United States and the Creek Nation. They had the right and the power to grant or to withhold it from him and, a fortiori, to fix the conditions and limitations on which he should hold and use it. They provided, by section 4 of the original Creek agreement approved March 1, 1901, that no allotment of any minor should be sold during his minority (31 Stat. c. 676, § 4, p. 863), and by the supplemental Creek agreement approved June 30, 1902 (32 Stat. c. 1323, § 16, p. 503), that the homestead allotment of each Creek citizen should remain nontaxable, inalienable, and free from any incumbrance whatever for 21 years from the date of the deed therefor. By the Act of May 2, 1890, 26 Stat. c. 182, § 31, p. 94, the laws contained in chapter 73 of Mansfield's Digest of the Laws of Arkansas, so far as they were not locally inapplicable or in conflict with any law of Congress, had been put in force in the Indian Territory, and section 3464 of that chapter provided that males under 21 years and females under 18 years of age should be considered minors. So that Saulsbury was a minor when these restrictions upon the alienation of his homestead allotment were imposed, and he continued to be a minor and his homestead continued to be subject to prohibitive restrictions against its alienation, or incumbrance by lease, or otherwise, on March 2, 1908, unless his allotment was relieved from those restrictions by the decree of the district court under the Oklahoma law of 1895. This conclusion has not been reached without consideration of and reflection upon the contention of counsel for the plaintiff that the decree merely fixed the status or domestic social condition of Saulsbury. But the legal and actual effect of the decree, if it was valid, was to shorten the term of restriction upon the alienation or incumbrance of this homestead fixed

by the United States and the Creek Nation two years, for it permitted him to lease his allotment when he was 19 years of age, although by the Creek agreements and congressional restrictions he was prohibited from so doing until he was 21 years of age. Was there then no method by which a minor allottee could avail himself of the benefit of a lease of his allotment? The answer is that the United States had prescribed a way and had thereby excluded all others. There was a law in Arkansas which had been in force in that state since 1869, found in section 1362 of Mansfield's Digest of the Laws of Arkansas, from which the law of Oklahoma of 1895 appears to have been copied, which authorized the circuit courts of Arkansas to empower minors to transact business as if they were of age. Congress extended many of the general laws of Arkansas over the Indian Territory, but it declined to put this law in force in that territory. On the other hand, it granted to the district courts of the Indian Territory the jurisdiction commonly given to probate courts, full, complete, and exclusive jurisdiction of the leasing of the allotments of minors and incompetents (Act of April 26, 1906, c. 1876, 34 Stat. 137, 145, 148, § 20), of the guardianship of minors and incompetents, and of the administration of estates of decedents, whether Indians, freedmen, or otherwise. Act of April 28, 1904, 33 Stat. 573, c. 1824, § 2; *Morrison v. Burnette*, 154 Fed. 617, 621, 83 C. C. A. 391, 395.

This, therefore, was the situation when the state of Oklahoma was admitted into the Union and the Indian Territory became a part of it. The United States had prohibited the alienation of their homestead allotments by Creek minors except by means of the probate jurisdiction over them, their allotments, and the leases thereof, which it had vested exclusively in the district courts in the Indian Territory sitting as probate courts, and it had carefully withheld from those and all other courts the power to abolish, diminish, or modify by adjudging that these minors might lease or sell their allotments as though they were adults, the restrictions upon the alienation of their lands which it had imposed. The jurisdiction over the leases and allotments of these minors, and over their guardianship, together with all the other probate jurisdiction of the district courts of the Indian Territory, was transferred to and vested, not in the district courts of the state of Oklahoma, but in the county or probate courts of that state when it was admitted into the Union on November 16, 1907. 34 Stat. 277, § 19; Act March 4, 1907, c. 2911, 34 Stat. 1287, § 3; Constitution of Oklahoma, art. 7, § 12; *Snyder's Comp. Laws of Oklahoma* 1909, p. 88; Schedule of the Constitution of Oklahoma, § 23; *Snyder's Comp. Laws of Oklahoma* 1909, p. 140; *Davis v. Caruthers*, 22 Okl. 323, 97 Pac. 581, 583; *Eaves v. Mullen*, 25 Okl. 679, 107 Pac. 433, 436; *Burdett v. Burdett*, 26 Okl. 416, 109 Pac. 922, 924, 925, 35 L. R. A. (N. S.) 964. In addition to the watchful preservation of its control over these allotments which the legislation which has been recited evinces, the United States had expressly reserved its power over them and the alienation and incumbrance of them by the proviso to the first section of the enabling act of Oklahoma:

"That nothing contained in the said Constitution (of Oklahoma) shall be construed to limit or impair the rights of persons or property pertaining to

the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed." 34 Stat. 267.

The United States then, at the admission of the state of Oklahoma, as we have seen, had lawfully restricted the alienation by Creek minors of their homestead allotments until they came of age, except that by an order of the proper district court in the Indian Territory sitting as a probate court in regular proceedings therefor, such minor might be authorized to lease his property. If in this state of the legislation any state or territory had enacted a law adding the exception that such allotments might be leased by the minor upon the order of one of the trial courts of that state or territory, to the effect that such minor might act, contract, or convey as though he were of age, that law would have been in conflict with the acts of Congress and void, because the United States by excluding the law of Arkansas to that effect from the general laws of that state which it put in force in the Indian Territory rendered that law and any other territorial or state law of like character inapplicable to the rights of Creek minors in their homestead allotments, and to the restrictions upon the alienation of them. And by the same mark, and also because these restrictions, their nature and duration, are within the exclusive jurisdiction and power of the United States, and may not be destroyed or modified without its clear assent, the law of Oklahoma of 1895 of the same character, set forth in section 4955a and those which follow, of the Compiled Laws of Oklahoma 1909, was inapplicable to these rights and restrictions at and after the admission of that state to the Union, and the extension of all the laws of Oklahoma, so far as applicable over the Indian Territory by the Oklahoma enabling act (34 Stat. 275), and section 2 of the Schedule to the Oklahoma Constitution (Laws 1909, p. 137), failed to subject them to it.

[2] The law of 1895 is a general law applicable to minors in the state of Oklahoma who are not governed by special legislation. The Creek agreements and the acts of Congress constitute special legislation governing the restrictions imposed by the United States upon the alienation of the allotments of minor allottees, which excludes the general law from application thereto under the familiar rule that specific legislation upon a particular subject is not affected by a general law upon the same subject, unless it clearly appears that the provisions of the two laws are so repugnant that the legislators must have intended by the later to modify or repeal the earlier act. Such does not appear to have been the intention of the legislators in this case, and under such circumstances the special legislation and the general law must stand together; the one as the law of the particular subject, and the other as the general law of the land. *Christie-Street Commission Co. v. United States*, 136 Fed. 326, 333, 69 C. C. A. 464, 471; *Gowen v. Harley*, 56 Fed. 973, 978, 979, 6 C. C. A. 190, 196; *State v. Stoll*, 17 Wall. 425, 436, 21 L. Ed. 650; *Board of Com'rs of Seward County v. Aetna Life Ins. Co.*, 32 C. C. A. 585, 590, 90 Fed.

222, 227; *The Distilled Spirits*, 11 Wall. 356, 365, 20 L. Ed. 167; *Henderson's Tobacco*, 11 Wall. 652, 658, 20 L. Ed. 235.

About three months after this lease was made Congress passed the Act of May 27, 1908, c. 199, 35 Stat. 312. That act and the construction and legal effect given to it by this court and by the Supreme Court of Oklahoma are consistent with the conclusion which has been reached in this case. *Truskett v. Closser*, 198 Fed. 835, 839, 840, 117 C. C. A. 477; *Jefferson v. Winkler*, 26 Okl. 653, 110 Pac. 755, 758; *Wilson v. Morton*, 29 Okl. 745, 119 Pac. 213. That act was not passed, as counsel for the plaintiff contends, because prior to its passage the Oklahoma law of 1895 was applicable to the restrictions upon the alienation of the allotments of Creek minors and for the purpose of depriving it of further application. The chief object of its enactment was to remove certain restrictions upon the alienation of the allotments of some of the members of the Five Civilized Tribes, and if any purpose regarding the law of 1895 ever entered the minds of the legislators who passed this act of 1908, that purpose was to make it clear beyond doubt that the law of 1895 was inapplicable to the restrictions imposed by Congress upon the allotments of members of those tribes who were minors. The court below committed no error in its negative answer to the first question in this case.

[3] Moreover, if the lease had been valid the plaintiff could not have maintained ejectment upon it, because no one under it had ever taken possession of any of the land described in it, or found or reduced to possession any of the oil or gas in the land, and the lease therefore granted no corporeal hereditament. Title in the plaintiff to a corporeal interest is essential to the maintenance of ejectment by one who has never been in possession.

[4] Oil and gas in the earth, unlike ore and coal, are fugacious and are not susceptible to ownership distinct from the soil. A grant by lease or deed of the oil or gas in a specified tract of land and of the right to occupy and use so much of the surface of the land only as may be necessary to prospect for and remove the gas and oil is not a grant of the oil and gas in the land, but of such a part thereof only as the grantee finds and reduces to possession. It vests no title to any oil or gas which he does not extract and reduce to possession, and hence no title to any corporeal right or interest. It is therefore insufficient to maintain ejectment by a grantee who has never taken possession of the land or prospected for or found any oil or gas under it. *Kelly v. Keys*, 213 Pa. 295, 62 Atl. 911, 912, 110 Am. St. Rep. 547; *Kolachny v. Galbreath*, 26 Okl. 772, 110 Pac. 902, 906, 38 L. R. A. (N. S.) 451; *Dark v. Johnston*, 55 Pa. 164, 168, 93 Am. Dec. 732; *Gillespie v. Fulton Oil & G. Co.*, 236 Ill. 188, 86 N. E. 219; *Funk v. Haldeman*, 53 Pa. 229; *Hicks v. American Natural Gas Co.*, 207 Pa. 570, 57 Atl. 55, 65 L. R. A. 209.

There was no error in the trial of this case, and the judgment below is affirmed.

IOWA CENT. RY. CO. v. HAMPTON ELECTRIC LIGHT & POWER CO.†

(Circuit Court of Appeals, Eighth Circuit. April 21, 1913.)

No. 3,796.

1. RAILROADS (§ 484*)—COURTS (§ 366*)—FIRES—ACTIONS—PRESUMPTION.

The construction given to Code Iowa 1897, § 2056, providing that a railroad company "shall be liable for all damages sustained by any person on account of loss of or injury to his property, occasioned by fire set out or caused by the operation of such railway," by the state Supreme Court, that it creates a presumption of negligence from proof that a fire was caused in the operation of the railroad, which has the continuing force of affirmative evidence, is binding on the federal courts; and where evidence in rebuttal is offered by a defendant, the question is one for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740-1746; Dec. Dig. § 484;* Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

Liabilities of railroads for injuries by fire as affected by management of locomotives, see note to Woodward v. Chicago, M. & St. P. Ry. Co., 75 C. C. A. 598.]

2. EVIDENCE (§ 77*)—PRESUMPTIONS—FAILURE TO CALL WITNESS.

The failure of a party to call as a witness an employé, who was in a position to have some knowledge with respect to the facts in issue, does not justify an inference by the jury that his testimony would have been prejudicial to his employer, where he was also accessible to the adverse party, which did not call him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97; Dec. Dig. § 77.*]

In Error to the District Court of the United States for the Northern District of Iowa; Henry Thomas Reed, Judge.

Action at law by the Hampton Electric Light & Power Company against the Iowa Central Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. H. Bremner, of Minneapolis, Minn. (F. M. Miner, of Minneapolis, Minn., B. J. Price, of Ft. Dodge, Iowa, and George W. Seevers, of Minneapolis, Minn., on the brief), for plaintiff in error.

John M. Hemingway, of Hampton, Iowa, for defendant in error.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge. The Power Company obtained a judgment against the Railway Company for the destruction of its premises by fire negligently set out by a locomotive engine. The Railway Company contends here that there was no substantial proof that it caused the fire, or of its negligence, and also that the trial court erred in its rulings in respect of a presumption from the nonproduction of a witness.

We think there was sufficient evidence of the origin of the fire for the consideration of the jury. Witnesses testified to the distance between the railroad track and the building, the direction and violence of the wind, the passage of the engine, the discovery a few minutes afterwards of a fire in the roof at a point where sparks might naturally have been blown, and where it would less likely have been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 204 F.—61

† Rehearing denied June 30, 1913.

caused by fire within the building, or by defective electric wires. There was considerable testimony upon these subjects, and the verdict of the jury was in accord with the reasonable inferences.

[1] To establish negligence the Power Company relied on an Iowa statute which provides that:

"Any corporation operating a railway shall be liable for all damages sustained by any person on account of loss of or injury to his property occasioned by fire set out or caused by the operation of such railway." Section 2056, Code Iowa 1897.

This statute might well have been construed to impose an absolute liability, irrespective of negligence. As so construed, it would have been constitutional. *St. Louis, etc., R. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611. But the Supreme Court of Iowa gave it an evidential effect in *Stewart v. Railway*, 136 Iowa, 182, 113 N. W. 764. It was there held the statute means that upon proof of the origin of the fire a presumption arises establishing *prima facie* the fact of negligence; if, then, the defendant introduces no evidence, the presumption will warrant judgment; but, if defendant introduces evidence, the presumption nevertheless continues, "having all the force of substantive evidence of negligence, until overcome by the weight of the affirmative evidence introduced in proof of due care." See, also, *Greenfield v. Railway*, 83 Iowa, 270, 49 N. W. 95, and *Hemmi v. Railway*, 102 Iowa, 25, 70 N. W. 746.

It is contended that this is a rule of general law, and therefore not binding on the courts of the United States. We do not think so. It is the local construction of a state statute (*Jones v. Brim*, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677), and none the less so that, instead of imposing directly an absolute liability, or less directly a liability following a conclusive presumption of negligence, it creates a presumption having the continuing force of affirmative evidence. As we have said, there was evidence that sparks from the engine caused the fire. The Railway Company introduced evidence of care in the operation of the engine and of the efficient character and condition of the spark arresting appliances, and it was quite persuasive; but after all it had to wrestle before the jury with the presumption arising under the construction of the statute from the fact that sparks did escape and cause the fire.

[2] The Power Company did not call as a witness its engineer, who was in the building at the time of the fire, and was found trying to extinguish it from the inside after it had gained headway. The Railway Company asked instructions that the failure to call him justified an inference that his testimony would have been prejudicial to his employer. The instructions were properly refused. There was no suppression of evidence in the right sense of that phrase. Though the engineer was still in its service, the Power Company did not conceal him or run him away. For aught that appeared, its reason for not calling him may have been entirely proper. The Railway Company might have secured his attendance by subpoena and his testimony, after it learned he was not among the witnesses of the Power Company. Still further, it is mere argument or speculation that the engineer had the best information as to the origin of the fire. He might have

had, if the fire originated within the building; but other witnesses testified to facts tending to show the converse was more probable. Whatever the testimony of the engineer might have been, its production was not under the exclusive control of the Power Company; it was accessible to the Railway Company, which did not avail itself of its right and opportunity.

The judgment is affirmed.

CENTURY SAVINGS BANK v. ROBT. MOODY & SON et al.

In re HARTZELL.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1913.)

No. 3,793.

MARSHALING ASSETS AND SECURITIES (§ 3*)—MORTGAGES—HOMESTEAD.

Code Iowa 1897, § 2976, which provides that the homestead may be sold for debts created by written contract, executed by the persons having power to convey and expressly stipulating that it is liable therefor, "but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt," is mandatory, and governs in the marshaling of liens between different mortgages, some of which include the homestead, while others do not, and although the mortgagor makes no claim.

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.*]

Appeal from the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

In the matter of Oscar M. Hartzell, bankrupt. From an order entered on issues joined between the Century Savings Bank, Robert Moody & Son, and R. A. Crawford, administrator of the estate of Emma G. Johnson, deceased, the Century Savings Bank appeals. Reversed.

W. G. Harvison, of Des Moines, Iowa (Horatio F. Dale, of Des Moines, Iowa, on the brief), for appellant.

S. F. Prouty, of Washington, D. C. (Mulvaney & Mulvaney, of Des Moines, Iowa, on the brief), for appellees.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge. This case involves the marshaling of the liens of three mortgagees. Omitting a number of facts which serve only to confuse, the situation in its last analysis was this: The common debtor mortgaged to Johnson 960 acres of land in Iowa. Embraced in the land was his homestead of 40 acres. He next mortgaged the 920 acres exclusive of his homestead to Moody. Then he mortgaged the whole 960 acres to the appellant, the bank. Upon judicial sale the lands were so sold that the proceeds of the homestead and nonhomestead portions were distinguishable. The total proceeds were more than enough to pay Johnson, but the surplus was not enough for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Moody and the bank. As Moody had no lien on the homestead and the bank had, the amounts they would receive depended on how Johnson, the first mortgagee, was paid—whether proportionately from homestead and nonhomestead proceeds, or entirely from the latter. In other words, if Johnson, with his first lien on two funds, was paid in part from that which was not available to Moody, it would operate pro tanto to the advantage of the latter and correspondingly to the disadvantage of the bank. The trial court adopted that plan. It directed payment to Johnson from the proceeds of the homestead and the nonhomestead property proportionately. This enlarged the surplus in the latter fund for Moody by about \$5,000.

If neither tract had been a homestead there would be precedent for the action of the court. *Green v. Ramage*, 18 Ohio, 428, 51 Am. Dec. 458. But the homestead element cannot be disregarded. The debtor and his wife expressly waived their homestead right and consented to the use of the proceeds in paying debts. The effect of this depends upon the state statute, which created the right and prescribed its incidents, and with respect to which the parties are held to have contracted. Section 2976 of the Iowa Code of 1897 provides that the homestead may be sold "for debts created by written contract, executed by the persons having the power to convey, and expressly stipulating that it is liable therefor, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt." In *Linscott v. Lamart*, 46 Iowa, 312, the holder of a mortgage upon both homestead and other property purchased the homestead, and it was held he had the right, notwithstanding the purchase, to satisfy his claim out of the nonexempt property to the exclusion of junior liens. The sale by the debtor in that case was as complete an abandonment of all right and equity as the waiver and consent in the case at bar.

At an early day in Wisconsin it was held that where a mortgage covered a homestead, and also other property, which was subject to a junior lien, the debtor had no right to have the latter exhausted first to preserve his homestead. *White v. Polleys*, 20 Wis. 503, 91 Am. Dec. 432. This decision led to a statute (Laws 1870, c. 133) very similar to that of Iowa, and the case of *Hanson v. Edgar*, 34 Wis. 653, arose under it. There was a first mortgage upon 160 acres of land, 40 acres of which was a homestead. A second mortgage upon the same land was void as to the homestead, because not signed by the debtor's wife, but valid as to the remainder. Upon foreclosure, the debtor and his wife made no claim. The second mortgagee insisted that the homestead, on which he had no valid lien, should be first sold to pay the prior mortgage. He contended that the statute was only for the protection of the debtor, and was not designed to affect equities between creditors and mortgagees, when the debtor was not interested. The court held otherwise. In the later case of *Smith v. Wait*, 39 Wis. 512, the same rule was applied, though the liens were acquired prior to the passage of the statute. The court held that the marshaling of liens according to equitable principles was not a vested right, secure from legislative change. We think that in a case like the one at bar

the provision of the Iowa statute that resort to the homestead shall be only for a deficiency is mandatory, and is not affected by the act of the debtor and his wife after the mortgages are given.

The case below was in equity, and is considered here on the appeal. The writ of error, which was also prosecuted, is dismissed.

The order of the District Court is reversed, and the matter is remanded for further proceedings in conformity with this opinion.

EMERY et al. v. CENTRAL TRUST & SAFE DEPOSIT CO.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1913.)

No. 2,292.

1. COURTS (§ 405*)—APPEAL—CROSS-BILL—DISMISSAL.

Dismissal of a cross-bill, which is only a part of the main litigation, is not appealable, under Judicial Code (Act March 3, 1911, c. 231) § 128, 36 Stat. 1133 (U. S. Comp. St. Supp. 1911, p. 193), authorizing appeals and writs of error to review final decisions, etc.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103; Dec. Dig. § 405.*]

2. COURTS (§ 405*)—JUDGMENTS APPEALABLE—CROSS-BILL PRAYING A STAY OF PROCEEDINGS.

Where the dismissal of a cross-bill amounts to the denial of a stay of proceedings, made in the case other than that in which the stay is operative, it constitutes in effect the denial of an injunction, within Judicial Code (Act March 3, 1911, c. 231) § 129, 36 Stat. 1134 (U. S. Comp. St. Supp. 1911, p. 194), giving appeal from an order or decree granting or refusing an injunction; but if the order refusing a stay is made in the case in which the desired stay would operate, then the dismissal of the cross-bill would not amount to denial of such an injunction, and would not therefore be appealable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103; Dec. Dig. § 405.*]

3. COURTS (§ 405*)—APPEAL—EQUITY—CROSS-BILL—DISMISSAL.

Complainant, having leased certain property from defendants with a right of renewal, the rent for the renewal period to be fixed by an appraisement, filed a bill alleging that appraisers had been unable to agree, and that by reason of divergent views as to the method to be adopted a new appraisal would not be effective, and prayed that the court determine the question. Defendants filed what was denominated a "cross-bill," setting up in detail the physical condition of the premises, and that cross-complainants desired another appraisement, after a decree directing that the same be had in accordance with their contentions. The cross-bill also set up the institution of suits in a state court, their removal to the federal court and motion to consolidate, and prayed that all further proceedings in such suits be stayed until complainant in the original bill should join in the appointment of appraisers, and until an appraisement be made fixing the money rental, to be reported to the court. *Held*, that defendants' bill was a pure cross-bill, in effect seeking a stay in the case in which the stay would operate; and hence the dismissal of the cross-bill on demurrer was not appealable prior to final decree in the principal suit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103; Dec. Dig. § 405.*]

Appeal from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Suit by the Central Trust & Safe Deposit Company against Mary M. Emery and the Girard Trust Company, as trustee, etc. From a decree dismissing defendants' cross-bill, they appeal. Dismissed.

In 1884 the predecessors in interest of appellants (whom we shall speak of as the "Emerys") gave appellee a written lease of the front 63 feet of the first floor of the St. Paul Building in Cincinnati (together with two rooms in the basement), to be occupied by the lessee as "a bank, trust company, and safe deposit." The lease ran until May 31, 1909, at an annual rental of \$8,000. It contained this provision: "At the expiration of the term of this lease, said lessee shall have the privilege (having given one year's written notice of its desire therefor) of renewing this lease for another term of twenty-five (25) years, commencing June 1, nineteen hundred and nine (1909), upon the same terms and conditions herein contained, except the money rental, which shall be fixed by three appraisers chosen in the usual way." In 1904 the Emerys gave appellee another lease, covering the remainder of the ground floor of the building (except certain hallway rights not necessary to specify), together with a room on the second floor. This lease likewise ran until May 31, 1909. It contained the same provision for renewal as the 1884 lease.

On December 17, 1910, appellee filed its petition in the court of common pleas for Hamilton county, Ohio, against the Emerys, setting up the lease of 1884 and the renewal privileges mentioned, and alleging that it had exercised its privilege of renewing the lease for a further term of 25 years, beginning June 1, 1909, on the same terms and conditions as contained in the lease (except the money rental), and had given notice thereof and of its readiness to choose the appraisers to fix the money rental, and to comply with all the other terms required by the lease. It further alleged that, pursuant to such terms, it appointed one appraiser and the Emerys another, "to fix the money rental" to be paid under the renewal term; that the appraisers (first, the two selected by the parties, and later with the addition of a third chosen by the other two), with the aid of briefs and arguments of the parties and their counsel upon both facts and the law, and (in the case of two of the appraisers) after receiving opinions from their own personal and independent counsel as to their duties and the law governing the basis of rental appraisal, were unable to agree, and (because the parties thereto could not agree) even after offering to accept as their own any conclusion the parties might agree upon as to the rental or the rules governing its ascertainment: and that the appraisers had accordingly filed with the parties their final report of disagreement on the questions submitted, with their reasons therefor and conclusions thereunder, and have asked to be and have been, "with the consent of plaintiff and defendants hereto, discharged." The petition further alleged that "in view of the widely divergent views of said appraisers, of said parties, of the counsel of said parties, and of the disinterested counsel of two of said appraisers, the questions involved in this ascertainment of the rental for said new term, both of fact and of law, can never be finally settled and determined, unless the said new rental for said renewed term be ascertained and fixed by a court having jurisdiction and power finally to determine all of said questions, and that any further attempt to settle and determine said matters, other than by an action in and adjudication by such court, will only result in delay and needless expense to the plaintiff and defendants." The court was accordingly asked to determine the rental to be paid during the renewed term.

On the same 17th day of December, appellee filed its petition in the superior court of Cincinnati against the Emerys, for relief with respect to the 1904 lease, making substantially the same allegations (so far as applicable) and containing the same prayer for relief as in the suit in the court of common pleas. The Emerys (appellants) removed both suits to the District Court of the United States, by reason of diverse citizenship of the parties.

Before answering these petitions, appellants moved for a consolidation of the two suits, and that the plaintiffs therein be required to replead according to the practice in equity. Before the motions were passed upon, answer was filed to each petition, substantially admitting, so far as material here and except as herein stated, the allegations referred to. The answer contained this clause: "These defendants deny that the amount of said rental can never be finally settled and determined, as is averred in the bill of complaint, unless said new rental be ascertained and fixed by this court without the aid of the appraisers provided for in said lease, and they deny that any further attempt to fix said rental would only result in needless expense and unnecessary delay. These defendants say that the principal reason why said appraisers did not agree was because of the unjust claim made by the complainant to the appraisers that the two premises be considered as if there were no connection between the two." The answer further stated that appellee had refused to appoint other appraisers to fix the money rental for the renewed term, and therefore defendant denied that appellee had "made every effort to settle said controversy."

On June 3, 1911, appellants filed in the court below what they denominated a cross-bill, setting up the two leases, together with the provision for renewal, alleging that defendant came into possession, by virtue of the two leases, of the whole of the ground floor of the building (except the hallway rights before mentioned); appellee's rightful removal, at a large expense, of a brick wall, existing when the 1904 lease was made, between and separating that part of the ground floor premises included in the 1884 lease and that included in the 1904 lease, thereby throwing the two ground floor premises into one, and making other alterations and improvements and additions "for the purpose of harmonizing in the matter of usefulness and appearance the two premises," whereby the value of each of the premises relative to each other was alleged to be greatly increased; and that ever since June 1, 1904, the appellee has used the two premises as one. The bill alleged the notice by appellee of its exercise of the privilege of renewing both leases, the selection of appraisers to fix the money rental on renewal, the futile attempt of the appraisers and parties to agree upon the rental, substantially (so far as material here) as in the bills filed in the state courts, except that the reason for such failure of the appraisers to agree was specifically alleged to be a difference of opinion as to whether the money rental for the renewal period should be fixed with reference to the physical condition of the two premises on May 31, 1909, when the original terms of both leases expired, or whether with reference to that condition on May 1, 1904, when defendant took possession under the 1904 lease. The bill alleged that this divergence of views as to the basis of appraisalment would prevent any appraisalment of the rental being agreed upon "by said or any appraisers"; that complainants desired another attempt at an appraisalment, and believed that other appraisers could and probably would fix the rental, and expressed a willingness that other appraisers be appointed for the purpose, of all of which they informed defendant; and alleged defendant's refusal to take part in the selection of other appraisers. The bill set up the two suits in the state courts, their removal to the court below, complainants' motion to have the two cases consolidated, and the then pendency of said motion; the filing of answers in said suits, the principal allegations of the petition denied by the answer being in effect stated to be those which are replied to by the paragraph in the answer quoted in this statement; alleged that by the exercise of its privilege of renewal appellee agreed that the money rental should be fixed in the manner provided in the leases, and that appellants are entitled to have it fixed that way; that it is not impracticable to have it so fixed, but that, by reason of the conflicting and irreconcilable claims as to the basis of rental appraisalment, it is necessary that the court determine the rights of the parties with reference to the matters in dispute, as well as the duties of the appraisers, in order to enable the latter to fix the rentals properly, intelligently and justly. The court was asked to decree that the appraisalment be made according to complainants' contentions, and that upon the making and return of such appraisalment, in conformity with

the orders of the court, specific performance be decreed. The bill prayed that all further proceedings in the two cases mentioned be stayed (except the determination of the motions to consolidate and to require repleading) until the appellee should join in the appointment of appraisers, and until the latter shall be chosen in good faith, and an appraisal made by them fixing the money rental be reported to the court, or until good cause shown why the same had not been made.

A demurrer to this bill was sustained on the ground of lack of equity, and, on complainants refusing to plead further, the bill was dismissed. Before the order of dismissal was entered, the motions to consolidate and for repleader were granted, and bills of complaint on repleader filed. A single answer to these two bills was filed after the entry of dismissal mentioned. This answer differs, in no respects material here, from the answers filed before consolidation and repleader. From that dismissal an appeal has been taken to this court. Motion to dismiss the appeal has been made, and was heard in connection with the argument upon the merits.

Harmon, Colston, Goldsmith & Hoadly and Jenney & Smith, all of Cincinnati, Ohio, for appellants.

W. Worthington and Frank O. Suire, both of Cincinnati, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge (after stating the facts as above). [1] The motion to dismiss the appeal is grounded upon the proposition that the bill in question is merely a cross-bill, and thus only a part of the main litigation instituted by the filing of the original bills, and that a dismissal of the cross-bill was not a final decision of the case, and so is not appealable under section 128 of the Judicial Code. That the dismissal of a mere cross-bill is not appealable until final decree in the principal suit is determined by *Winters v. Ethell*, 132 U. S. 207, 210, 10 Sup. Ct. 56, 33 L. Ed. 339.

[2] Appellants base the right of appeal on section 129 of the Judicial Code, which gives an appeal from an order or decree in equity granting or refusing an injunction. They contend that the dismissal of the cross-bill was a denial of the requested stay of proceedings in the two original suits, and that an injunction was thus denied within the meaning of section 129 of the Code. We think an order refusing a stay of proceedings, made in a case other than that in which the stay is operative, amounts to a denial of an injunction, under the section invoked, but that an order refusing a stay, made in the case in which the desired stay would operate, would not amount to such denial of injunction. *Griesa v. Mutual Life Ins. Co.* (C. C. A. 8th Cir.) 165 Fed. 48, 50, 91 C. C. A. 86. Is the bill before us a mere cross-bill, or is it substantially distinguishable from such a bill?

[3] Appellants have throughout treated the bill as a cross-bill. In the prayer for process it is so denominated; it was indorsed and filed as a "cross-bill"; its filing as such was allowed by the judge of the court below; the petition for appeal to this court is entitled in the original suits as consolidated, followed by the words, "Cross-Bill to Said Cases Consolidated as Above, No. 6746," followed by the title of the cross-suit. The demurrer is in the petition for appeal

referred to as "to the cross-bill," and the order sustaining the demurrer as "dismissing said cross-bill"; the assignment of errors throughout speaks of the bill as a "cross-bill." Its dominant note is clearly such.

Questions of technical nomenclature are not specially helpful. Looking to matters of substance: The only prominent respects in which the bill we are considering adds to the case made by the answer to the original bills is, first, that in the cross-bill the alleged incorrectness and injustice of appellee's construction of the basis of proper rent appraisal is set out by detailed statement of specific facts and considerations, instead of by general statement; and second, that affirmative relief is asked as already stated.

But the mere fact of prayer for affirmative relief does not make the bill other than a cross-bill, for at the time the bill was filed (whatever may be the case under the new general equity rule 30) the defendant could not obtain affirmative relief by answer unaided by cross-bill. 1 Bates, Fed. Eq. Procedure, § 377, and cases cited in note. It would seem open to appellants, under their answers to the original bills, to prove in detail all the facts alleged in the cross-bill, to the extent necessary to show actual conflict of claims as to the basis of rent appraisal, and actual conditions affecting the propriety of the respective bases and the alleged injustice of appellee's contention. But if any doubt exists as to the sufficiency of the answer in that regard, amendment is of course open.

Again, comparing the bill in question with the bills in the original suits, it will be noted that the only difference which can be thought controlling is that appellants' bill states the reason for the failure of the appraisers to agree, asserts the incorrectness of appellee's construction of the basis of rent appraisal which should be adopted, denies the impracticability of agreement if appellants' construction of proper rental basis is judicially determined, and asks the court to make such adjudication and to restrain further proceedings in the original suits to the extent necessary to permit such appraisal under the rules so fixed by the court.

The considerations to which we have referred are not overcome by the facts that diversity of citizenship conferred jurisdiction for an original bill, that there was prayer for process (which accorded with proper practice under cross-bills—see *Washington Railroad v. Bradley*, 10 Wall. 299, 302, 19 L. Ed. 894), or that the bill was filed under a separate number. Indeed, such method of filing would not unnaturally be had, in view of the fact that when the cross-bill was filed appellants' petition for a consolidation of the two original suits and for repleading therein had not been granted.

Appellants cite a number of authorities which recognize a distinction between a pure cross-bill, filed simply as matter of defense, and one seeking affirmative relief as to other matters than those brought in suit by the bill. Some of these authorities hold (and this illustrates the independent nature of the latter class of cases) that a dismissal of the original bill would not, in such cases, operate to dismiss the cross-bill. We find nothing in the principle so announced opposed to

the conception of the bill in question as a mere cross-bill, because we think the additional matter introduced by the cross-bill cannot properly be said to be matter collateral to that presented by the original bills, or that the affirmative relief sought is (to quote the language of appellants' counsel) "so far severable from and independent of the suit brought by the original bills that the cross-cause is not to be considered as being the same cause as that in which the stay was to operate." The character of cross-bill is not taken away by the mere statement therein of facts not contained in the original bill, so long as such additional facts are germane to the matters embraced in the original suit. The rule is that:

"If the plaintiff in the original bill does not fully state all the facts and circumstances connected with the subject-matter in controversy, but omits facts which, if alleged, would show a right in a defendant, entitling him to relief against either the plaintiff or a codefendant, such omitted facts, however extended and voluminous, may be stated by the defendant in a cross-bill, and the appropriate relief demanded." 1 Bates, Fed. Eq. Procedure, § 376.

It is true that the dismissal of a cross-bill is a denial of the affirmative relief asked by appellants, and if the present appeal is dismissed, and, on appeal taken after final decree on the merits, the appellate court should conclude that the cross-bill was improperly dismissed, it might be necessary to send the case back for further proofs and hearing. But such evil is necessarily incident to the dismissal of a cross-bill, in advance of final hearing on the merits of the original suit.

We are constrained to hold that the bill in question is in effect a pure cross-bill, that the stay asked for was a stay in a suit in which it would operate, and that its dismissal was therefore not the subject of appeal, in advance of final decision in the original suits.

The appeal is therefore dismissed.

PARTEE v. ST. LOUIS & S. F. R. CO.

(Circuit Court of Appeals, Eighth Circuit. April 25, 1913.)

No. 3,849.

(*Syllabus by the Court.*)

LIMITATION OF ACTIONS (§ 130*)—NEW ACTION AFTER FAILURE OF FORMER ACTION—DEATH BY WRONGFUL ACT.

Section 5945, art. 17, c. 87, Statutes of Oklahoma 1909, creates a cause of action unknown to the common law for death caused by the wrongful act of another, and requires such action to be commenced within two years. Section 5547, art. 3, of that chapter, provides that civil actions may be brought within the times limited in that article only, but that where in special cases a different limitation is prescribed by statute the action shall be governed by such limitation. Section 5555 of article 3 declares that if any action be commenced within due time, and a judgment for the plaintiff therein be reversed, or he fail otherwise than on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

merits after the time limited has expired, he may commence a new action within one year after the reversal or failure.

Held, section 5555 is inapplicable to actions created or permitted by section 5945, and the former section neither modifies nor extends the condition of the liability and action imposed by the latter section that the action must be commenced within two years after the wrongful act or death.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 539, 545, 553-566; Dec. Dig. § 130.*]

2. LIMITATION OF ACTIONS (§ 1*)—CONSTRUCTION—NEW LIABILITY—COMMENCEMENT OF ACTION—TIME FIXED.

The time fixed for the commencement of an action unknown to the common law, by act of Congress or statute which creates or permits the action, is a condition of the liability and action thus created, and not a statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

3. STATUTES (§ 161*)—CONSTRUCTION—GENERAL AND SPECIAL.

A special statute upon a particular subject and a general law must stand together, the one as the law of the specific subject and the other as the general rule, unless it clearly appears that it was the intention of the Legislature to modify or repeal one or the other.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.*]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action by Louis P. Partee, administrator, etc., against the St. Louis & San Francisco Railroad Company, a corporation. Judgment for defendant, and plaintiff brings error. Affirmed.

G. W. Hutchins, of Tulsa, Okl. (J. J. Henderson, of Tulsa, Okl., on the brief), for plaintiff in error.

Fred E. Suits, of Oklahoma City, Okl. (W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt, of Oklahoma City, Okl., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and WILLIAM H. MUNGER and TRIEBER, District Judges.

SANBORN, Circuit Judge. This is an action for the death of William McCain, which is alleged to have been caused by the wrongful act of the St. Louis & San Francisco Railroad Company. The action was not commenced within two years after the wrongful act or the death; but the plaintiff had commenced a similar action within the two years, had failed in that action otherwise than upon the merits, and had commenced this action within one year after the failure. He set forth these facts in his pleading, and the court below sustained a demurrer to it, and dismissed the action. This ruling is assigned as error.

[1] Article 3, which is entitled "Time of Commencing Civil Actions," of chapter 87 of Snyder's Compiled Laws of Oklahoma of 1909, contains these provisions:

"Section 5547. Limitations.—Civil actions can only be commenced within the periods prescribed in this article, after the cause of action shall have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

accrued; but where, in special cases, a different limitation is prescribed by statute, the action shall be governed by such limitation."

"Section 5555. New Action—Limitation.—If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die, and the cause of action survive, his representatives may commence a new action within one year after the reversal or failure."

Article 17, which is entitled "Causes of Action Which Survive, and Abatement of Actions," contains this provision:

"Section 5945. Action for Death—Limitation, etc.—When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

The complaint in this court is that the court below held that section 5555 was inapplicable to this action, and that it could not be sustained because the plaintiff failed to comply with the condition of its maintenance fixed by section 5945, which created it, failed to commence his action within two years of the wrongful act or death. In support of this complaint counsel argue that section 5555 is general in its terms and without exception, and that it should be held to apply to this and every action which is commenced within due time, wherein a judgment is reversed or the plaintiff fails on the merits after the time limited has expired, and he brings a new action within one year after the reversal or failure. In support of this contention they cite, and we have carefully read and considered, the opinions of the courts in *Meekins v. Norfolk & S. R. Co.*, 131 N. C. 1, 42 S. E. 333, *Kenney v. Parks*, 137 Cal. 527, 70 Pac. 556, *Swift & Co. v. Hoblawetz*, 10 Kan. App. 48, 61 Pac. 969, and *Trull v. Seaboard Air Line Ry. Co.*, 151 N. C. 545, 66 S. E. 586, 587. But by the common law no civil action lies for an injury which results in death. *Insurance Company v. Brame*, 95 U. S. 754, 757, 24 L. Ed. 580. The only foundation for this action is section 5945. In the absence of that section the plaintiff could have no action, and the defendant would have been exempt from liability for the death of McCain.

[2] A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. Such a statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability. *The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140, 30 L. Ed. 358; *Pollard v. Bailey*, 20 Wall. 520,

526, 527, 22 L. Ed. 376; *Bank v. Francklyn*, 120 U. S. 747, 756, 7 Sup. Ct. 757, 30 L. Ed. 825; *Brunswick Terminal Co. v. National Bank*, 99 Fed. 635, 638, 639, 40 C. C. A. 22, 25, 26, 48 L. R. A. 625; *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Hine*, 25 Ohio St. 629, 634; *Dennis v. Atlantic Coast Line R. R. Co.*, 70 S. C. 254, 49 S. E. 869, 870, 106 Am. St. Rep. 746; *International Navigation Co. v. Lindstrom*, 60 C. C. A. 649, 651, 123 Fed. 475, 477.

[3] Because a special act and a general law must stand together, the one as the law of its particular subject and the other as the general rule, unless it clearly appears that it was the intention of the legislative body to modify or repeal one of them, because it does not appear that the Legislature of Oklahoma intended by section 5555 to annul or to modify the specific conditions on which new actions were created or permitted by special statutes, but that body seems to have enacted this section to extend the time fixed by the general statutes of limitation of the state for the commencement of the ordinary actions governed by that statute, and because it is expressly provided by section 5547, which is found in the same article as section 5555, that where in special cases a different limitation from those fixed in that article is prescribed by statute, as there is in this case, the action shall be governed by such limitation, and not by those prescribed in that article, the provisions of section 5555 are inapplicable to actions for death by wrongful acts, and neither modify nor extend the condition of these liabilities and actions fixed by section 5945, that they must be commenced within two years after the respective injuries or deaths. *Rodman v. Missouri Pacific Ry. Co.*, 65 Kan. 645, 649-653, 70 Pac. 642, 59 L. R. A. 704; *Gerren v. Railroad Company*, 60 Mo. 405, 411; *Theroux v. Northern Pac. Ry. Co.*, 64 Fed. 84, 85, 12 C. C. A. 52, 53; *Anglo-American, etc., Co. v. Lombard*, 132 Fed. 721, 751, 68 C. C. A. 89, 119; *Atchison, T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55, 70, 29 Sup. Ct. 397, 53 L. Ed. 695; *Boston & Maine R. R. Co. v. Hard*, 108 Fed. 116, 125, 47 C. C. A. 615, 624, 56 L. R. A. 193.

As this action was not commenced within the two years, it cannot be maintained, and the judgment below must be affirmed.

It is so ordered.

THOMPSON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1913. Rehearing Denied May 21, 1913.)

No. 2,246.

CRIMINAL LAW (§ 1218*)—IMPRISONMENT—PLACE—LENGTH OF SENTENCE—CUMULATION.

Rev. St. § 5541 (U. S. Comp. St. 1901, p. 3721), provides that, where any person convicted of any offense against the United States is sentenced to a term longer than a year, the court may order the sentence executed in any state jail or penitentiary within the district or state where the court is held, the use of which is allowed by the state authority. *Held*, that where accused was convicted on two counts of violating the White Slave Traffic Act (Act Cong. June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

St. Supp. 1911, p. 1343]), and was sentenced to one year's imprisonment on the first count, and to 6 months' imprisonment on the second count, to run successively, the two sentences in legal contemplation were but a single sentence for 18 months, and hence the court was authorized to require that the term be served in a penitentiary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3320-3328; Dec. Dig. § 1218.*

Computation of cumulative sentences, see note to United States v. Carpenter, 81 C. C. A. 196.]

In Error to the District Court of the United States for the First Division of the Northern District of California; Wm. C. Van Fleet, Judge.

A. C. Thompson was convicted of violating the White Slave Traffic Act (202 Fed. 346), and he brings error. Affirmed.

Sea & Fallon, both of San Francisco, Cal., for plaintiff in error.

John L. McNab, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The plaintiff in error was convicted on two counts of an indictment charging him with the violation of the act of Congress of June 25, 1910 (36 Stat. 825, c. 395 [U. S. Comp. St. Supp. 1911, p. 1343]), commonly known as the "White Slave Traffic Act." He was sentenced to be imprisoned in the penitentiary for the term of one year on the first count, and for a term of six months on the second count, the term of imprisonment on the second count to commence at the expiration of the term of imprisonment on the first count.

It is contended that the court below had no authority to direct that the terms of imprisonment be served in a penitentiary. The act under which the plaintiff in error was convicted declares the offense with which he is charged to be a felony, and provides that one guilty thereof shall, upon conviction, be punished by a fine not exceeding \$5,000 or by imprisonment of not more than five years, or by both such fine and imprisonment. Section 5541 of the Revised Statutes (U. S. Comp. St. 1901, p. 3721), provides that:

"In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the Legislature of the state for that purpose."

In the case of *In re Mills*, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107, the crimes committed by the petitioner were not declared to be felonies. The petitioner had been convicted on two indictments. Upon conviction on one, he was sentenced to imprisonment for one year, and upon the other he was sentenced to imprisonment for six months, the term of imprisonment on the latter sentence to commence at the date of the expiration of the first. The Supreme Court held

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that, where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary, the punishment cannot be executed by confinement therein except in cases where the sentence is for a period longer than one year. In *Re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149, the petitioner having been found guilty of an offense not by statute declared to be a felony, was sentenced to imprisonment in the penitentiary for the period of one year. The court, following the *Mills Case*, held that the trial court was without jurisdiction to pass such a sentence. This court, in *Mitchell v. United States*, 196 Fed. 874, 116 C. C. A. 436, following the decisions just quoted, held that where a prisoner was convicted under a statute prescribing the punishment as a fine or imprisonment or both, and the sentence was for one year only, the trial court was without authority to order his confinement in a government penitentiary.

But it is said that those decisions are rendered inapplicable to the present case by reason of the provisions of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [U. S. Comp. St. Supp. 1911, p. 1687]), which went into effect on January 1, 1910, section 335 of which provides:

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

The argument is that the offense of which the plaintiff in error was convicted, being made a felony, not only by the terms of the act which defines it, but by section 335 just quoted, is punishable by imprisonment in a penitentiary, whether the sentence imposed provides for imprisonment for a longer or shorter term than one year. It is true that section 335 is the first statute of the United States which defines a felony. In *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89, it had been held that crimes punishable by imprisonment for a term of years at hard labor are infamous crimes, within the meaning of the fifth amendment, or, in other words that they were felonies. And in *Mackin v. United States*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909, the court held that a crime punishable by imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous crime.

But, when it is determined that the offense of which the plaintiff in error here was convicted is a felony, not all is said that bears upon the question with which we have to deal. Section 5541 remains unrepealed, and we are not shown how its terms are affected by the definition of a felony which is found in the new Criminal Code. The provisions of section 5541 were not based upon any distinction between felonies and misdemeanors. It was a statute to prescribe the place of imprisonment for crimes, whether misdemeanors or felonies. The determining factor was to be the length of the sentence, and that alone. If the sentence were for a longer period than one year, the place of imprisonment was a penitentiary; otherwise, it was a jail.

But we think the judgment is sustainable on the ground that the two sentences imposed should, in legal contemplation, be regarded as a single sentence. In *Dimmick v. Tompkins*, 194 U. S. 540, 24 Sup.

Ct. 780, 48 L. Ed. 1110, there had been a conviction on two counts, and a single sentence of imprisonment for two years in the penitentiary was imposed. It was contended that the sentences were in legal effect two, each for one year. But there was nothing in the record to show that a separate sentence of one year each was imposed on conviction on each count, and the court held the sentence valid on the ground that it might have been imposed upon one count only. The court, however, said:

"Although for some purposes the different counts in an indictment may be regarded as so far separate as to be in effect two different indictments, yet it is not true necessarily and in all cases."

If there is any conceivable case in which it is not true, it is a case such as that which is now before us. The first count of the indictment charged the plaintiff in error with transporting and causing to be transported, and aiding and assisting in obtaining transportation for, a woman from Hot Springs, Ark., to San Francisco, for the purpose of prostitution. The second count charged him with procuring and aiding and assisting in procuring a railway ticket for the woman to travel from Hot Springs, Ark., to San Francisco. Both counts charge substantially the same acts, and the commission of the same offense. The decision in the Mills Case is not controlling here, for the reason that in that case there were two separate convictions on different indictments charging two distinct and different offenses.

The judgment is affirmed.

SUMMERS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1913.)

No. 2,177.

JURY (§ 29*)—WAIVER—NECESSITY OF TRIAL—OVERRULING DEMURRER—REFUSAL TO PLEAD—JUDGMENT.

Code Cr. Proc. Alaska, § 97, provides that, if a demurrer to an indictment is disallowed, the court must permit accused at his election to plead, which he must do forthwith, or at such time as the court may allow, but, if he does not plead, judgment must be given against him. *Held*, that where, after the overruling of a demurrer, defendant elected to stand thereon and refused to plead further, there was no issue for trial to a jury; and hence it was no objection to the court's rendition of a judgment against accused, and sentence thereon, that he was entitled to a trial by jury, which he could not waive.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 197-203; Dec. Dig. § 29.*]

On rehearing. Denied.

For former opinion, see 202 Fed. 457.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The plaintiff in error in his petition for rehearing represents that this court in its decision of the case

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

passed without consideration the contention that the court below, in imposing sentence upon him, denied him his constitutional right to a trial by jury, and argues that, as the offense charged was a felony, the plaintiff in error was without power to waive his right to a jury trial. There was no assignment to direct our attention to the alleged error, although it was mentioned in the briefs. But as it is now earnestly urged as ground for granting a rehearing, we deem it proper to present briefly our views upon the contention so made, while denying the petition.

The record shows that, the plaintiff in error having demurred generally to the indictment on the ground "that the facts stated do not constitute a crime," and the court having overruled the demurrer, the plaintiff in error, by permission of the court, withdrew his plea of not guilty, and gave notice of his election to stand upon the demurrer, and not further to plead, "and to take advantage of section 97 of the Alaska Criminal Code of Procedure, and to submit to judgment thereunder." That section provides as follows:

"That if the demurrer be disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, judgment must be given against him."

In the court below counsel for the plaintiff in error insistently contended that this section was applicable to the case at bar, and the court adopted that view, although the district attorney earnestly opposed the contention. Counsel for the plaintiff in error, notwithstanding this record of his attitude in the court below, now contends that the court erred in accepting his view of the law, and in not compelling the plaintiff in error to plead over and go to trial before a jury, and he cites decisions to the proposition that one who is accused of felony cannot waive his constitutional right to a jury trial. Those cases have no application here. There is no question here of a waiver of a jury trial. Here there was no issue to try, and therefore no occasion for a jury.

When a defendant demurs generally to an indictment, he admits all the facts alleged against him, and rests his defense on the judgment of the court whether those facts as pleaded constitute the crime charged. The plaintiff in error, by his demurrer to the indictment, declared in effect that he was guilty of the offense charged, provided that the indictment properly and lawfully set forth the facts which constituted the crime. After the demurrer was overruled, he had his right either to plead over or to stand on his demurrer, and thereby continue in the attitude of admitting to the court that he was guilty of committing the acts which were charged against him. He chose the latter course. At common law, in cases of misdemeanor, there was no right to plead over, and in cases of felony such, also, was originally the common law, although in later years the rule has been relaxed in felony cases, so as to recognize the power of the court in its discretion to allow the defendant to plead over. 2 Hale, P. C. 255; *Reg. v. Faderman*, 3 C. & K. 359; *Reg. v. Hendy*, 4 Cox, C. C. 243; *Reg. v. Odgers*, 2 M. & Rob. 479; *State v. Wilkins*, 17 Vt. 151. The statute above quoted expresses the common-law rule,

with the addition that the defendant shall have at his election the right to plead over.

In the brief filed in support of his petition for rehearing, counsel for the plaintiff in error insists that the courts are practically unanimous "in holding that, as to felonies, in the absence of statutory authority, a defendant cannot waive a jury trial, and an attempt to do so, followed by a trial before the court without a jury, will be of no avail, and a judgment rendered by the court will be erroneous, if not void." In the present case, however, as has been shown, there was and could have been no trial, and Congress by section 97 of the Alaska Criminal Code of Procedure expressly declared the consequence of the defendant's failure to raise an issue, namely, that there should thereupon be judgment against him.

The petition for rehearing is denied.

SNAVELY v. HENDERSON.

(Circuit Court of Appeals, Eighth Circuit. April 25, 1913.)

No. 3,842.

(*Syllabus by the Court.*)

GIFTS (§§ 15, 49*)—INTER VIVOS—ESSENTIALS—SUFFICIENCY OF EVIDENCE.

A clear and certain intention of the alleged donor at once and forever to divest himself of his property is indispensable to a valid gift inter vivos. Evidence considered, and *held* insufficient to overcome a finding of the court below that the delivery of money by a mother to a son constituted a loan, and not a gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 14, 95–100; Dec. Dig. §§ 15, 49.*]

Appeal from the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action by Thirza Henderson against Edgar F. Snavely, trustee, etc. From a decree of the District Court, affirming an allowance by the referee of plaintiff's claim against the estate of Roscoe E. Henderson, who was adjudged a bankrupt, defendant appeals. Affirmed.

Elmer W. Brown, of Lincoln, Neb. (Burkett, Wilson & Brown, of Lincoln, Neb., on the brief), for appellant.

C. J. Campbell, of Lincoln, Neb. (George W. Berge, of Lincoln, Neb., on the brief), for appellee.

Before SANBORN, Circuit Judge, and WILLIAM H. MUNGER and TRIEBER, District Judges.

SANBORN, Circuit Judge. This is an appeal from a decree of the District Court which affirmed the allowance by the referee of a claim of Thirza Henderson for \$2,500 against the estate of Roscoe E. Henderson, her son, who was adjudged a bankrupt in the year 1909. These facts were conclusively established by the evidence:

About June 24, 1907, Henderson, who was a young man without

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

much experience in business, formed a partnership with Holger Hald in the jewelry business, whereby Henderson was to contribute \$2,500 capital and Holger Hald his knowledge, experience, and services. During that summer Henderson solicited and obtained from his mother \$2,500, which he put into the partnership business. Nothing was said between him and his mother at the time he obtained this money about his paying it back, nor about her giving it to him. In January, 1908, he asked and obtained from her \$500 more, and she then inquired of him when he could pay back the \$2,500, and he said that he did not know when he could do so, but he thought he could some time. She subsequently spoke to him about his paying it back, and every time she mentioned it he told her he would do so, and never claimed to her that she had given it to him. Mrs. Henderson testified that she never gave it to him.

The finding of the referee and the court below that the transaction described by this evidence was a loan is sustained by the facts which have now been recited. But counsel for the trustee seek to reverse it on the ground that it was a gift. The facts on which they rely are these:

About a month after Mrs Henderson filed her claim for this \$2,500, Mr. Snavely, the trustee in bankruptcy of Henderson's estate, went to the town where Henderson was found, took him to a hotel, caused an attorney to come there, induced Henderson to think that the fact that he had made a statement to R. G. Dun & Co. in which he did not include any indebtedness to his mother was a serious matter, and suggested that he make an affidavit, which the attorney dictated. At the suggestion of Mr. Snavely, Henderson wrote the affidavit dictated by the attorney, and stated in that affidavit, pursuant to that dictation, that at the time his mother let him have the \$2,500 no notes were taken, nothing was said about payment or time of payment, that he regarded the money as a gift at that time, that when he subsequently asked her for \$500 more she said, "When do you think you can begin to pay back the \$2,500?" that he did not know that she expected payment until she asked that question, that nothing had been said about paying it back prior to that time, but that he answered that he could not tell exactly when he could pay it, but he thought he could pay it back some time. Henderson's subsequent testimony in the case corresponded with the statements he made in this affidavit. Mrs. Henderson did not include this credit of \$2,500 due from her son in her returns of her assessable property for taxation. Hald testified that when the partnership was formed Henderson told him that his mother would give him the \$2,500. Nothing was said between Mrs. Henderson and her son about interest. She has never claimed any and Henderson testified that when, in January, 1908, he asked for \$500 more, she said that she did not want to put any more money into the business.

But it is the intention of the alleged donor to give away his property, not the intention of the alleged donee, or his hope or belief, that conditions a valid gift. The clear and certain intention of the donor presently and forever to part with his property is indispensable to such a gift. *Allen-West Commission Co. v. Grumbles*, 129 Fed. 287, 290, 63 C. C. A. 401, 404; 30 Cyc. 1194; *Jones v. Falls*, 101 Mo.

App. 536, 73 S. W. 903, 905. The finding of the referee and of the court below that Mrs. Henderson never had such an intention is presumptively right, and a review of the evidence in this case in the light of the arguments and briefs of counsel sustains it.

The decree of the District Court is therefore affirmed.

THE FLEMINGTON.

THE ARTHUR W. PALMER.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 213.

COLLISION (§ 95*) — NEGLIGENT BACKING INTO CHANNEL — COLLISION WITH TOW.

A steam tug *held* solely in fault for a collision with the tow of another tug, on the ground that she backed from her berth into a narrow and frequented channel without proper precautions, when the other tug was seen approaching.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*

Collision with or between towing vessels and in tow, see note to The John Englis, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by the Central Union Stockyards Company against the steam tug *Flemington*, the Central Railroad Company of New Jersey, claimant, in which the steam tug *Arthur W. Palmer*, the Moran Towing & Transportation Company, claimant, was impleaded. Decree against the *Flemington*, and her claimant appeals. Affirmed.

The following is the oral opinion of Van Vechten Veeder, District Judge:

The witnesses for the *Flemington* and for the *Palmer* give accounts of this collision that cannot be reconciled, because each boat claims that the other was going away from it at the time of the collision, under which circumstances no collision would have been possible. The determination of this issue depends largely upon the credibility of witnesses, and in that respect I think that the witnesses for the *Palmer* give an account that is more coherent and more consistent, and therefore more convincing, than the witnesses on behalf of the *Flemington*.

I am disposed to accept as a fact the account given by the captain of the *Palmer*, supported as it is by the testimony of other witnesses on behalf of the *Palmer*, and particularly by the only disinterested witness in the case. The clear preponderance of all the testimony, including that of some of the witnesses for the *Flemington*, shows beyond a doubt that the collision took place far out in the middle of this navigable channel. I have no doubt from the testimony that the *Palmer*, with her tow, was pursuing the usual and customary course through this narrow channel, and, as it is a busy channel, that course must have been well known to this tug, which berthed alongside of Pier 8. I could not reach any other determination if I were disposed to accept the testimony of the man who says he was on the lookout on the stern of the *Flemington*, because his testimony shows, as indeed the testimony or the report of the captain of the *Flemington* to the local inspectors

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

shows, that although he saw the Palmer coming down with the tow a long distance away he did not give a signal to his captain until they were out in the channel.

I think the preponderance of the credible testimony in this case shows that the Flemington lacked out without taking proper precautions. She evidently came out under a momentum that she was unable to check when, at last, an effort was made to avoid this collision.

I find no fault on the part of the Palmer. Decree accordingly.

James J. Macklin, of New York City (De Lagnel Berier, of New York City, of counsel), for appellant.

Carpenter & Park and Foley & Martin, all of New York City (H. E. Mattison, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decree affirmed, with interest and costs, on opinion of Judge Veeder.

THE LUZERNE.

THE FLUSHING.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 169.

COLLISION (§ 95*)—TUGS WITH TOWS—FAULT.

Under uncontradicted evidence that such is the practice, a tug passing through Hell Gate into East River with two tows tandem on an ebb tide, which prevented her from stopping or slowing, *held* entitled to make her turn down East River, while it was the duty of another tug coming down Harlem River with tows alongside to hold back and keep out of the way; and the latter vessel *held* solely in fault for a collision between two of the tows.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*]

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

This cause comes here upon appeal from a final decree of the District Court, Southern District of New York, holding the Luzerne solely in fault for a collision as a result of which the boat John J. Lubey, while in tow of the Flushing, was damaged.

Harrington, Bigham & Englar, of New York City (H. S. Harrington, of New York City, of counsel), for appellant.

James J. Macklin, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The Flushing with two scows in tow, tandem on a hawser, was proceeding with the ebb tide through Hell Gate to New York. Because of dredges anchored east of Mill Rock, her course was between Mill Rock and Ward's Island and then through the channel to the westward of Mill Rock. Before she turned she saw the Luzerne with two car floats alongside coming down the Harlem River and about opposite 102d street. The tide in the Harlem

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

River was running about a mile and a half, while in the East River around Mill Rock it was running about four miles. The Flushing on sighting the Luzerne blew two whistles, which the Luzerne answered with two. The Flushing made her turn to port, keeping in mid-channel, and the Luzerne's port car float collided with the rear scow about off Ninety-Eighth street.

The appeal of the Luzerne is predicated on the contention that the navigation of the vessels should have conformed to the starboard hand rule. We do not think this rule applied. Although when the signals of two whistles were exchanged the tugs were on courses which, if protracted, would cross, each knew that there was no intention to cross, but both were going down the East River. It was impossible for the Flushing to stop or slow; if she had done so, she could not control her tandem tow, in the swift tide that ran through the Gate. On the other hand, the slower tide in the Harlem River would present little difficulty to the Luzerne in stopping. There is uncontradicted evidence that with an ebb tide it is the practice, in Gate navigation, when vessels come in sight of each other as these did, for the one in the Harlem River to hold back and let the one in the Gate make her turn into the East River. We think the case was one of special circumstances under article 27 of the Inland Rules, and that the exchange of two-whistle signals imported an agreement that the Flushing, instead of trying to hold back for the Luzerne, should proceed to make her turn to port, and that the Luzerne should not embarrass her in executing that manœuvre, even if she had to check her own speed to allow of its execution. This she failed to do in time and was rightly held in fault.

It may be that the Flushing might have gone closer to Mill Rock, but the fault of the Luzerne is so plain that we are not disposed to put any liability on the Flushing.

Decree affirmed, with interest and costs.

In re NEVADA-UTAH MINES & SMELTERS CORPORATION.

(Circuit Court of Appeals, Second Circuit. April 22, 1913.)

No. 108.

COURTS (§ 405*)—CIRCUIT COURT OF APPEALS—INTERVENTION—PETITION AFTER RETURN OF MANDATE.

Where a petition to revise has been determined by the Circuit Court of Appeals, and mandate transmitted to the District Court, which has acted thereon, the cause is no longer in the Circuit Court of Appeals, and an application there to intervene would be denied.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103; Dec. Dig. § 405.*]

Petition to Revise Order of the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

On rehearing. Denied.

For former opinion, see 202 Fed. 126.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Liebmann & Tanzer, of New York City (L. A. Tanzer, of New York City, of counsel), for petitioners.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The petitioner for a revision of the order of the District Court has filed an application for a rehearing of this cause, which we disposed of on January 13, 1913. We see no reason to change our opinion, and the petition for rehearing is dismissed.

Another stockholder asks to be allowed to intervene as a party to the proceeding. Our mandate has been transmitted to the District Court, which has acted upon it. We have decided not to ask for a return of the mandate for the purpose of a rehearing. The cause is no longer in this court, and the application made here to intervene is denied.

NATIONAL CASKET CO. v. STOLTS.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

No. 174.

PATENTS (§ 328*)—VALIDITY—PRIOR ART—BURIAL CASKETS—FACE PLATE—TRANSPARENT GAUZE—FABRIC.

Reissue patent No. 12,750 (original No. 619,567), issued to the National Casket Company, as assignee of William Hamilton, for a face plate comprising a stretched sheet of transparent non-brittle gauze fabric, mounted on a supporting member, to be used in burial caskets, held devoid of invention, in view of the prior art, and therefore invalid.

Appeal from the District Court of the United States for the Southern District of New York.

Bill by the National Casket Company against Julius W. Stolz, as president and treasurer of J. & J. W. Stolz, an unincorporated joint-stock association. From a decree dismissing the complaint (197 Fed. 940), complainant appeals. Affirmed.

On appeal from a decree of the United States District Court for the Southern District of New York dismissing the bill in an action based upon reissued letters patent No. 12,750, dated February 14, 1908. The original patent, No. 619,567, was granted February 14, 1899, to William Hamilton, assignor to the complainant. Hamilton having died prior to December 18, 1907, the reissue was, on that date, applied for by the complainant. The original had one claim, the reissue has five claims. The patent has been in litigation during the last ten years, the result being that the original was held invalid for lack of novelty and invention and the reissue was held invalid for lack of novelty and invention and also for the reason that its claims, or their equivalents, had been applied for in the original application and had been abandoned. (C. C.) 127 Fed. 158; 135 Fed. 534, 68 C. C. A. 84; (C. C.) 153 Fed. 765; 157 Fed. 392, 85 C. C. A. 300; 174 Fed. 413, 98 C. C. A. 617; (D. C.) 197 Fed. 940.

Duell, Warfield & Duell, of New York City (F. P. Warfield, C. H. Duell, and H. S. Duell, all of New York City, of counsel), for appellant.

Arthur v. Briesen and Hans v. Briesen, both of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

COXE, Circuit Judge. The claim of the original patent was as follows:

"The combination with a burial-casket, of a face-plate comprising a stretched sheet of transparent non-brittle gauze fabric."

The claims of the reissue are as follows:

"1. The combination with a burial casket cover portion, of a relatively movable face-plate comprising a supporting member, and a stretched sheet of transparent, non-brittle gauze mounted upon said supporting member.

"2. The combination with a burial casket cover portion, of a face-plate which comprises a frame and a sheet of transparent, non-brittle gauze evenly stretched to said frame and held thereby along each edge, whereby it is uniformly supported and may be handled as a unit.

"3. The combination with a burial casket cover portion, of a face-plate slidably mounted thereon which comprises a frame and a sheet of transparent, non-brittle gauze evenly stretched to said frame and held thereby along each edge, whereby it is uniformly supported and may be handled as a unit.

"4. In constructions of the class described, in combination, a casket cover, a frame movably mounted upon said casket cover, and a sheet of gauze evenly stretched over and secured to said frame, whereby it is supported and held in position throughout each edge.

"5. In constructions of the class described in combination, a casket cover provided with guiding slots, and a face-plate slidably mounted within said slots, said face-plate comprising a frame and a sheet of transparent gauze evenly stretched over said frame along each edge and secured thereto."

It will be seen that the only appreciable difference between the structures described and claimed in the reissue and in the original is that in the reissue the elements which unite to form the combination are described with minute particularity. In our former decision—157 Fed. 392, 85 C. C. A. 300—we held that a face-plate for a burial casket of transparent non-brittle gauze fabric, whether of silk or cotton, irrespective of the color of the material, the fineness of the mesh or the method of attachment, would anticipate the claim and that such structures had been shown in the prior art. This conclusion was reached after a careful examination of the testimony and is not now subject to review. We start, then, with the proposition that it did not require an exercise of the inventive faculties to stretch a sheet of non-brittle gauze fabric as a face-plate for a burial casket. The question now confronting us is whether it involved invention to use such fabric when stretched over a movable or sliding frame whereby it is uniformly supported and may be handled as a unit. Or, to state the question more concisely, if the claims of the reissue had been in the original, could we have reached a different conclusion? When it is remembered that long prior to Hamilton's application glass face-plates were mounted in sliding frames, that black silk illusion was stretched over the face opening, drawn smooth and tacked all around and that the part of the cover containing this face-plate was removable, we have no hesitation in saying that our conclusion would have been the same. Giving to Hamilton full credit for all he accomplished, he was still among the skilled mechanics and never reached the higher plane of the inventor. It surely required no exercise of inventive skill to fasten the silk illusion, which had previously been stretched tightly over the casket opening, to the movable slide. The advantages and disadvantages of glass and illusion were known; some might prefer one and

some the other, but to assert that it required invention to substitute illusion for glass in the movable slide is, in our judgment, an untenable proposition. It might as well be asserted that it involves invention for one who has used mosquito netting tacked to a window casing, to remove the glass and tack the netting to the movable sash. Nothing novel is accomplished by such changes. For one who preferred gauze to glass as a face-plate it was a perfectly obvious thing to do.

When the former appeal was before us the questions were fully and ably presented and the patent was held invalid because, if not actually anticipated, there was no invention, in view of the prior art.

For convenience, the testimony of Riggins was selected as probably the most positive and distinct of all the numerous witnesses sworn. In brief, the record showed that long prior to the Hamilton patent, silk and cotton illusion had been used as the face-plate of caskets and was tacked all the way round, the black silk illusion being drawn perfectly tight as it is shown in the patented structure. There is no escape from the conclusion that the patent was held void because the prior art showed several instances where the identical thing which was the subject of the claim had been done long prior to the date of the alleged invention. There was certainly nothing in our opinion to indicate that we considered the case one for a reissue or that we thought that what Hamilton accomplished, beyond what the prior art showed, required the exercise of the inventive faculties.

The entire proceeding has assumed the character of a reargument of the decision of this court. If we adhere to our former decision that Riggins and others had employed the basic idea of Hamilton, viz., covering the face of the dead with cotton and silk illusion stretched tightly over the casket opening, there certainly can be no patent for a change in the details by which this fastening is accomplished.

The decree is affirmed with costs.

LEHIGH VALLEY R. CO. v. UNITED STATES (INTERSTATE COMMERCE COMMISSION et al., Interveners).

(Commerce Court. April 25, 1913.)

No. 70.

1. CARRIERS (§ 34*)—FIXING OF RATE BY INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDER—PRESUMPTION.

It is individual rates or joint rates or charges which may be investigated by the Interstate Commerce Commission, and not primarily systems of rates; and although, in determining whether an individual rate is reasonable, the Commission may consider all matters pertaining to the condition and management of the carrier, including other rates in force, when the carrier seeks to review a finding that a rate is unreasonable, and an order for its reduction, on the ground that the effect of the order will be to reduce the revenues of the company below the point which will give it a fair return, it is not aided by a presumption in favor of the reasonableness of the many other rates not under direct investigation which will overthrow substantial evidence that the individual rate in question is unreasonable in itself; but the burden rests on the carrier to prove that its rates, other than the one involved in the order, are reasonably high, and cannot be advanced; otherwise, the courts cannot interfere with the judgment of the Commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 91-93; Dec. Dig. § 34.*]

2. CARRIERS (§ 26*)—RATES—CONSTITUTIONAL GUARANTIES—JUST COMPENSATION.

Just compensation, secured by the Constitution of the United States, does not mean a guaranty to a carrier, as against the public, of any fixed percentage of profit on an investment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67-82; Dec. Dig. § 26.*]

3. CARRIERS (§ 34*)—FIXING OF RATES BY INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDER.

The courts cannot set aside an order of the Interstate Commerce Commission requiring a reduction of rates by a railroad company on coal to a single terminal, on the ground that its effect will be confiscatory, on an allegation that the prior earnings of the company did not exceed 4 per cent. on the value of its property, where it is also shown that the order affects less than one-eleventh of the freight traffic of the company, it is admitted that the rates fixed by the Commission are not below the cost of the service and some substantial profit, and it does not appear whether or not its other rates are reasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 91-93; Dec. Dig. § 34.*]

Petition by the Lehigh Valley Railroad Company against the United States, in which the Interstate Commerce Commission and Henry E. Meeker have intervened. On motions to dismiss. Motions granted. See, also, 190 Fed. 1023.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Frank H. Platt, of New York City, and Everett Warren, of Scranton, Pa. (E. H. Boles, of New York City, and John G. Johnson, of Philadelphia, Pa., on the brief), for petitioner.

Blackburn Esterline, Sp. Asst. Atty. Gen., for the United States.

Charles W. Needham, of Washington, D. C., for Interstate Commerce Commission.

William A. Glasgow, Jr., of Philadelphia, Pa., for Meeker.

Before KNAPP, Presiding Judge, and HUNT, CARLAND, and MACK, Associate Judges.

HUNT, Judge. The Lehigh Valley Railroad Company, petitioner herein, prays for a decree enjoining an order of the Interstate Commerce Commission. By the bill it appears that the lines of petitioner's railroad system aggregate some 1,407 miles, operated as continuous transportation routes through Pennsylvania, New York, and New Jersey; that the anthracite coal fields of Pennsylvania are divided into three groups, known as the Wyoming, Lehigh, and Schuylkill regions, located in the eastern portion of Pennsylvania; that the consumption of anthracite coal from the said coal fields is about 14,000,000 tons gross in Pennsylvania and 70,000,000 tons gross in other states; that petitioner assembles and carries annually from the above-mentioned Wyoming region about 11,000,000 gross tons of anthracite coal from collieries which are widely scattered; that it transports about 2,000,000 gross tons to petitioner's tide water terminal at Perth Amboy; that of the total freight tonnage of 25,000,000 gross tons transported annually by the petitioner, over 11,000,000 gross tons consists of anthracite coal, and that of petitioner's total annual freight revenue of \$31,000,000, over \$15,000,000 consists of revenue from transporting anthracite coal, and that petitioner's total revenue from the transportation of freight and passengers is approximately \$36,000,000; that petitioner's prosperity and existence have been always dependent upon the business of transporting anthracite coal; that prior to October 15, 1911, it charged for services between the Wyoming region and Perth Amboy \$1.55 per gross ton on prepared sizes of coal (that is, on the larger or domestic sizes), \$1.40 per gross ton for a somewhat smaller size known as pea coal, \$1.20 per gross ton for what is known as buckwheat coal, and \$1.10 per gross ton for the finest sizes; that, as will be shown by the evidence to be offered at trial, the rates as fixed have been and will be, for more than two years hence, just and reasonable for the services performed.

It appears that on July 17, 1907, Henry E. Meeker and Caroline H. Meeker complained that the rates on anthracite coal from the Wyoming region to tide water at Perth Amboy were excessive and unreasonable, and asked the Commission to compel a reduction and to grant reparation; that the railroad company answered the complaint; that testimony was taken, and thereafter, on May 17, 1910, argument was had before the Commission; that on June 8, 1911, the Commission made its report and order, requiring this petitioner to abstain from charging the aforesaid rates on anthracite coal from

the Wyoming region to Perth Amboy, and to establish for the transportation of anthracite coal in carloads from the Wyoming to Perth Amboy rates not in excess of the following, to wit, \$1.40 per gross ton on prepared sizes of said coal, \$1.30 per gross ton on pea coal, and \$1.15 per gross ton on buckwheat coal; that the effective date of the order of the Commission was changed from August 15 to October 15, 1911. Petitioner says that it appears from the facts set forth, and as will be fully shown by the evidence to be offered by it at the trial, that the rates prescribed in the order of the Commission are and each of them is unjust to petitioner and unreasonably low for the services performed.

It is alleged that new circumstances have required an amendment to the petition first filed in this court, and that experts and engineers were put to work to appraise the value of the petitioner's railroad system, the value thereof being a fact of chief importance in the evidence to be presented; that petitioner asked the Commission for a rehearing; but on May 28, 1912, the Commission denied such application.

Petitioner says that the value of its railroad plant as of January 1, 1912, measured by the cost of reproduction, has been ascertained to be at least \$312,500,000, and that there are many other elements of value which will be shown at the trial; that a reasonable and fair return upon such value is at least 8 per cent.; that the returns from the investment in times of relative prosperity must provide, in addition to a reasonable per cent. return, an amount sufficient to cover the deficits of less prosperous years; that provision must be made out of earnings for the loss of capital invested in the railroad plant resulting from the exhaustion of the anthracite mines, which will within 10 years cause a decrease in the annual tonnage, and thereafter a gradual decrease until the coal is exhausted; that a minimum reasonable and fair annual return would be \$25,000,000; that by charging the rates in effect prior to the effective date of the order and by using skill and economy petitioner cannot earn "an annual return equal to \$12,500,000," which is but 4 per cent. of the minimum value, and constitutes far less than a reasonable and fair return; that if the order of the Commission is effective the earnings on the property will be reduced by more than \$450,000 annually, in that many other rates on anthracite coal will have to be reduced to avoid inconsistencies and discriminations; that petitioner cannot increase its earnings from other sources to offset reductions which would have to be made; that anthracite rates east-bound and west-bound are controlled by the competition of other lines; and that the rates fixed by the order of the Commission are relatively lower than other anthracite rates of petitioner. Petitioner then sets forth that much of its other traffic is made up of the products of manufacture and other miscellaneous commodities for the most part carried under joint rates with connecting carriers; that there can be no increase in the volume of traffic and earnings on petitioner's railroad within the two-year period covered by the order of the Commission that will

not be far more than offset or absorbed by the great increase of expenses; that the petitioner's railroad was wisely and economically constructed, and that there is no excessive expense of operation; that the rates in force before the Commission made its order were so low that the traffic to which they applied moved freely and with reasonable profit to the shippers, and that the rates then in force were relatively lower than all other anthracite rates on petitioner's railroad; that the order will cause reductions in the rates on about 4,000,000 tons of petitioner's anthracite traffic, or 37 per cent. of its total anthracite traffic and 16 per cent. of its total freight traffic; that it is possible with substantial accuracy to determine whether or not the assembling, transporting, storing, and transshipping of anthracite coal may be conducted without loss under the rates fixed by the order, and that the rates so fixed are not and will not be sufficient to pay the cost of conducting the assembling, transporting, storing, and transshipping aforesaid, and a just and fair return on the value of that portion of petitioner's property used in said service; that the average revenue per gross ton for all sizes of anthracite, under the rates prescribed, is approximately \$1.35; that to assemble, transport, and transship petitioner has to expend for operating expenses at least 90 cents per gross ton; that the cost per gross ton for the depreciation of the facilities so employed is at least 10 cents, leaving a balance of 35 cents, which is insufficient to pay an annual return of 6 per cent. on the value of that portion of petitioner's facilities so employed.

The bill then avers that the Commission issued its order without a full hearing as required by the act to regulate commerce; that the Commission neglected to follow the rules for judicial investigation, received improper testimony, gave undue and controlling weight to incompetent evidence, failed to consider established and undisputed testimony, and to apply the ordinary rules of a court to the competency of testimony and exhibits; that it based its decision upon certain alleged facts (which are specified in the petition under consideration) set forth in the petition filed before the Commission, which said allegations were not true; that it arbitrarily and unlawfully ignored proof, and reached its conclusion by wrongfully confusing the value of petitioner's transportation plant with the par value of petitioner's outstanding capital stock; that since the hearing was had before the Commission conditions have materially changed, wages have increased, and cost of operation has become greater; that the Commission excluded facts and circumstances that ought to have been considered, in that the Commission refused to consider the investment as evidence of the cost of assembling, transporting, storing, and transshipping and depreciation, but based its conclusion solely upon a comparison between the net earnings prior to June 30, 1908, and the par value of petitioner's outstanding capital stock.

The United States and the Interstate Commerce Commission and the intervener have moved to dismiss the petition for lack of equity.

Two principal contentions are advanced by petitioner: First, con-

fiscation; second, lack of substantial evidence before the Commission on which to rest the conclusion reached. Petitioner argues that (a) the order of the Commission compels the carrier to operate its entire plant for a return of less than 4 per cent. upon its value; and (b) that the order deprives the carrier of its right to receive for transporting tide water coal an amount sufficient to cover operating expenses, depreciation, and a reasonable compensation for the use of that portion of the facilities used in handling tide water coal.

Reducing essential facts to a narrow compass, we find that the order of the Commission affects the traffic on 165 miles out of a total of 1,407 miles of petitioner's railroad, and about 2,000,000 tons of anthracite coal out of a total anthracite coal tonnage of over 11,000,000 tons; that the anthracite tonnage involved is four fifty-sevenths of the entire freight traffic of the petitioning road; and that the effect on the gross income of the road, which is \$36,000,000, when measured by the traffic of the year prior to the making of the report of the Commission, was to make a reduction of \$247,000.

The argument is that the order reduces the annual return from \$12,500,000 to \$12,050,000, which is less than 4 per cent. of the value of the petitioner's road, which, as stated by the petitioner, is \$312,500,000, and that the loss of income brought about by carrying out the order cannot be made up from rates on other traffic, because such other rates, so far as applicable to anthracite, are as low as they can consistently be put. The assumption is that the Commission cannot and would not approve of any increases in other anthracite rates, while rates on commodities other than coal are for the most part joint rates covering competitive traffic, which are made under such circumstances that larger divisions cannot be obtained, and that it is beyond the petitioner's power to increase materially its revenue from those sources.

[1] Petitioner says that it should not be called upon to establish its inability to make up on other traffic the losses resulting from the order in question; that it is for the respondent to meet the showing of confiscation by the petitioner by proof that the tide water rates are relatively high and that other rates are unreasonably low and should be raised in order to equalize the schedule; that as anthracite tide water rates constitute the "backbone" of petitioner's rate structure, the order is not incidental; and that its effect is not unsubstantial in its bearing upon the property rights of petitioner.

As the Commission has not established a system of rates for the petitioning carrier, it cannot be presumed to have examined the tariffs of petitioner in their entirety for the purpose of ascertaining whether its rates upon all classes of traffic are reasonable. It is individual rates, or joint rates or charges, which may be investigated by the Commission in the exercise of its powers under the act to regulate commerce, and not primarily systems of rates. Naturally, to the end that justice shall be done in the consideration of the question whether a single or individual rate is reasonable, the Commission may, among other things, consider the reports of the finances of the car-

rier whose rates are the subject of investigation, may inquire into such reports and the items thereof, into circumstances of management, the carrier's present and prospective business, operating expenses, outstanding obligations, and interest charges, whether the rate under examination appears to be disproportionately or unreasonably high, and whether all traffic appears to bear a proper share of expenses and profits. But the power of determination being confined to the matter of a single rate, when the complaint is as to the injustice of such rate, if it is found that such individual rate is unreasonable, the carrier, which seeks to set aside the order of the Commission reducing such rate upon the ground that the effect of the order will be to confiscate its property by reducing its total revenues to a point where it cannot earn more than a given per cent. upon the alleged total value of its road, is not aided by a presumption in favor of the reasonableness of the many rates which are not under direct investigation which is strong enough to overthrow substantial evidence to the effect that the individual rate under investigation is unreasonable in itself.

Let it be assumed that where a system of rates has been established by legislative authority, and an attack is made upon such entire system in a manner to present the question whether such tariff as a whole operates to confiscate the property of the carrier, the courts are empowered to inquire whether all classes of traffic are charged relatively reasonable rates or are justly classified, whether the body of rates prescribed is such as "to work a practical destruction to rights of property," and, if it be found that such system is unjust and unreasonable to such extent, to restrain its operation. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014. Such cases have generally arisen where state authorities have fixed systems of rates. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *St. Louis & S. F. R. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *Minneapolis & St. Louis R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151. Let it be assumed, too, that where a carrier's business is such that the effect of a reduction of a single rate (for example, where 90 per cent. of the business of the road is the carriage of a single commodity) will clearly operate to deprive the carrier of any compensation by way of profit the courts will interfere. But where the tariffs are constructed by the carrier and, after full hearing, an individual rate is found to be unreasonable, and an order is made by the Commission which reduces such individual rate merely to a point where such reduction will reduce the total income of the carrier to 4 per cent. approximately, the carrier has no case of confiscation *prima facie*, but must prove that its rates other than the one involved in the order are in fact reasonably high and cannot be advanced above the point fixed by the tariffs it has filed. It is not for the courts to say under such circumstances what are reasonable rates between two points upon a railroad line, for to do so would be to substitute judicial judgment for that of the tribunal to which the determination of such matters is committed.

[2, 3] Nor can the courts lay down any general rule as to what shall

constitute confiscation with reference to railroad rates, where the facts, as in this case, show a profit of approximately 4 per cent. The just compensation secured by the Constitution does not mean a guaranty to a carrier as against the public of any fixed percentage of profit upon an investment.

Application of these views is very just when the carrier relies upon inadequacy and unreasonableness of individual rates on a particular traffic for a past time, alleging that the rates upon the whole system as affected by the single reduction will not yield a sufficient profit in the future. Illustration is afforded by the case at hand. Petitioner shows that the revenue from its coal traffic, or \$15,000,000, is approximately 47 per cent. of the revenue from its total freight traffic, or \$31,000,000. The total anthracite coal tonnage, or 11,000,000 tons, thus represents 47 per cent. of the gross earnings of the road; and inasmuch as but 2,000,000 tons of anthracite are affected by this order, it becomes evident that the order of the Commission affects only two-elevenths of 47 per cent. of the total revenues of the road, or two-elevenths of \$15,000,000, representing the revenue derived from coal traffic.

At once the inquiry arises whether the rates upon the balance of the traffic of the road are reasonable, and whether the proportion of the petitioner's other earnings, the 53 per cent., is bearing its fair share of the expenses of the road. How can a court say that the reduction of the particular rate complained of to a point admittedly not below cost of service and some substantial profit is confiscatory merely because it will reduce the gross income? Investigation into the proportions borne by other rates would have to be made to arrive at a just conclusion. Surely if the carrier is charging more than a reasonable rate on the particular traffic, coal, yet is not earning a sufficient amount on the balance of its traffic to yield an income, investigation should be had into the rates on other traffic, to see if they are too low or based upon considerations not properly regarded.

In *Minneapolis & St. Louis R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151, the court recognized that in the general supervising of rates upon classes of freight the Commission is not bound to reduce the rates upon all classes, which may perhaps be reasonable except as applied to a particular article, and said that if—

“upon examining the tariffs of a certain road the Commission is of opinion that the rate upon a particular article, or class of freight, is disproportionately or unreasonably high, it may reduce such rate, notwithstanding that it may be impossible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously, such a reduction could not be shown to be unreasonable simply by proving that, if applied to all classes of freight, it would result in an unreasonably low rate.”

The allegations that it is possible with substantial accuracy to determine whether or not the assembling, transporting, storing, and transshipping of anthracite coal may be conducted without loss under the rates fixed by the order of the Commission, that the rates as fixed

by the order are not and will not be sufficient to pay the cost of conducting the assembling, transporting, storing, and transshipping, "and a just or fair return upon the value of that proportion of petitioner's property used in said service," fail to state grounds for equitable relief when they are put alongside of the further allegation that the rates fixed by the Commission cover the cost of service in transporting coal from the Wyoming district to Perth Amboy, which is 90 cents per gross ton, and that the average of the rates allowed by the Commission as applied to the traffic for all sizes of anthracite coal affected is \$1.35 per gross ton, with depreciation cost of 10 cents on the facilities. This is an admission that the profit left above the cost of service is sufficient to yield an annual return on the value of that portion of petitioner's facilities employed in that particular traffic, which, though less than 6 per cent. on the value—not specifically stated—of the facilities employed, is at least of such a substantial margin as to prevent a conclusion that petitioner's property is being taken without just compensation.

Other averments of the bill, to the effect that the Commission excluded and refused to consider facts and circumstances that ought to have been considered, or that the rates prescribed were fixed arbitrarily, and are not just and fair, fall when we examine the report of the Commission, which is before us, disclosing that evidence relevant to the issues which the petitioner raised herein, except those matters which it is alleged accrued since the report was made, was considered.

Turning to the report, we find reference to the endeavor on the part of the Lehigh Valley Railroad Company to show the actual cost of transporting coal from the Wyoming district to barges at Perth Amboy, with comment upon the character of testimony offered, which consisted of statements by engineers, estimates based upon operating expenses, interest, depreciation, and other facts and circumstances. The report refers to the basis used in apportioning expenses, to rates for transporting coal, to evidence concerning markets for anthracite on the lines of the Pennsylvania Railroad, and to the allowances made in connection with such transportation. The contentions of the carrier with respect to terminal expenses are adverted to, and reference is had to the privileges of stocking and storing and lifting accorded by the carrier at Perth Amboy. Nor did the Commission fail to consider the argument of the carrier that there is a limited life to railroads dependent upon anthracite coal carriage. The most careful attention appears to have been given to this point, the Commission quoting at length from the report of the Anthracite Coal Strike Commission rendered to the President of the United States on March 18, 1903, wherein the opinion was expressed that anthracite coal mining would continue for a period of over 200 years. The Commission also noticed the claim of the carrier with respect to its right to earn enough out of its coal rates to provide for a return of the principal of the investment in that part of the railroad devoted to the carriage of coal when and as the principal would become reduced by exhaustion of the coal supply, and it was expressly found that the rates were more than

sufficient to meet the contention that there should be an annual income sufficient to provide for a return of the capital when that part of the railroad devoted to the carriage of anthracite would lose its earning capacity through the depletion of the supply of coal. The Commission, however, regarded that as "too speculative to be of much value in determining the reasonableness of present rates," inasmuch as, when anthracite coal would be exhausted, other traffic might be so dense as not to impair the present earnings of the road. The report then advances to the further arguments of the carrier that the rates on coal must be sufficient to produce (1) income enough to make up for past deficiencies in return upon investment; (2) a reasonable current annual return upon the investment in the railroad and transportation adjuncts; (3) an amount sufficient to provide for keeping up the property to modern standard; and (4) an amount sufficient to provide for a return of the principal of the investment when and as the principal becomes reduced and extinguished by the exhaustion of coal freight. Each of these several propositions was dwelt upon by the Commission, and with painstaking care the various aspects of the financial condition of the Lehigh Valley Railroad were presented and analyzed. The estimated cost of transporting a ton of coal from the Wyoming region to Perth Amboy as made by the engineers of the Lehigh Valley Railroad was considered, and the Commission said in part:

"Turning again to the Wilgus exhibit, we find the estimated cost of transporting a ton of coal from the Wyoming region to Perth Amboy is \$1.49. But we have shown that 10 cents of that amount, designed to cover past deficits, is an improper charge. Therefore \$1.39 would be the cost if the exhibit were accurately and properly constructed on the basis of the facts known to the witnesses. In considering this exhibit it must be remembered that the so-called cost does not mean operating expense. The item of \$1.49 is designed to cover all proper, possible, and probable charges, including not only interest and depreciation charges, but other items, such as the 10-cent allowance above mentioned. Therefore, if the exhibit were not open to objection, it would be seen that, after eliminating the 10-cent charge above referred to, defendant's rates on the several sizes of anthracite coal ought to bring them revenue averaging \$1.39 per gross ton; that is to say, upon defendant's own showing it is collecting rates which have been on the average 7 cents per ton in excess of a reasonable rate."

In the light of all the facts and circumstances stated, the allegation in the bill that there was no "substantial evidence" to sustain the order of the Commission, and that the order was made by the Commission "without any substantial evidence to warrant the conclusion reached," or the reasons assigned by the Commission for its conclusion, becomes not a challenge of the truth of the report to the effect that there was evidence introduced in support of those matters which were material to the inquiry had, and to which the evidence was given, but only states that the evidence heard was not substantial or so substantial as to justify the conclusion reached. As such evidence, however, was proper to be considered, and bore directly on the issues, it was both relevant and pertinent to the essential features of the inquiry.

The averment that "the Commission, in fixing said order, acted arbitrarily and unjustly, contrary to the evidence, and without evidence to support its conclusions" must be disregarded in the light of the history of the case as detailed by the bill itself, showing that the Commission proceeded regularly to a hearing and that it acted after the introduction of much testimony, apparently properly introduced and competent in its bearing upon the questions involved at the hearing. That the Commission acted contrary to the evidence is negated by those parts of the bill which set forth what evidence was before the Commission concerning its financial affairs, its railroad system, returns, and other matters. The averment that the Commission acted without evidence to support its conclusions falls when the bill is considered as a whole, for the reason that it appears therefrom that there was introduced before the Commission proof of the amount of money invested in petitioner's railroad plant, together with evidence concerning the returns on the investment, evidence in detail of petitioner's revenues and disbursements with respect to the cost of assembling, transporting, storing, and transshipping of coal, difference between net earnings prior to June 30, 1908, and the par value of petitioner's outstanding capital stock. Whether the Commission gave much or little weight to such evidence, or regarded it as controlling in arriving at a result, is immaterial, provided the action of the Commission was not in disregard of law.

These views dispose of the more important features of the case. We have given careful attention to the briefs and arguments made by counsel, but do not find any well-founded reason for interference with the action of the Commission.

The motions to dismiss are granted.

THE DELAWARE.

THE AMBROSE SNOW.

(District Court, S. D. New York. April 15, 1913.)

COLLISION (§ 100*)—STEAM AND SAILING VESSELS MEETING—CHANGE OF COURSE BY SCHOONER.

A collision in the main ship channel in New York Harbor in a fog, between a steamer passing outward and a meeting pilot schooner, *held*, on the evidence, due solely to the fault of the schooner in starboarding and going to the westward across the course of the steamer, instead of maintaining her course and speed as the privileged vessel, as required by the rules.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 213-215; Dec. Dig. § 100.*]

In Admiralty. Suit for collision by the United New York Sandy Hook Pilots' Association, as owner of the pilot boat Ambrose Snow, and others, against the steamship Delaware, the Clyde Steamship Company claimant, and cross-libel against the Ambrose Snow. Decree for cross-libelant.

Lindsay, Kalish & Palmer, of New York City (J. Culbert Palmer, of New York City, of counsel), for United New York Sandy Hook Pilots' Ass'n and the Ambrose Snow.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Robinson Leech, both of New York City, of counsel), for the Delaware and the Clyde S. S. Co.

HAZEL, District Judge. These are cross-libels to recover damages for a collision occurring in the main ship channel in New York Harbor, near Staten Island shore, on the 23d day of May, 1912, between the schooner Ambrose Snow and the freight steamer Delaware, resulting in the sinking of the former. The vessels, which were going in opposite directions, collided late in the afternoon, while it was still daylight, in a fairly dense fog, at ebb tide, in wind blowing light in a southeasterly direction. There was a man at the wheel of the pilot boat with the master, another amidships casting the lead, and two lookout men in her bow, all pilot apprentices. At regular intervals the schooner blew three blasts of her fog horn, while the steamer, having on board a complete crew, blew her whistle at intervals as required by the rules of navigation. The fog signals, when first heard aboard the schooner, sounded ahead, and the vessels were then from 1,500 to 2,000 feet from each other.

The witnesses for libelant swear that the steamer was two points on the starboard side when she was first observed through the fog; while in contradiction of such testimony the master of the Delaware, who

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was in the pilot house, and the first officer, and several of the steamer's crew testified that the schooner was approximately a point and a half on her port bow. Indeed, the principal dispute has arisen over the relative positions of the vessels on approaching each other; the master of the pilot boat testifying that, after hearing the fog signals of the Delaware, he starboarded a little, going to the westward, and that later, when he perceived the steamer through the fog, a point and a half on the schooner's starboard bow, he hard-astarboarded, meanwhile keeping watch of the approaching steamer. He further testified that he soon noticed that the steamer sheered slightly to port, seeming to slack away, and then quickly threw her bow over towards the schooner, coming ahead into her amidships.

The version of Capt. French of the Delaware is that, on the instant that he was made aware of the presence of the schooner in the channel, he walked from the starboard side of the steamer to the pilot house and ordered her wheel to be put hard-a-port and the steamer "hooked up full speed ahead." He testified that the Snow was then about a point and a half on the port bow, and that if she had maintained her course and speed the vessels would have passed port to port 150 to 200 feet apart. It is shown that the steamer was going through the water at the rate of approximately $6\frac{1}{4}$ knots an hour, and that in obedience to the hard-a-port order of her master she promptly swung to starboard. The schooner, instead of keeping her course, continued to swing gradually to the westward, and though the steamer's engines were stopped, and she was reversed full speed astern, the situation was in extremis, and as the schooner jibbed her sails she swerved further to the westward, and the collision occurred.

The movement of the steamer to the right or westward under a hard-a-port wheel was not a fault; for if the schooner had kept her course, as she was required to do under the Inland Rules, the vessels would have safely passed each other. Nor, indeed, are any of the faults charged against the steamer in the libel proven. While it is true that she was required to keep out of the way of the pilot boat, and upon approaching a vessel was bound to reduce her speed, back, or stop, as the circumstances demanded, yet her failure to comply with such requirement was not the primary cause of the disaster, as the position of the schooner was fully ascertained after her fog horn had been sounded a few times. In such a situation the steamer had a right to assume that the approaching schooner would keep her course while the former maneuvered to keep out of her way. *The S. C. Tryon*, 105 U. S. 267, 26 L. Ed. 1026.

Taking into consideration the probabilities, I am led to think that the error in navigation was the starboarding by the schooner, which took her across the bow of the steamer. The retarded progress of the pilot boat against the tide, and the nearness of the steamer, together with the speed at which she was proceeding, made it quite probable that the vessels would pass in about a minute, and this should have prompted a stricter adherence to the rule which, while giving to the schooner the right of way, required her to keep her course and speed.

Her fault was grievous enough to bring on the collision, and to justify overlooking any fault, if there was such, in the navigation of the steamer.

The libel is dismissed, and the cross-libel sustained, with costs.

McGOON v. NORTHERN PAC. RY. CO. COOK v. SAME.
LITTLER v. SAME.

(District Court, D. North Dakota, S. E. D. May 14, 1913.)

1. REMOVAL OF CAUSES (§ 19*)—JURISDICTION OF FEDERAL COURT—SUIT ARISING UNDER INTERSTATE COMMERCE ACT.

A suit by a shipper against a railroad company to recover for damage or injury to property while being transported in interstate commerce is one arising under Interstate Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1911, p. 1307), of which a federal District Court is given original jurisdiction by Judicial Code (Act March 3, 1911, c. 231) § 24, par. 8, 36 Stat. 1092 (U. S. Comp. St. Supp. 1911, p. 136), which confers jurisdiction on such courts of all suits and proceedings arising under any law regulating commerce, except those of which the Commerce Court is given exclusive jurisdiction, and such a suit is removable under section 28, without regard to the amount involved.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37-46, 48, 52, 53; Dec. Dig. § 19.*]

2. COURTS (§ 284*)—JURISDICTION OF FEDERAL COURTS—SUIT ARISING UNDER FEDERAL LAW.

Whenever federal law grants a right of property or of action, and a suit is brought to enforce that right, it is one which may properly turn upon a construction of that law, and such suit arises under the law for the purposes of federal jurisdiction, notwithstanding the defendant may raise only issues of fact by his answer.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-826, 831; Dec. Dig. § 284.*]

At Law. Actions by Richard F. McGoon, by J. W. Cook, and by J. M. Littler against the Northern Pacific Railway Company. On motions to remand to state court. Motions denied.

W. S. Lauder, of Wahpeton, N. D., for plaintiffs.
Edw. T. Conmy, of Fargo, N. D., for defendant.

AMIDON, District Judge. The plaintiffs brought six separate actions against the defendant in the district court of Richland county, N. D. They are all based upon shipments of live stock from Western North Dakota and Eastern Montana, to Chicago, Ill. Each complaint

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

embraces several causes of action, but the principal ground of recovery is alleged damage to the live stock by reason of defendant's failure to perform its duty as a common carrier. The suits were removed into this court upon the ground that they arise under the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]). In neither case does the plaintiff seek to recover \$3,000, and motion is now made to remand the suits to the state court because the amount in controversy is less than the sum required to justify their removal, and also because they do not involve a federal question.

[1] Section 24 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [U. S. Comp. St. Supp. 1911, p. 135]) specifies the suits of which the District Courts are given original jurisdiction. Subdivision 1 of that section ends with the following proviso:

"Provided, however, that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section."

Subdivision 8, which follows this proviso, enacts that the District Courts shall have original jurisdiction—

"* * * of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court."

It is claimed by the defendant that these actions are suits "arising under a law regulating commerce," and for that reason may, under the proviso above quoted, be removed into the federal court, although they involve less than \$3,000.

Defendant's liability arises wholly out of section 20 of the Interstate Commerce Act, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. at Large, 584, 593 (U. S. Comp. St. Supp. 1911, p. 1307). Under the decision of the Supreme Court in *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —, that section abrogates all state and common-law liabilities on interstate shipments of property. If the statute does not give plaintiff a right of recovery, he has none. The court says, at pages 505 and 506 of 226 U. S., and page 152 of 33 Sup. Ct. (57 L. Ed. —):

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. *Northern Pac. Ry. v. State of Washington*, 222 U. S. 370 [32 Sup. Ct. 160, 56 L. Ed. 237]; *Southern Railway v. Reid*, 222 U. S. 424 [32 Sup. Ct. 140, 56 L. Ed. 257]; *Mondou v. Railroad*, 223 U. S. 1 [32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44].

"To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the pro-

vision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject."

The statute referred to is a part of the Interstate Commerce Act. It is not only incorporated in its language, but is germane to its subject. It relates to interstate commerce in its most primary sense—the transportation of property from one state to another. It stands side by side with section 8 of that act, which gives to persons injured by rebates and unjust discriminations the right to recover damages therefor. It is, therefore, a "law regulating commerce," within the meaning of subdivision 8 of section 24 of the Judicial Code.

Do the suits "arise under" section 20 of the Interstate Commerce Act? These words are found in the judicial article (article 3) of the federal Constitution, were used in the original Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 73), and have been a part of all subsequent statutes defining the jurisdiction of federal courts. Few subjects, however, are involved in greater perplexity than their meaning. Many criteria have been laid down for determining when a suit arises under federal law. They can be classified, but they cannot be harmonized. In the language of Chief Justice Marshall, a case "may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either" (*Cohens v. Virginia*, 6 Wheat. 379, 5 L. Ed. 257); or when "the title or right, set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction" (*Osborn v. Bank of United States*, 9 Wheat. 822, 6 L. Ed. 204). And yet in the latter case it was held that a suit by or against a federal corporation was one arising under federal law—a doctrine which has since been adhered to by the Supreme Court. *Pacific R. R. Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319. It would, however, be difficult to conceive a case less likely to involve a construction of federal law than the ordinary suit by or against a federal corporation. A suit by or against a receiver of a national bank (*Bartley v. Hayden* [C. C.] 74 Fed. 913), or a receiver appointed by a federal court (*Central Trust Co. v. East Tenn. V. & G. Ry. Co.* [C. C.] 69 Fed. 353; *State of Washington v. Northern Pacific R. Co.* [C. C.] 75 Fed. 333), arises under the Constitution and laws of the United States, although as a rule such suits in no way involve a controversy as to the meaning of the federal Constitution or law. Suits to protect the rights of patentees under federal law are held to arise under the Patent Law, although many, possibly most, of them turn wholly upon questions of fact.

Counsel calls attention to the following language in *Defiance Water Co. v. Defiance*, 191 U. S. 184, 190, 24 Sup. Ct. 63, 66 (48 L. Ed. 140):

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground."

Similar language has been used in other decisions. An examination of these cases, however, will generally show that the right asserted in the complaint was not a right created by federal law. On the contrary, such law was only indirectly and remotely concerned, and the right immediately in litigation was created by state law. Such were *Gold Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656, and *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed. 864. When the complaint discloses such a case, it becomes affirmatively clear that the suit does not arise out of federal law, and not only does not, but cannot properly, present a controversy as to the meaning of such law.

It cannot be that the jurisdiction of a suit originally brought in the District Court, or removed thereto, on the ground that it arises under the federal Constitution or law, must depend upon whether in the actual trial of the case a controversy will arise as to the effect or construction of the federal Constitution or law. That must be so, because it never can be determined from the complaint alone, upon which such jurisdiction is entirely dependent (*Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511), that the case will actually involve a controversy as to the meaning of the federal Constitution or law. What controversy the case will present necessarily depends upon the issue raised by the answer. Though plaintiff bases his right upon federal law, the defendant may concede the law and the interpretation thereof asserted by the plaintiff, and raise only issues of fact.

[2] So far as I am aware, the following is a correct affirmative rule: Whenever federal law grants a right of property or of action, and a suit is brought to enforce that right, such a suit arises under the law creating the right, within the meaning of statutes defining the jurisdiction of federal courts. This has been frequently declared by the Supreme Court:

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted." *Tennessee v. Davis*, 100 U. S. 257, 264 (25 L. Ed. 648).

Shoshone Mining Co. v. Rutter, 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed. 864, is a leading authority on this subject. It was an adverse suit to determine the right of possession to a mining claim. The suit was authorized by section 2326 of the Revised Statutes (U. S. Comp. St. 1901, p. 1430), but the right which it was to determine was not

created by federal law. On the contrary, that right was dependent upon state statutes, and the local customs and rules of miners in the several mining districts. Because the right was not created by federal law, it was held that the case was not a suit arising under a law of the United States. The case, as Mr. Justice Brewer says, is a close one. In pointing out the distinction which determined the decision, the learned justice uses the following accurate language (177 U. S. at page 510, 20 Sup. Ct. at page 728, 44 L. Ed. 864):

"A statute authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a controversy, for the thing to be decided is the extent of the right given by the statute."

The whole reasoning of the opinion shows clearly that, if the right of possession which the suit was brought to determine had been created by federal law, the case would then have been a suit arising under a law of the United States.

Swafford v. Templeton, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005, was an action brought to recover damages for the wrongful refusal by the defendants to permit the plaintiff to vote at a national election for a member of the House of Representatives. The trial court dismissed the action for want of jurisdiction, holding that it did not arise under the federal Constitution or law. The Supreme Court reversed the decision, holding that, as the right asserted was created by federal law, the suit was necessarily one arising under such law. The court said:

"It results from what has just been said that the court erred in dismissing the action for want of jurisdiction, since the right which it was claimed had been unlawfully invaded was one in the very nature of things arising under the Constitution and laws of the United States, and that this inhered in the very substance of the claim."

The meaning of this language is made still plainer when the court points out later in the opinion the difference between such a case and a writ of error from the Supreme Court of the United States to review the judgment of the highest court of a state, in which a federal right has been claimed and denied by the state court. To support such a review, it must appear that a federal right was actually claimed in the trial of the action, and denied by the state court. In such a case the federal jurisdiction arises only after the case has passed to final judgment. There it is possible to see just what questions are actually litigated. On the other hand, the jurisdiction of the Circuit or District Courts of the United States in a suit brought in those courts, or removed thereto, must be disclosed on the face of the complaint. As to such a jurisdiction, it is, of course, impossible to ascertain whether there will in fact be at the trial a controversy as to the construction of the Constitution or laws of the United States. Speaking to that point the court says:

"But the doctrine referred to has no application to a case brought in a federal court where the very subject-matter of the controversy is federal, however much wanting in merit may be the averments which it is claimed

establish the violation of the federal right. The distinction between the cases referred to and the one at bar is that which must necessarily exist between controversies concerning *rights which are created by the Constitution or laws of the United States, and which consequently are in their essence federal*, and controversies concerning rights not conferred by the Constitution or laws of the United States, the contention respecting which may or may not involve a federal question depending upon what is the real issue to be decided or the substantiality of the averments as to the existence of the rights which it is claimed are federal in character."

In that case it will be noticed that it was impossible to say from the complaint whether its trial would in fact turn upon the interpretation of the Constitution or laws of the United States. The defendants, while admitting plaintiff's contention as to the law, might have denied the charge that they had deprived the plaintiff of his federal franchise, and thus the case would have turned wholly on a question of fact.

The Supreme Court, in *Macon Grocery Co. v. Atlantic Coast Line*, 215 U. S. 501, 508, 30 Sup. Ct. 184, 187 (54 L. Ed. 300), held that a suit to enforce a right conferred by the Interstate Commerce Law was a suit arising under that law, and declared the reason for that interpretation in the following language:

"The object of the bill was to enjoin alleged unreasonable rates, threatened to be exacted by carriers subject to the act to regulate commerce. The right to be exempt from such unlawful exactions is one protected by the act in question, and the purpose to avail of the benefit of that act, as well as of the Anti-Trust Act, is plainly indicated by the averments of the bill. *Of necessity, in determining the right to the relief prayed for, a construction of the act to regulate commerce was essentially involved.*"

If we press the doctrine to the full extent of the language used in some opinions (as was done in *Leggett v. G. N. Ry. Co.* [C. C.] 180 Fed. 314, and *Nelson v. Southern Ry. Co.* [C. C.] 172 Fed. 478), we wholly nullify the statute. Jurisdiction upon the ground that the case arises under the Constitution or laws of the United States cannot be shown by the answer or petition for removal, or by averments in the complaint as to the issue which the defendant will raise by his answer. *Louisville & Nashville R. R. Co. v. Mottley*, 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. 126; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144. That jurisdiction must be shown wholly by plaintiff's statement of his own cause of action. Every such cause of action, however, is made up of matters of fact as well as law, and it must be entirely plain that the plaintiff by his statement of his own cause of action cannot show whether the defendant will take issue as to matters of fact or matters of law, and it is therefore impossible for the plaintiff to show by his complaint that the case will "really and necessarily involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States." It necessarily follows that such a rule, if pressed to the extreme point for which plaintiff contends, would wholly destroy jurisdiction under this head, by prescribing conditions with which no plaintiff can ever com-

ply. Congress, however, has declared that the District Court shall have jurisdiction of cases arising under the Constitution and laws of the United States. This language is plain, and ought not to be wholly nullified by a process of reasoning which professes to ascertain its meaning. An interpretation which leads to such absurd results must be wrong.

What, then, do the courts mean when they say that the construction of federal law must be involved in order to confer this jurisdiction? Certainly not that the case will necessarily turn upon an interpretation of the statute, but simply that the complaint must set forth a cause of action of which federal law is an essential ingredient, and which may, therefore, properly involve a construction of that law. Chief Justice Marshall pointed this out in *Osborn v. United States Bank*, 9 Wheat. 738, 823 (6 L. Ed. 204):

"The question forms an original ingredient in every cause. Whether it be, in fact, relied on or not, in the defense, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The question which the case involved, then, must determine its character, whether those questions be made in the cause or not. * * * The act itself is the first ingredient in the case—is its origin—is that from which every other part arises."

A suit brought to enforce a right granted by federal law must have that law as its foundation. The particular suit may turn upon questions of fact. The right, nevertheless, arises out of the law. This distinction is made plain in numerous patent cases. See *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 25, 33 Sup. Ct. 410, 57 L. Ed. —. Whenever the plaintiff bases his right directly upon the patent, the case arises under the Patent Law, and the federal courts have jurisdiction. This is true, notwithstanding the litigation may turn wholly upon questions of fact. If the case does not assert a right granted by the Patent Law, but is simply based on a contract affecting a patent, it does not arise out of the Patent Law, and the federal courts are without jurisdiction. There has never been any controversy about the rule, although serious difficulty has been experienced in its application. See prevailing and dissenting opinions in *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645. The same rule has been applied in regard to rights asserted under the federal land laws. Whenever the complaint directly asserts a right growing out of those laws, the federal courts have jurisdiction. *Kansas Pacific R. R. Co. v. Atchison R. R.*, 112 U. S. 414, 5 Sup. Ct. 208, 28 L. Ed. 794; *Florida C. & P. R. Co. v. Bell et al.*, 87 Fed. 369, 31 C. C. A. 9; *McCune v. Essig*, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237.

The national courts had jurisdiction of all actions under the federal Employer's Liability Act until that jurisdiction was restricted by section 6 of the act of April 5, 1910. *Watson v. St. Louis, I. M. & S. Ry. Co. (C. C.)* 169 Fed. 942; *Hall v. Chicago, R. I. & P. Ry. Co. (C. C.)* 149 Fed. 564; *Van Brimmer v. Texas & P. Ry. Co. (C. C.)* 190 Fed. 394, 398. Contra: *Leggett v. G. N. Ry. Co. (C. C.)* 180 Fed. 314.

Congress recognized the existence of this jurisdiction, and enacted section 6 for the purpose of restricting it. *Symonds v. St. Louis & S. E. Ry. Co.* (C. C.) 192 Fed. 353, 355; *De Atley v. C. & O. Ry. Co.* (D. C.) 201 Fed. 591, 596; *Rice v. B. & M. R. R. Co.* (D. C.) 203 Fed. 580.

It has been uniformly held that suits to recover damages under other sections of the Interstate Commerce Act are suits arising under that act in such a way as to confer federal jurisdiction. *Tift v. Southern Ry. Co.* (C. C.) 123 Fed. 789; *Northern Pacific Ry. Co. v. Pacific, etc., Ass'n*, 165 Fed. 1, 91 C. C. A. 39; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.* (C. C.) 54 Fed. 730, 19 L. R. A. 387; *Macon Grocery Co. v. Atlantic Coast Line*, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300. See, also, *A., T. & S. F. Ry. Co. v. Kinkade* (D. C.) 203 Fed. 165.

The line of distinction which it seems to me will go far to harmonize the cases is this: When the complaint shows a case which arises out of a contract or a common-law right of property, and only indirectly and remotely depends on federal law, such a case not only does not, but cannot properly, turn upon a construction of such law. But when the complaint asserts a right created by federal law, it presents a suit which *may properly* turn upon a construction of that law; and such a suit "arises out of" the law for purposes of federal jurisdiction, notwithstanding the defendant may raise only issues of fact by his answer.

Counsel is mistaken when he says that plaintiff's right arises out of the contract of shipment. The statute fixes the liability of the carrier and declares that:

"No contract, receipt, rule or regulation shall exempt the carrier from the liability hereby imposed."

The conclusion seems to me irresistible that the present suits arise under section 20 of the Interstate Commerce Act, and are, therefore, suits of which the federal courts would have had original jurisdiction, and were for the same reason properly removed under section 28 of the Judicial Code.

The motions to remand will therefore be denied.

MEMORANDUM DECISIONS

BLACKWELL v. SOUTHERN PAC. CO. (Circuit Court of Appeals, ninth Circuit. May 14, 1913.) No. 2,103. In Error to District Court of the United States for the Second Division of the Northern District of California. See, also, 184 Fed. 489. Thomas, Beedy & Lanagan, of San Francisco, Cal., for plaintiff in error. William F. Herrin, C. W. Durbrow, and G. V. Shoup, all of San Francisco, Cal., for defendant in error.

PER CURIAM. On motion of counsel for plaintiff in error to dismiss the writ of error, and pursuant to stipulation therefor of counsel for respective parties, said motion is granted, and writ of error dismissed, with costs in favor of the defendant in error and against plaintiff in error.

CITY AND COUNTY OF SAN FRANCISCO et al. v. SPRING VALLEY WATER CO. (Circuit Court of Appeals, Ninth Circuit. May 5, 1913.) No. 2,176. Appeal from the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge. Percy V. Long, City Atty., and Thos. E. Haven, Asst. City Atty., both of San Francisco, Cal., for appellants. John W. Shenk, City Atty., and George E. Cryer, Asst. City Atty., both of Los Angeles, Cal., amici curiæ. Edward J. McCutchen, A. Crawford Greene, and Page, McCutchen, Knight & Olney, all of San Francisco, Cal., for appellee. Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. On the authority of the decision of the Supreme Court in the case of Home Telephone & Telegraph Company v. City of Los Angeles et al., 227 U. S. 278, 33 Sup. Ct. 312, 57 L. Ed. —, October term, 1912, the judgment is affirmed.

FREEMAN v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. April 30, 1913.) In Error to the District Court of the United States for the Southern District of New York. Application to admit plaintiff in error, who was defendant below, to bail pending disposition of the writ of error. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Bail may be taken in the amount of \$150,000. Sureties to be individuals, not surety companies or corporations, and not indemnified by defendant, or any other person, and no one to assume more than \$20,000. Sureties to be approved by the district attorney, or, in case of disapproval by him, then by the court. Bond conditioned that defendant will not leave the Southern district of New York, will report himself daily, except Sundays, to the marshal, and will be returned to custody on the morning of the 1st Monday of November 1913, or such other day thereafter as this court may by order direct. The bond shall further provide that no failure to notify sureties of failure to report himself shall be any defense to proceeding to forfeit the bond. There shall also be a stipulation entered into that the cause be ready for argument on writ of error on the first day of the coming October term, record to be printed by August 1, 1913.

SOLOMON et al. v. EGGLESTON. (Circuit Court of Appeals, Fifth Circuit. March 4, 1913.) No. 2,440. Appeal from the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

A. Latady, of Birmingham, Ala., for appellants. Robert C. Redus, of Birmingham, Ala., for appellee. Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. On the facts we concur with the judge a quo in finding a re-entry by the lessor. The decree (198 Fed. 581) appealed from is affirmed.

WILLIAMS v. FRIEDRICHS. (Circuit Court of Appeals, Fifth Circuit. April 12, 1913. Rehearing Denied June 2, 1913.) No. 2,452. In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. Action at law by F. A. Williams, trustee in bankruptcy of Harry D. Brown, against George G. Friedrichs. Judgment for defendant, and plaintiff brings error. Affirmed. T. M. Miller, John D. Miller, and Girault Farrar, all of New Orleans, La., for plaintiff in error. Frank McGloin, of New Orleans, La., for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. In the light of the pleadings and evidence, the result reached in this case was correct and proper, and, as the case shows in the alleged contract sued on the bankrupt, Brown, while bargaining with the vendor for a share of the profits to result from the proposed and probable sale and purchase, was representing and interested with the purchasers, we find no prejudicial error in the charge of the court referred to in the fourth assignment of error. The judgment is affirmed.